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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **03/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

COMMERCIAL DIVISION

_____

Between:
HISTORIC ROYAL PALACES
Plaintiff
and

PIPERHILL CONSTRUCTION LTD
Defendant

_____

Mr Fletcher of counsel (instructed by Carson McDowell Solicitors) for the Plaintiff
Mr McCausland of counsel (instructed by McIldowie Solicitors) for the Defendant

_____

McBRIDE J

Introduction

[1] This is an application by Historic Royal Palaces ("HRP") for summary judgment against the defendant Piperhill Construction Ltd ("Piperhill"), pursuant to Order 14 rule 1 of the Rules of the Court of Judicature (NI) 1980 to enforce an adjudication award made on 16 March 2022.

[2] The plaintiff was represented by Mr Fletcher of counsel. The defendant was represented by Mr McCausland of counsel. I am grateful to all counsel for their comprehensive and well-argued skeleton arguments.

Background

[3] HRP is a Royal Charter Body with responsibility for the care, conservation, and preservation for the public of the Royal Palaces at HM Tower of London, Hampton Court Palace, and Kensington Palace amongst others. HRP is also contracted by the Secretary of State for Northern Ireland to manage Hillsborough Castle and gardens.

[4] Piperhill is a construction company based in Ballymoney.

[5] In or about July 2017 Piperhill entered into a lump sum capital JCT (2001 Edition) Construction Management Trade Contract with bespoke amendments ("the Contract") with HRP, as employer, to carry out certain construction works at Hillsborough Castle, Royal Hillsborough, Co Down.

[6] The contract provided that the contract sum was £476,825 (exclusive of VAT) and the construction manager employed by HRP, was F3 Construct Limited.

Relevant Contractual Provisions

[7] Clause 4.16 of the contract provided as follows:

> "**Final Statement and Final Payment**
>
> 1. The construction manager shall issue the Final Statement to the Trade Contractor not later than two months after whichever of the following occurs last:
>
> (i) The final release date, or (where there are sections) the last such date,
>
> (ii) The date of issue of the certificate of making good under clause 2.38 or (where there are sections) the last such certificate to be issued; or
>
> (iii) The date on which the construction manager sends to the trade contractor a copy of the statement to be prepared under clause 4.6.2.
>
> 2. The final statement shall set out:
>
> (i) The final trade contract sum
>
> …
>
> 6. If the final statement is not issued in accordance with clause 4.16.1 and 4.1.6.2:
>
> (i) The trade contractor may at any time after expiry of the two month period referred to in clause 4.16.1 give notice to the employer with a copy to the construction manager (a final payment notice) stating what the trade contractor considers to be the amount of the

final payment due to him under this trade contract and the basis on which the sum has been calculated and, subject to any pay less notice given under Clause 4.16.6.3, the final payment shall be that amount.

(ii) If the trade contractor gives a final payment notice, the final date for payment of the sum specified in it shall for all purposes be regarded as postponed by the same number of days as the number of days after expiry of the two month period that the final payment notice is given.

(iii) Following the final payment notice the employer may not later than five days before the final date for payment give a pay less notice in accordance with clause 4.14.1 and, if he gives such notice, the provisions of clause 4.16.5 shall correspondingly apply."

[8] Final release date is defined in clause 2.36 as follows:

> "Where completion by sections does not apply (where no date or period is stated) the date is 12 months after practical completion of the works."

[9] As no date was specified in the contract the date of the final release was 12 months after practical completion of the works.

[10] Other relevant definitions contained in the contract include the following:

Clause 2.38 states:

> "When in the construction manager's opinion, the defects, shrinkages or other faults in the works or such works in a section which he has required to be made good under Clause 2.36 have been made good, he shall issue a certificate to that effect (a Certificate of Making Good), and completion of that making good shall for the purposes of this trade contract be deemed to have taken place on the date stated in that certificate."

[11] Clause 2.36 provides at 1(1):

> "Such defects, shrinkages and other faults shall be specified by the construction manager in a schedule of

> defects which he shall deliver to the trade contractor as an instruction not later than 14 days after the final release date."

[12] Clause 4.6 deals with the calculation of the final trade contract sum and states as follows:

> "(i) Not later than three months after the issue by the construction manager of the certificate of practical completion of the works, the trade contractor shall provide the construction manager with all documents necessary for calculating the final trade contract sum.
>
> (ii) Not later than three months after receipt by the construction manager of the documents referred to in Clause 4.6.1 the construction manager shall prepare and send to the trade contractor a provisional calculation in accordance with Clause 4.3 or 4.4, as applicable."

[13] To date HRP have paid £902,037.81 to Piperhill. This includes a sum of £231,368.64 paid by HRP to Piperhill on foot of an earlier adjudication award dated 17 December 2021.

[14] On 24 December 2021 by email at 18:23 the construction manager issued a final statement, in respect of the value of the works executed, to Piperhill, whereby the construction manager concluded that Piperhill owed £406,293.01 to HRP due to overpayment in previous payment applications.

[15] On 14 January 2022 Piperhill issued a pay less notice in respect of this computation.

[16] On 21 January 2022 HRP issued a notice of adjudication and identified the dispute as follows:

> "This dispute relates to the value of the works as stated in HRP's final statement and Piperhill's corresponding pay less notice. HRP aver, pursuant to the terms of the contract, that Piperhill owe HRP £406,293.01 plus VAT at the final date for payment, that being 21 January 2022."

[17] The referral notice was issued on 28 January 2022 and a response was served by Piperhill on 10 February 2022 and HRP then served a reply on 22 February 2022. Thereafter, Piperhill served a rejoinder and HRP served a surrejoinder.

[18] On 16 March 2022 the adjudicator, Raymond Nash, issued his decision as follows:

> "(i) Piperhill Construction Ltd shall make payment to Historic Royal Palaces, within seven days of the date of this decision, of the sum of £314,264.58 in respect of the works executed by Piperhill Construction Ltd.
>
> (ii) That Piperhill Construction Ltd shall make payment to Historic Royal Palaces within seven days of the date of this decision, of the sum of £25,368.64 in respect of interest.
>
> (iii) That Piperhill Construction Ltd shall make payment to Historic Royal Palaces, within seven days of the date of this decision, with such value added tax as is due in law.
>
> (iv) That Historic Royal Palaces shall make payment to me, within 14 days of the date of this decision, of the sum of £16,002.00 (inclusive of value added tax) in respect of my fees, expenses, and disbursements.
>
> (v) That Piperhill Construction Ltd shall make payment to Historic Royal Palaces, within seven days of the date of this decision, in the sum of £16,002 (inclusive of value added tax) in respect of my fees, expenses, and disbursements."

Court Proceedings issued and Evidence in relation to summary enforcement application.

[19] On 25 March 2022 Piperhill issued a writ seeking a declaration that the decision of the adjudicator dated 16 March 2022 was made in excess of his jurisdiction and/or in breach of the rules of natural justice and should be set aside in whole. Further, and in the alternative, Piperhill sought a declaration that the true value of the works carried out by the plaintiff for the defendant at Hillsborough Castle, Co Down, under the contract was £932,508.80 plus VAT and further sought an order that the defendant pay to the plaintiff the sums due under the contract in respect of the true value of the works completed by the plaintiff. ("true value proceedings").

[20] On 25 August 2022 HRP issued a writ seeking judgment against Piperhill in respect of the adjudicator's award dated 16 March 2022.

[21] HRP issued the present Order 14 application for summary judgment on 14 October 2022. This application is grounded on the affidavit of Mr Murphy, Solicitor, who avers that despite requests for payment, Piperhill has failed to pay the sums found due by the adjudicator to the plaintiff and he further avers that the defendant has no defence to the claim for £314,264.58 plus £25,368.64 interest and £16,002 in respect of the adjudicator's fees (with have been paid in full by HRP).

[22] Kevin Osbourne, Director of Piperhill, replied by affidavit sworn on 24 November 2022. He resists the application for summary judgment on the grounds that:

(a) The adjudicator lacked jurisdiction.

(b) The adjudicator erred in his decision making and

(c) In the event the court considers it should make an order for summary judgment, he asks that such order be stayed on the grounds of:

    (i) delay by HRP;

    (ii) hardship to Piperhill and

    (iii) on the basis Piperhill's true value proceedings can be heard on an expedited basis and in accordance with the overriding objective it should be dealt with first thereby avoiding the need for a separate interim hearing regarding enforcement of the adjudicator's decision.

In support of his application for a stay he exhibits a letter from Piperhill's auditors and tax advisors which states:

> "The request to make an immediate payment of £355,635.22 in full would result in extreme cashflow difficulty for the company in the immediate short term. Such a large payment is something that a company of this size would make provision for in the medium/long term.
>
> As a result of current market conditions, especially within the construction industry, PCL's current outgoings increased by over 25% in terms of materials, fuel, and subcontractors. These inflated costs are already putting the company under severe cashflow pressure. The impact of a demand to pay such an amount in the immediate future will have a serious detrimental impact on the business … there is not enough cash in the company bank account to cover the above upcoming costs along with the HRP monies. The effect of exhausting Piperhill's cash

> reserves and working capital in this manner would be extremely detrimental to Piperhill and could affect its ability to continue to trade … If the sum of £355,635.22 is to be paid by the company immediately, this will require a period of months to do so, as it will require to be included in its projected monthly cash flow."

General principles for enforcement of adjudication awards

[23] Clause 9.2 of the contract provides:

> "If a dispute or difference arises under this trade contract which either party wishes to refer to adjudication, the Scheme shall apply…"

The Scheme referred to is the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 (as amended). ("The Scheme"). Part 1, paragraph 1(1) provides:

> "Any party to a construction contract may give written notice (the "notice of adjudication") of his intention to refer any dispute arising under the contract, to adjudication."

The Scheme then sets out in detail the procedure to be followed by the parties.

[24] A number of features of the Scheme should be borne in mind. Firstly, the notice of adjudication is intended to identify and describe the dispute. Further, as per para [23] of the Scheme the decision of the adjudicator is binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

[25] The purpose underlying the Construction Contracts (Northern Ireland) Order 1997 ("the 1997 Order") and the 1999 Regulations made thereunder which contain the Scheme, was explained by Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Limited* [1999] BLR 93 at 97 para [4]:

> "The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation, or agreement …

> It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that the decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved." (Emphasis added)

[26] The applicable legal principles regarding enforcement of adjudication awards were conveniently summarised in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] All ER 202 at para [52] as follows:

> "(i) The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);
>
> (ii) The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact, or law: see *Bouygues, C & B Scene* and *Levolux*;
>
> (iii) Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see *Discain*, *Balfour Beatty* and *Pegram Shop Fitters*;
>
> (iv) Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see *Pegram Shop Fitters and Amec*."

[27] In *Carillion* Chadwick LJ also observed at para [85] as follows:

> "… It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to

> DML's outlined submissions, to which we have referred at para [66] of this judgment) may, indeed, aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'.
>
> 86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice.' …
>
> 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator."

[28] The jurisprudence makes very clear that the general rule is that the decision of an adjudicator is binding until the underlying dispute is finally determined. This reflects the "pay now, argue later" principle. The only exceptions to this rule are when the adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice or, as explained in the following paragraphs, the adjudicator has erred in respect of a short self-contained point which can be determined without the need for oral evidence.

[29] The general rule is that adjudicator's decisions are binding and are to be enforced even when he or she has erred in some respect. This is because, given the limits on time, the adjudicator quite often can only give a "rough and ready" assessment. There is, however, one exception to the general rule that the adjudicator's decision should not be held to be unenforceable on the basis that the adjudicator erred in some respect. The exception was set out by Coulson J in *Caledonian Modular Ltd v MAR City Developments Ltd* [2015] EWHC 1855 (TCC) para [12]: After reiterating the general principle he stated:

> "That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. <u>If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration</u> than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration."(emphasis added)

[30] In *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC) Coulson J stated that where a defendant seeks to argue such a short and self-contained point as the basis for resisting summary judgment in respect of an adjudicator's award, he should issue a Part 8 claim (the equivalent in

Northern Ireland is an Originating Summons) seeking declaratory relief and he should 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."

At para [18] he provided:

> "What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document. In a disputed case, anything less than that would be contrary to the principles in *Macob*, *Bouygues* and *Carillion*."

He further went on to say that:

> "such an issue can still only be considered by the court on enforcement if the consequences of the issue raised by the defendant are clear cut."

General principles relating to the granting of a stay

[31] Order 14, rule 3(2) provides:

> "The court may by order, and subject to such conditions, if any, as may be just, stay enforcement of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action."

[32] The law relating to stays of execution in adjudication of enforcement cases was summarised by Coulson J in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] EWHC 1086 at para [26] as follows:

> "In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:
>
> (a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> (b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
>
> (c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind (see *AWG Construction* case).
>
> (d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay. (See the *Herschell Engineering* case).
>
> (e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (See the *Bouygues* and *Rainford House* cases).
>
> f) Even if the evidence of the claimant's present financial position suggested that it is probable that it

would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator."

[33] Coulson J reiterated that it was not his intention that his summary of the principles should be set in stone rather it was simply a summary of the main points established by the cases up to that time. The summary of necessity therefore is not comprehensive. It did not exhaustively seek to consider every possible factor which may arise in a future case and for example did not deal with the position where there were allegations of fraud.

[34] Later in *Grosvenor London Limited v Aygun Aluminium UK Ltd* [2018] EWCA Civ 2695 Coulson LJ added to the principles when he stated:

> "If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."

[35] Order 14, rule 3(2) specifically grants to the court a power to stay pending the termination of another claim by the defendant. In applying this power in adjudication enforcement proceedings however, I consider, this discretion must be exercised bearing in mind the legislative intent in the 1997 Order that "decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved" (See *Macob.*) Weatherup J in *Henry Brothers v Brunswick (8 Lanyon Place Ltd)* [2011] NIQB at 102 also summed up the correct approach to be taken in adjudication enforcement proceedings when he said:

> "Under the adjudication scheme the plaintiff is entitled to payment of the adjudication award. The defendant is entitled to have a determination of the issue about the defects and of any entitlement to damages in respect thereof and to recover any amount that is found due in respect of those defects in any arbitration or in any litigation or by agreement. The defendant will in time recover that money if it is due. None of the above

> prevents the plaintiff obtaining judgment against the defendant for the sum found due to the plaintiff under adjudicator's award."

[36] I am therefore satisfied exercising the discretion on the basis "true value" proceedings are pending would be an affront to the "pay now, argue later" principle which underpins the 1997 Order. In a similar vein Humphreys J in *KPR Mechanical Limited v Kevin Watson Group Ltd and others* [2021] NIQB 34 held that:

> "It is a fundamental principle of adjudication enforcement that a defendant is not entitled to a stay of execution simply because he has a claim which will be determined in the near future."

[37] In exercising the discretion to stay enforcement proceedings the court will have regard to the principles emerging from the jurisprudence governing the exercise of the court's discretion to grant a stay, but will bear in mind that the overriding consideration for the court is whether, as a matter of justice and fairness, a stay is required in all the circumstances. As Coulson J noted in *Hillview Industrial Developments (UK) Ltd v Botes Building Ltd* [2006] EWHC 1365 at para [33]:

> "I am satisfied that the jurisdiction in adjudication enforcement cases to grant a stay under the CPR must be limited to cases where there is a risk of manifest injustice."

Summary of the applicable principles for enforcement of adjudicator's awards

[38] Having regard to the authorities set out above, I consider the applicable principles in relation to summary enforcement of an adjudicator's award can be summarised as followed:

(a) Adjudication decisions should be enforced unless the adjudicator lacked jurisdiction, or he otherwise acted in serious breach of natural justice.

(b) Adjudication decisions should be enforced even if the adjudicator erred unless the error is in respect of a "short and self-contained point" which does not require oral evidence. When a party wishes to oppose summary judgment on this basis, he should issue an originating summons for a declaration which will be heard at the same time as the summary enforcement proceedings. If a party fails to issue an originating summons seeking a declaration this should not stand in the way of justice being done and, therefore, the court will usually allow the point to be argued if it would be otherwise unconscionable not to deal with it.

(c) If the court determines that the adjudication award is enforceable and grants summary judgment the defendant can invite the court to exercise its discretion to stay enforcement. The court's discretion will be exercised to ensure fairness and justice in all the circumstances whilst having regard to the legislative intent of Parliament, summarised in the "pay now argue later" principle and in accordance with the principles which have emerged from the existing jurisprudence in relation to enforcement of adjudication decisions.

Consideration

Ground 1 - Lack of jurisdiction

[39] Piperhill submitted that the jurisdiction of the adjudicator was defined by the notice of adjudication which at para [18] defined the 'dispute' as follows:

> "This dispute relates to the *value of the works as stated in HRP's final statement* and Piperhill's corresponding pay less notice." (*emphasis added*)

[40] Piperhill submitted that the final statement did not comply with the terms of the contract and, was therefore, void and invalid. As the final statement was the basis upon which the entire adjudication was predicated and the vehicle by which the adjudicator derived his jurisdiction, the adjudication was accordingly, unenforceable. In support of his contention that the validity of the final statement went to jurisdiction, Mr McCausland relied on the ruling of the adjudicator himself who accepted at para 2.1.1 of his decision, 'Piperhill had raised a "threshold jurisdictional challenge".

[41] After considering the issue the adjudicator then concluded at para 2.1.27:

> "In view of the foregoing, and for the reasons set out above, I formed the non-binding opinion that I had the necessary jurisdiction to reach a decision in respect of the dispute that has been referred to me and I so advised the parties by email dated 27 February 2022."

Mr McCausland submitted that the adjudicator's ruling on the jurisdiction issue was not determinative and therefore the enforcement proceedings could be defeated on the grounds the adjudicator lacked jurisdiction. In support of this submission, he relied on Coulson on Construction Adjudication (5th Edition) at paragraph 7.10 which states:

> "The adjudicator's ruling on the jurisdictional issue will not be determinative and the challenger can defeat the enforcement proceedings by showing a respectable case

> that the adjudicator did not have the necessary jurisdiction and was wrong to conclude to the contrary."

Basis of jurisdiction of the adjudicator

[42] Article 7 of the Contract provides that either party may refer any dispute or difference to adjudication in accordance with Clause 9.2 which provides that the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 (as amended) ("the Scheme") shall apply. The Scheme provides in Part 1 paragraph 1(1) that any party to a construction contract may give written notice, namely the notice of adjudication of his intention, to refer "any dispute" arising under the contract, to adjudication.

[43] HRP was therefore entitled to refer "any dispute" under the Contract to adjudication and accordingly the jurisdiction of the adjudicator rests on the existence of a "dispute" between the parties.

[44] In *Amec Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC) Jackson J set out a number of principles in relation to the interpretation of the word 'dispute'. At para [68] he stated as follows:

> "1. The word 'dispute' which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
> …
>
> 3. The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
>
> 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.
> …

> 7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

[45] Accordingly, a dispute which is capable of being referred to an adjudicator arises when a party makes a claim which is denied or is not admitted by the other party.

[46] In the present case HRP issued a final statement to Piperhill on 24 December 2021. Piperhill then issued a pay less notice on 14 January 2022 taking issue with HRP's computation of the final trade contract sum, on a without prejudice basis, as it made clear it considered the HRP's final statement to be invalid as it was not in accordance with the contract. The notice of adjudication set out the issues between the parties stating that the dispute related to the value of the works as stated in "HRP's final statement and Piperhill's corresponding pay less notice."

[47] I am satisfied that there was a dispute between the parties which crystalised on 14 January 2022 for the following reasons. On 24 December HRP notified Piperhill of its claim. On 14 January 2022 Piperhill issued a Pay Less Notice in respect of the final trade contract sum set out in the final statement. By issuing its Pay less Notice Piperhill was taking issue with HRP's computation of the final trade contract sum. On 14 January 2022 it was therefore clear that the claim made by HRP was disputed by Piperhill as Piperhill had denied HRP was entitled to the payment it claimed was due under the final statement. Accordingly, the parties were in dispute. This dispute was then the subject of the notice of adjudication dated 21 January 2022 and I am therefore satisfied that the adjudicator had jurisdiction to hear the dispute which had arisen between the parties.

[48] Although Piperhill has sought to label the dispute about the validity of the final statement as "excess of jurisdiction", I consider this to be a misrepresentation of its true nature. It is in reality a merits-based argument supporting Piperhill's contention that HRP is not entitled to the money claimed. It is not the validity of the final statement which grounds the jurisdiction of the adjudicator, rather in accordance with the Contract, the adjudicator's jurisdiction derives from the existence of a crystallised dispute between the parties. The fact Piperhill argues about the validity of the final statement demonstrates the existence of a dispute and, accordingly, I am satisfied the adjudicator had jurisdiction.

[49] A similar issue arose in *CC Construction Ltd v Mincione* [2021] EWHC 2052 (TCC). In that case the employer contended the adjudicator lacked jurisdiction on the issue of the conclusivity of the final statement. Judge Eyre QC however held at para [112]:

> "It was inherent in those exchanges both that there was a dispute as to the conclusivity of the Final Statement and that that dispute had crystallised in advance of the adjudication. It follows that the adjudicator was right to proceed on the basis that he had jurisdiction to determine the question of whether the Final Statement was conclusive."

[50] The fact the adjudicator considered the validity of the final statement was a "threshold jurisdictional" issue and the fact he made a "non-binding decision" does not mean that this court cannot independently consider whether the adjudicator had in fact jurisdiction. For the reasons I have outlined I am satisfied there was a crystallised dispute between the parties in advance of the adjudication and therefore the adjudicator had jurisdiction to make an award.

[51] I am therefore satisfied that no respectable case has been made out by Piperhill that the adjudicator acted in excess of jurisdiction.

Ground 2 – The adjudicator erred

[52] In *Hutton Construction Limited v Wilson Properties (London) Ltd [2015] EWHC 1855 (TCC*) Coulson J indicated that a defendant who seeks to argue that an adjudicator erred should issue a Part 8 Claim seeking declaratory relief and such a claim is then heard at the same time as the application for summary judgment.

[53] In the present case Piperhill issued a High Court writ seeking declaratory relief together with the determination of the true value of the works under the contract. It did not issue an Originating summons seeking a declaration.

[54] Mr Fletcher, on behalf of HRP, argued that as Piperhill had not issued an originating summons it could not argue in the present Order 14 proceedings that the adjudicator had erred in his determination.

[55] Although it is best practice to issue an originating summons, I nonetheless consider that failure to do so is not an absolute bar to arguing in the Order 14 application that the adjudicator erred, if the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore. Accordingly, I have heard argument under this ground notwithstanding the lack of an originating summons seeking a declaration.

[56] Mr McCausland submitted that the adjudicator erred in finding the final statement issued by HRP was valid. There are two bases in which he submitted it was invalid, both of which were raised before the adjudicator. Firstly, he submitted that the contract manager's final statement did not comply with the provisions of Clause 4.16 of the contract which required the contracts manager to issue the final statement not later than two months after:

(a) the final release date; or

(b) the date of issue of the certificate of making good; or

(c) the date on which the contract manager sent to Piperhill a copy of the provisional calculation of the contract sum adjusted in accordance with Clause 4.3 whichever occurred last.

Secondly, he submits the contracts manager lacked a genuine belief in the accuracy of the final statement.

[57] Piperhill submitted that none of the three conditions in Clause 4.16 were met by HRP. Mr McCausland stated that practical completion was certified as having been achieved on 14 April 2019 and, accordingly, the final release date was 19 April 2020. Accordingly, condition (a) of Clause 4.16 was not met as the final statement was issued on 24 December 2021 and was not therefore issued within two months of 19 April 2020. Secondly, Piperhill submitted that condition (b) was not met. Piperhill submitted that the contracts manager was contractually required to issue a notice of defective works 14 days after the final release date which, Piperhill says lapsed on 2 May 2020, and thereafter, the contracts manager had no contractual authority to issue the correction of a defect. Piperhill therefore submitted that the contract manager's final statement, albeit, having been issued within two months of the certificate of making good, was invalid as it was issued outside the period that it should have been issued. Piperhill further submitted that condition (c) was not met. Piperhill states that it provided the contracts manager with all the necessary documentation for the calculation of the final trade contract sum in its payment application No.19 dated 16 August 2019. The contracts manager was then required to issue the final trade contract sum within three months of that date which expired on 19 November 2019. Piperhill submits that the contracts manager failed to comply with the time limits.

[58] Secondly, Piperhill submitted that the final statement was invalid on the basis the contracts manager did not have a 'genuine belief' concerning the accuracy of the value of the works executed, as stated in the final statement. In support of this submission, they relied on an email dated 14 November 2019 sent by John Baird, Programme support [an employee of HRP and not the contract manager] which stated:

> "We are really keen to get a fair assessment agreed, finalise the account and get you paid."

Piperhill submitted that this email demonstrated HRP's genuine belief was that a further payment beyond the amounts already paid to Piperhill was due by HRP. Piperhill further relied on the fact that the contracts manager's forecast on 24 December 2021 was that the final account sum would be £672,381.19. One minute

later the contract manager issued a final trade contract sum of £563,460.30 (a difference of £100,000) which Piperhill contends is evidence that the contract manager had no genuine belief concerning the accuracy of the final statement. Accordingly, the final statement is invalid as it fails to comply with Article 89A (2) of the 1997 Order which provides:

> "A notice complies with this paragraph if it specifies-
>
> (a) in a case where the notice is given by a payer-
>
> (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment…"

[59] HRP take issue with some of the contentions made by Piperhill. For example, HRP submit that Piperhill has not fulfilled its obligations under Clause 4.6.1 as it has not provided the contract manager with all the documents necessary for calculating the final trade contract sum. Further, HRP submit that because Piperhill failed to provide the documentation HRP could not comply with the timescales set out in Clause 4.16 and, therefore, an estoppel argument arises. Further, HRP submit that the contracts manager did have a genuine belief in the accuracy of the final trade contract sum. They note that the email dated 14 November 2019 relied on by Piperhill did not come from the contracts manager and further submit that good reasons exist for the difference in the figures set out in the documentation sent by the contracts manager to Piperhill on 24 December 2021.

[60] The limited exception to the general rule that the court will not consider whether an adjudicator erred in his decision making is when the issue is "short and self-contained" and requires no oral evidence and its determination will not give rise to further disputes.

[61] On the basis of materials before the court, I consider that the dispute regarding the validity of the final statement is not just a dispute about the interpretation of the contractual terms. Rather the dispute is about the factual matrix to which the contractual provisions will be applied. As appears from the papers which were provided to the adjudicator there are a large number of factual disputes between the parties all of which are relevant to the question whether the final statement was valid or not. By way of example there is a dispute about whether Piperhill provided all the documents necessary to calculate the final trade contract sum. Piperhill say they were provided and HRP say they were not provided. Such a dispute can only be resolved after a full hearing when the parties will have the benefit of discovery and the opportunity to cross-examine the relevant witnesses.

[62] There is also a dispute about whether the contracts manager held 'a genuine belief' in the accuracy of the final trade contract sum. Mr McCausland relied on the case of *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd* [2021]

EWHC 2441 as authority for the proposition that the court was able to resolve a dispute about genuine belief in the absence of oral evidence. I consider however that *Downs Road* can be distinguished from the present case on its facts. In *Downs Road* the court was able to resolve the dispute about genuine belief easily, as the defendant sent a covering email with the notice stating that a further notice would be issued. In these circumstances the court held that:

> "The employer clearly envisaged that the further notice would set out a different figure which would be the figure which the employer, in fact, considered to be due."

In those circumstances, the court could, without the need for oral evidence, be satisfied that the employer did not have a genuine belief as to the accuracy of the sum claimed in the earlier notice. There is no such document emanating from HRP in the present case. The question whether the contracts manager had a genuine belief is a matter going to credibility and can of necessity only be assessed by seeing and hearing the witnesses and after assessing discoverable documentation. Unlike in *Downs Road* I consider the dispute cannot be determined on the papers alone.

[63] Accordingly, I am satisfied the limited exception to the general rule that errors by an adjudicator do not prevent enforcement, does not apply in the present case.

Ground 3 – Stay on the basis Piperhill has 'true value' proceedings pending

[64] Piperhill submitted that HRP delayed in enforcing the decision of the adjudicator with the consequence that Piperhill's 'true value' writ proceedings could be heard in the very near future meaning the entire dispute could be disposed of in one hearing thereby avoiding a duplication of hearings and costs.

[65] Mr McCausland submitted HRP delayed as the writ seeking judgment was not issued until 25 August 2022, some five months after the adjudicator's decision, and the application for summary judgment was not issued until 14 October 2022, some seven months after the adjudicator's decision.

[66] Mr McCausland relied on *Sutton Services International Limited v Vaughan Engineering Services Ltd* [2013] NIQB 63 and *Broseley London Ltd v Prime Asset Management Ltd* [2020] EWCA 944 as authority for the proposition that the court, when considering whether to grant a stay for a limited time, can take into account "the diligence of the defendant in pursuing the claim against the plaintiff as the defendant's conduct of that claim may provide a basis for refusing to grant a stay or basis for granting a stay for a limited time to enable the court to review the progress of the defendant's claim against the plaintiff." [para 5 *Sutton Services*].

[67] Mr McCausland submits that Piperhill has proceeded with diligence and expedition as their Statement of Claim was served on 13 May 2022, the Defence and

Counterclaim was served on 8 July 2022 and Notice for Further and Better Particulars have now been served by both parties. He therefore asserts that given that discovery can be dealt with in early course the case is capable of being heard in the very near future. In these circumstances, he submits that it would be fair and just to have the entire dispute resolved at one hearing, and accordingly, asks the court to impose a stay of enforcement, if it is minded to grant summary judgment, pending the hearing of Piperhill's true value proceedings.

[68] Earlier in this judgment I have set out the applicable principles for granting a stay in adjudication enforcement proceedings although it must always be acknowledged that the factors set out in the jurisprudence to date are not exhaustive and the power to grant a stay under Order 14, rule 3 can be imposed where the justice of the case requires it.

[69] Order 14 rule 3 provides that the court has a discretionary power to grant a stay where there are pending proceedings. In construction disputes however Parliament has introduced 2 stages into the dispute resolution process. The first is a provisional interim decision by an adjudicator which is to be enforced pending the final determination of the dispute by arbitration, litigation, or agreement. Accordingly, to stay enforcement of an adjudicator's decision on the basis of pending 'true value' proceedings would offend the "pay now, argue later" principle enshrined in the legislation.

Stay on basis of delay

[70] Order 14 does not prescribe any time period within which an application must be made. Further even if there has been culpable delay on the part of HRP I find no prejudice has been occasioned to Piperhill. The only prejudice is to HRP who have not been paid the moneys awarded under the adjudicator's decision. I therefore do not consider that the alleged delay in the issue of the present proceedings provides a basis for the exercise of my discretion to grant a stay of enforcement.

[71] In both *Bosely* and in *Sutton* the application for a stay arose in circumstances where the parties were in dispute about the plaintiff's financial position. Weatherup J in *Sutton* held that in such circumstances the onus was on the defendant to establish that,

> "the plaintiff is probably going to be unable to make the payment to the defendant should the defendant be successful in the final outcome of the dispute"

It was in this context that Weatherup J made the point that the court would look at the defendant's diligence in pursuing its claim against the plaintiff in deciding whether to grant or refuse a stay of enforcement. Such a consideration does not arise in the present case as it is accepted HRP would be able to pay Piperhill should Piperhill be successful in the final determination of the dispute. In these

circumstances, I consider, that the dicta of Weatherup J in para 5 of *Sutton* is not applicable, as it does not apply to the facts of the present case as there is no concern HRP could not repay the sum awarded by the adjudicator in the event it was asked to repay monies at the final hearing.

Stay on basis of Hardship

[72] Piperhill sets out, through its auditors and tax advisors, the hardship it would suffer if a stay is not granted. Although Mr Fletcher submits that the financial position of Piperhill is not a relevant circumstance for the court to consider in a stay application, as outlined earlier in this judgment, I consider the court is not so constrained and is at liberty to take into account all factors which have a bearing on whether, as a matter of justice and fairness, a stay ought to be imposed. In considering the justice of the case the court must look at all the circumstances and weigh them in the balance to determine whether to grant or not to grant a stay. It is important, however, to remember that the discretion to stay proceedings, must be considered through the prism of the purpose of the 1997 Order and each factor weighed in light of the legislative intent.

[73] In the present case there is no independent expert evidence supporting hardship and there is no evidence of a risk of insolvency. Even if hardship was established, it is my view that this factor alone, would not make it manifestly unjust to refuse a stay.

Conclusion

[74] For the reasons set out I consider the adjudicator's decision should be enforced by way of summary judgment.

[75] Taking into account all the factors in the present case I consider no grounds have been made out upon which the court should grant a stay.

[76] Accordingly, I grant summary judgment to HRP in the terms of the Order 14 summons. I will grant a stay of the judgment for seven days.

[77] I will hear the parties in respect of costs.