Neutral Citation Number: [2023] EWHC 2344 (TCC)

Case No: HT-2023-LDS-000003

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

The Court House
Oxford Row
Leeds LS1 3BG

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

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Between :

BEXHILL CONSTRUCTION LTD — **Claimant**

- and -

KINGSMEAD HOMES LTD — **Defendants**

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- -

Mr Adam Beaumont (instructed by **Ward Hadaway LLP**) for the **Claimant**
Mr Harry East (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing date: 17 May 2023
Date draft circulated to the Parties: 22 September 2023
Date handed down: 3 October 2023

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APPROVED JUDGMENT

This judgment was handed down by the Judge by circulation to the parties and the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on Tuesday 3 October 2023.

Her Honour Judge Kelly

1. This judgment follows the hearing of the Claimant's application for summary judgment in order to enforce an adjudicator's decision. The Defendant is a construction contractor in respect of a project built in Warrington ("the site"). The Claimant is a construction subcontractor to the Defendant, having agreed by a subcontract order signed on 17 September 2021 that the Claimant was to provide bricklaying services at the site.

2. On 16 May 2022, the Claimant sent an application for payment to the Defendant which the Defendant refused to pay. As a result of the dispute between them, the Claimant made a reference to adjudication. The adjudicator, Mr Jon. E. Mizrahi, was nominated by the Royal Institution of Chartered Surveyors. He provided his decision on 15 February 2023. The adjudicator decided that the Claimant was entitled to payment of £49,664.80. That sum remains unpaid.

3. I had the benefit of hearing counsel Mr Adam Beaumont for the Claimant and counsel Mr Harry East for the Defendant. Both counsel had provided me with very helpful skeleton arguments before the hearing which summarised the dispute between them.

Background

4. The following chronology is of assistance:

17.09.21	The Claimant entered into a subcontract with the Defendant to undertake labour only brickwork at the site for the sum of £174,128.50.
	The subcontract contained the following relevant provisions: Clause 6.2: "Form of Subcontract Conditions JCT" Clause 6.9.1: "Daywork shall only be carried out on the written instruction of the Contractor and Daywork sheets shall be submitted at the **end of the day** following the day the work was executed for signing by the Site Manager. **Any sheets submitted after this dated will be rejected**. Such signature shall not imply that the charge in reasonable or that the work is to be valued and paid for on a Daywork basis."

<table>
<tr><td></td><td>Clause 6.9.2:

Variations: Any works that are considered to be a variation by the Subcontractor shall be notified to the Contractor at least 7 working days prior to the date that the works are due to be carried out. The notification shall include full details of the works involved and include the Subcontractor's fully detailed quotation for carrying out the works. The Contractor will issue a notice stating whether the notified works constitute a variation. If the works are deemed to be a variation the Contractor will issue an instruction which will include details of the agreed cost for the works. Any notifications that are not issued in accordance with the above procedure will be rejected. Any variation works notified after the works have been carried out will also be rejected"

Clause 6.10:

"Valuation Periods: Applications for interim payments is one month. Valuations are to be submitted on the 1st of each month. Sub contact valuations are to be submitted in writing.

Sub contract valuations are to be submitted in accordance with the following:

Interim Valuation claims, for works executed to Valuation Date, to be submitted to head office by the 17th of the month

1. Interim Applications received after the Interim Application Date will be put forward to the following Valuation period
2. Claims for additional works must be accompanied with written approval from Kingsmead Homes Limited. Lack of approval will mean that such claims will be disallowed until approval in writing by Kingsmead Homes limited.
3. Additional works will be included in the Valuation period following issue of written approval by Kingsmead Homes Limited."</td></tr>
<tr><td></td><td>After work began, the Claimant issued a number of interim applications for payment pursuant to the subcontract.</td></tr>
<tr><td>16.05.22</td><td>The Claimant issued its interim application for payment number 8 in the sum of £49,664.80.</td></tr>
<tr><td>23.05.22</td><td>The Defendant sent an email to the Claimant which it asserted was a pay less notice for application 8. The email asserted that the application was not in line with the subcontract. The reason for refusal was either because the day works had not been accepted in</td></tr>
</table>

	accordance with paragraph 6.9.1 of the subcontract or alternatively the works were included within the scope of work included within the subcontract. In respect of the balance of work, the email asserted that a previous pay less notice had been issued and so nothing was due. The email also asserted that the subcontract was terminated as of 16 May 2022.
18.01.23	The Claimant instructed consultants to refer the dispute between the parties concerning application number 8 to adjudication. The Claimant asserted amongst other things that the JCT Short Form of Subcontract (ShortSub) 2016 Conditions ("the JCT terms") were incorporated into the subcontract, that the Defendant had not served a valid interim certificate nor a pay less notice and that the consultants were going to apply to the RICS to nominate an adjudicator. The Referral accompanied that letter and set out the nature of the dispute including: (1) The Dispute was "the Respondent's failure to pay the sum due of £49,664.80" and sought a decision that the Claimant was to be paid that sum or such other sum as the adjudicator deemed proper; (2) the subcontract agreement was subject to the JCT terms; (3) the Defendants did not serve an effective pay less notice because it was served to early and in any event did not state the sum considered to be due by the Defendant, nor the basis upon which that sum had been calculated.
19.01.23	The adjudicator was appointed by the RICS.
26.01.23	The Defendant provided a Response to the adjudicator including assertions that: (1) The Claimant had not established any contractual basis for its claim and was thus "restricted by Bexhill to only concern enforcing payment purely on the terms/rules of the contract rather than the valuation of the underlying works. Consequently, Kingsmead will not address the value of the underlying works within its Response". (2) The JCT terms did not apply because the parties had not agreed which form of JCT terms should apply. The agreement was

	therefore only the terms are set out in the subcontract agreement. (3) "To the extent that these terms do not fully comply with the Housing Grants Construction and Regeneration Act 1996 as amended ("the Act") then the Scheme applies". (4) There was no contractual basis for making a claim for payment under the subcontract agreement or under the JCT terms.
30.01.23	The Claimant provided a Reply to the Response (the Reply"). The Reply argued that: (1) Either the JCT terms applied or in the alternative the Act and the Scheme applied. (2) If the Act and the Scheme applied, the Defendant had not served an effective payment notice or pay less notice.
01.02.23	The Defendant provided its Rejoinder. The Defendant asserted: (1) The use of the letters "JCT" was insufficient to demonstrate the parties agreed the incorporation of particular JCT terms. (2) The application for payment was not issued in accordance with section 110B(4)(b) of the Act; (3) The application for payment was not valid as it did not conform with clause 6.10 of the subcontract agreement because the sums claimed were for additional work which had not been approved by the Defendant.
02.02.23	The Claimant sought permission by email from the adjudicator to respond to paragraphs 22 to 25 of the Defendant's Rejoinder, namely the Defendant relying on an "agreement to agree" in respect of additional works. The adjudicator gave permission for either or both parties to briefly address that issue further. The Claimant made brief further submissions on the point. The Defendant did not provide any further submissions.
15.02.23	The adjudicator provided his decision. Although neither party asked the adjudicator to provide reasons for his decision, he did so. The decision set out the following:

	(1) The broad nature of the dispute referred to adjudication, is the claimed Responding Party's failure to pay the sum due of £49,664.80, including later a more detailed summary of the dispute referred; (2) The "principal submissions" received from the parties including the Referral, Response, Reply and Rejoinder. He did not set out the further brief email exchanges after the Rejoinder. (3) It was agreed between the parties that the subcontract agreement dated 17 September 2021 was agreed. It was also agreed that to the extent that the subcontract did not fully comply with the Act, the Scheme applied. (4) This adjudication was only concerned with enforcing payment purely on the terms and rules of the contract rather than the valuation of any underlying works. (5) What the parties disagreed about was the applicable terms and conditions of the subcontract between the parties and the entitlement of the Claimant to payments in respect of its application number 8. (6) The adjudicator had read and considered both parties submissions but not all of those submissions were relevant to the matters he had to decide. (7) The JCT short form terms did not apply to the subcontract. (8) The Claimant succeeded on its alternative argument that the Scheme applied. The adjudicator noted that the Defendant had agreed that was the position in its Response. The adjudicator then went on to consider whether the Claimant was entitled to payment on the basis of the Scheme applying. (9) The Defendant's pay less notice email of 23 May 2022 was not compliant as a payment notice under the Scheme because the Defendant did not state the amounts due at the payment due date and the basis on which that sum was calculated. (10) The Defendant's pay less notice email of 23 May 2022 was also not compliant as a pay less notice under the Act because it did not state the amounts due at the payment due date on the basis on which that sum was calculated. (11) The adjudicator noted the Defendant's assertions that the Claimant had not provided any contractual basis for the claim. However, he stated that although the Claimant's arguments had evolved, in his view "it was essentially still the same dispute". (12) For technical reasons only therefore the adjudicator found that the Claimant was entitled to payment of the sum claimed of £49,664.80.
	After receipt of the decision, the Defendant's consultants emailed the adjudicator asserting that the decision "does not address the content of Kingsmead's Rejoinder" where a defence was raised that the interim

	application had not been issued in accordance with the subcontract agreement and as a result, interim application number 8 could not be the notification under section 110B(4)(b) of the Act and so was not a notified sum required to be paid by the Defendant under section 111. The email asked how this defence had been addressed in the decision.
16.02.23	The adjudicator replied the next day by email stating "I confirm that all submissions were reviewed during the adjudication. Those that have not been expressly referred to in my Decision, did not impact my Decision".
15.03.23	The Claimant issued the claim to enforce the adjudicator's decision.
21.04.23	The Defendant filed a defence to the claim. In it, the Defendant denied that the Claimant had issued a valid payment application because all of the claim was in respect of additional work which had not been approved by the Defendant. The Defendant asserted that the validity of the payment notice had been raised by the Defendant to the adjudicator and the adjudicator had not considered that argument in his decision. The Defendant therefore denied that the decision of the adjudicator was enforceable because it was made in breach of natural justice.

5. I have had the benefit of reading the trial bundle which contained the witness statement of Mr Paul Draisey dated 9 March 2023 for the Claimant and the witness statement of Mr Sam Edward Beer for the Defendant together with the various documents, some of which I was taken to during the course of the hearing and directed to in skeleton arguments.

6. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole, as well as various documents within the trial bundle to which my attention was drawn, in addition to all those arguments before coming to my decision.

<u>The Law</u>

7. Happily, counsel largely agree on the legal principles, even if they disagree as to whether some of the principles apply on the facts of this case.

8. In summary, in respect of the enforceability of the adjudicator's decision:
   (1) An adjudicator's decision will normally be enforced by the court by way of summary judgment. The court is not concerned with the merits of the decision. There are limited bases on which a Defendant may resist enforcement which include a material breach of natural justice.
   (2) The court must decide if the breach is material and is more than peripheral. The issue of whether an issue is material or peripheral involves a question of degree which must be assessed by the judge. Once a defence has been raised, it is the adjudicator's job to consider any defence properly put forward by the defending party (see *Cantillon Limited v Urvasco Limited* [2008] EWHC 282 (TCC), *Quarterzelec Ltd v Honeywell Control Systems Limited* [2008] EWHC 3315 (TCC) and *C & E Jacques Partnership v Ensign Contractors Limited* [2009] EWHC 3383 (TCC)).
   (3) A breach can be material if there is a failure to consider and address a substantive defence put forward by the responding party. It will not be a material breach if the adjudicator simply fails to address some particular aspect of the evidence or elements of one party's submissions (see *NAP Anglia Ltd v Sun-Land Development Co Ltd* [2011] EWHC 2846 (TCC)).
   (4) The objective of adjudication and of the Act is to respect and enforce an adjudicator's decision unless it is plain that the question which he has decided was not the question referred or the manner in which he has gone about his task is obviously unfair. There will only be rare circumstances where the court will interfere with the decision of an adjudicator (see *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWCA Civ 1358 at paragraphs 85 and 86).
   (5) The starting point for any application to enforce the decision of an adjudicator is that the court will always endeavour to enforce such decisions. The adjudicator is not obliged to set out the matters raised by each party nor give detailed reasons for every part of his conclusion, unless commentary and findings are necessary to provide reasons and explanations for the decision (see *Balfour Beatty Construction v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC) and *HS Works Limited v Enterprise Managed Services Limited* [2009] EWHC 729 (TCC))).

(6) There is a distinction between a case where an adjudicator deliberately decides not to consider a defence or a legitimate counterclaim and a case where there is an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide. The former may make the decision unenforceable whereas an inadvertent failure ordinarily will not (see *Pilon Limited v Breyer Group PLC* [2010] EWHC 837 (TCC)).

(7) In considering whether there has been a material breach, if an adjudicator disregards all of one party's Response both as to argument and evidence, that will be material. It is not necessary for the court to investigate the facts to decide if the adjudicator would have reached a different decision if he had considered that argument and evidence. All that is necessary is that there would be a real (as opposed to fanciful) possibility that the adjudicator could have reached a different decision (see *CJP Builders Limited v William Verry Limited* [2008] BLR 545).

(8) An adjudicator can act wholly honestly and transparently and still be in breach of natural justice if they fail to deal with matters which are properly before them or if they deal with a matter without giving the parties the opportunity to be heard on that point. There is no need for the court to consider whether the decision would have been different had the issue been properly considered (see *PC Harrington Contractors v Tyroddy Construction* [2011] EWHC 813 (TCC)).

9. In respect of a stay of execution:

(1) if a Claimant will probably be unable to repay a judgment sum awarded by an adjudicator and enforced by summary judgment at the end of the substantive trial or arbitration, that may constitute special circumstances such that it would be appropriate to grant a stay (see *Wimbledon Construction Company 200 Limited v Derek Vago* [2005] EWHC 1086 (TCC)).

(2) However, even if the receiving party's financial position suggested that it was probable it would be unable to repay the judgment sum, that would not justify the grant of a stay if either the receiving party's financial position was similar to its financial position at the time the contract was made, or the Claimant's financial position was due, in part, to the Defendants failure to pay those sums due (see *Bexheat Limited v Essex Services Group Limited* [2022] EWHC 936 (TCC)).

<u>The Issues</u>

10. The parties agree on the issues to be determined. The issues are as follows:

(1) What was the dispute referred to the adjudicator?

(2) What was the defence, or defences, raised by the Defendant in Response to the dispute?

(3) In deciding the dispute, did the adjudicator consider the defence, or defences, raised by the Defendant?

(4) If not, was there a material breach of natural justice?

(5) If so, does the Defendant have a real prospect of successfully defending the claim?

(6) In the alternative to the above, has the Defendant sufficiently pleaded that enforcement should be stayed?
(7) If not, can the court consider the matter of stay of enforcement?
(8) Would any subsequent judgment requiring the Claimant to repay monies to the Defendant go unsatisfied?
(9) Is any such evidence sufficient to provide special circumstances which render it inexpedient to enforce the adjudicator's decision?

Submissions and Findings

(1) What was the dispute referred to the adjudicator?

11. The parties agree that, in broad terms, the dispute was whether the Defendant should pay the Claimant £49,664.80 and that the adjudication was only concerned with enforcing payment on the terms/rules of the contract.

(2) What was the defence, or defences, raised by the Defendant in Response to the dispute?

12. The Defendant raised the incorporation (or not) of the JCT terms and whether or not the Claimant had established that it was entitled to be paid at all under the terms of the subcontract agreement and/or the Act and the Scheme.

(3) In deciding the dispute, did the adjudicator consider the defence, or defences, raised by the Defendant?

13. Whilst recognising that ordinarily the court will enforce the decisions of adjudicators, Mr East submitted that there was a breach of natural justice in this case such that it should not be enforced by way of summary judgment.

14. Mr East submitted that there were, perhaps unusually, two distinct rounds of formal submissions in this adjudication when all of the submissions were analysed. The first round of submissions was the Referral and the Response and the second round of submissions was the Reply and the Rejoinder. He submitted there were in effect two sets of Particulars of Claim and then two Defences as a result of the contents of the various submissions, all of which had to be considered as they raised different issues and defences.

15. In the Referral, the Claimant asserted that the contract incorporated the JCT short form terms and also relied upon clause 6.10 and other clauses of the subcontract itself to establish the date for submission of interim payment number 8. However, the Claimant did not set out any basis upon which it asserted it was entitled to be paid. That point was raised in the Defendant's Response when the Defendant asserted that the parties had not in fact agreed the inclusion of any JCT terms.

16. Further, Mr East accepted that the Defendant had accepted in paragraph 13 of the Response that insofar as the subcontract terms did not fully comply with the Act then the Scheme applied. However, he asserted that this meant that the Defendant was accepting that, where necessary, the subcontract agreement would be supplemented by the Act or by the Scheme, not that if there was any non-compliance with the Act that the Scheme would replace the subcontract to decide what was payable.

17. Mr East also asserted that because the Claimant had not set out the contractual basis upon which it was entitled to be paid at all, the Defendant had "chosen to keep its powder dry" in terms of any substantive argument on that point. The Defendant asked for a finding that the JCT short form terms did not apply.

18. Mr East argued that there were in effect two sets of pleadings because it was only in the Claimant's Reply that any substantive basis was put forward for an entitlement to be paid, namely that the work had been done. In response to that, the Defendant in its Rejoinder asserted that there was no entitlement to payment under the subcontract because the additional works had not been given written approval by the Defendant as was required. The Defendant therefore argued that the Claimant could not bring itself within the Act and the Scheme because the requirements of the subcontract agreement had not been complied with.

19. Although he accepted that neither party had required the adjudicator to give any reasons at all, Mr East asserted that having chosen to do so, it was incumbent upon the adjudicator to give adequate reasons to understand his decision. The adjudicator had not made specific reference to the Defendant's argument that no approval had been given for the additional works claimed and therefore there was no trigger for payment.

20. This issue had been raised both in the Rejoinder and also after the adjudicator's decision was given, by email from the Defendant's solicitors to the adjudicator asking for detail as to where in the decision this defence had been considered. Mr East argued that it was not good enough for the adjudicator simply to say he had considered the submissions and any not referred to made no difference to his decision. It was unlikely that the adjudicator, even if making an honest mistake, would admit to that mistake when challenged. If he had actively considered it, the likelihood was that the adjudicator would have put something into the decision about it. There was a notable absence of specific mention of the defence and consideration of the arguments in the decision.

21. Mr Beaumont submitted for the Claimant that it was perfectly clear on the face of the decision that the adjudicator had in fact considered the defence. The adjudicator had understood the nature of the dispute and set it out, and he set out on the face of the decision that he had considered the Rejoinder and made explicit reference to it. Even if he did not set out all of the detail, it was clear that the adjudicator had considered the defence and that was all that was required.

22. Mr Beaumont further argued that even if the decision itself is insufficient, that the adjudicator had considered the defence specifically was supported by the post adjudication correspondence in the immediate days after the decision was given. The adjudicator was specifically asked the question by the Defendant as to whether or not the dispute had been considered. The adjudicator had confirmed that he had considered all of the submissions during the adjudication and confirmed that those that had not been expressly referred to did not impact his decision. In those circumstances, the Claimant argues that there can be no doubt that the Defendant's submissions were considered.

23. In my judgment, the Defendant does not have a real prospect of successfully arguing that the adjudicator did not consider all of the defences raised during the course of the adjudication. Whilst I accept that the Defendant asserted a defence that no basis was established by the Claimant to justify (under the provisions of the Act) the claim made

in interim payment application number 8 in the Rejoinder, it is only if the adjudicator failed to consider that defence at all that there may be a breach of natural justice.

24. There is no indication in the decision that there was a deliberate exclusion of consideration of this defence. Indeed, the decision implies the contrary because it states that the adjudicator has considered all of the submissions when making his decisions. I do not accept the Defendant's argument that this single adjudication on a single issue has to be considered as being comprised of two sets of pleadings. For whatever reason, the Defendant chose, in its own words, to keep its powder dry in its Response until the Claimant had set out a contractual basis for payment. That said, the Defendant did specifically submit at paragraphs 15 and 16 of the Response that the Claimant had not identified a contractual basis for an entitlement to payment.

25. Once a basis was asserted by the Claimant in the Reply, the Defendant then responded with further details of its defence that no basis for payment had been established under the Act in its Rejoinder. In my judgment, the pleadings should be considered as a whole, demonstrating an evolving position for both parties. I do not accept that there is a real prospect of the Defendant successfully arguing that the submissions should be considered as two separate sets of pleadings. Even if I am wrong about that, I do not accept that the Defendant has a real prospect of successfully arguing that the defence it says was not considered was raised for the first time in the Rejoinder. Whilst it may have been presented in more detail and from a different angle in the Rejoinder, the Defence that no contractual basis had been shown was plainly raised on the face of the Defendant's Response.

26. In my judgment, on considering the decision itself , I do not accept that the Defendant has a real prospect of successfully arguing that the adjudicator had not considered all of the submissions, including the Rejoinder and the subsequent email submissions which followed. The adjudicator states that he considered all of the documentation and specifically notes the Rejoinder. The adjudicator further states that having read both parties submissions, not all of those submissions bear on the matters he had to decide. He also made it clear that although the Claimant's arguments had "evolved"

and were sometimes difficult to understand, the dispute was still essentially the same dispute.

27. I do not accept that the Defendant has a real prospect of successfully arguing that the adjudicator did not consider the Rejoinder and did not consider the defence raised that the Claimant had no basis contractually for claiming an interim payment. Having raised the defence of a lack of a contractual basis for the claim in further detail in the Rejoinder, the Claimant drew further attention to the Defendant's argument by seeking permission to make further submissions as the defence had not previously been raised. The adjudicator considered that request and then gave permission to both parties to make further brief submissions. Only the Claimant chose to do so.

28. I do not accept the assertion made by Mr Beer in his witness statement that the adjudicator made "erroneous findings of fact/agreements" when the adjudicator stated that the parties agreed that the Claimant's application for payment was made on 16 May 2022. It is correct that the adjudicator did not specifically set out the contents of paragraphs 22 to 25 of the Rejoinder and the emails of 2 February 2023 where the Defendant argues further why that notice was not a valid notice. However, in its Response at paragraph 20, the Defendant said "it accepts Bexhill served an interim application for payment on 16 May 2022" and later at paragraph 31 stated "However, as has already been agreed, Bexhill issued its interim application on 16 May 2022…". Having made those submissions, I do not accept that there is a real prospect of successfully arguing that the finding of such an agreement was erroneous.

29. That conclusion is supported by the email correspondence which followed shortly after the decision was given. The adjudicator confirmed specifically that he had considered all of the submissions. Whilst I note the observation made by Mr East that an adjudicator who has made an error was unlikely to admit to that error, I do not accept that necessarily to be the position. However, in any event, the adjudicator here specifically replies to state that any other submissions not specifically identified in the decision would not have made a difference to his decision.

30. It is further relevant to the issue of whether the adjudicator considered the defence that neither party asked the adjudicator to give any reasons whatsoever. Whilst the reasoning in the decision arguably could have been fuller, and the basis for all of the arguments set out more extensively, the adjudicator answered the question posed to him. In the absence of authority, I do not accept that having chosen to provide some reasons when none were requested, the adjudicator then obliges himself to provide reasons and a discussion on every point raised. It is a low bar for the adjudicator to negotiate in terms of reasons. If the adjudicator has answered the question posed to him and reached certain conclusions on the legal points raised and given reasons for those decisions which are comprehensible, that suffices even if the decision is wrong.

31. Even if there was no contractual basis for payment to be made, the adjudicator considered the facts of this case and the various submissions made by both parties across the whole of the adjudication. Those submissions included the adjudicator's understanding of the situation that the Defendant agreed that the Scheme applied. Even if the adjudicator was wrong in interpreting the Defendant's submissions in that way, that by itself is not sufficient in my judgment to show that he did not consider the defence. Indeed, the adjudicator specifically noted that not all of the submissions applied to the issue which he had to decide. As Mr East acknowledged, the adjudication decision is not a final determination of any issues which the parties wish to raise. Even if the adjudicator has got it wrong, that is not something which the court will interfere with at this stage.

32. Applying the Act and the Scheme, the adjudicator decided, applying the Scheme, that once the claim had in fact been made by the Claimant, in order for the Defendant to dispute the claim, it needed to comply with the provisions of the Act and/or the Scheme. As the adjudicator decided, the Defendant did not serve a valid payment notice or a valid pay less notice. This was a decision which the adjudicator was entitled to make to deal with the dispute he was asked to decide, even if he made the wrong decision.

(4) If not, was there a material breach of natural justice?

33. This question does not fall to be answered as I have decided on the balance of probabilities that the adjudicator did consider the defences asserted by the Defendant.

(5) If so, does the Defendant have a real prospect of successfully defending the claim?

34. No, for the reasons given above.

(6) In the alternative to the above, has the Defendant sufficiently pleaded that enforcement should be stayed?

35. In the Defendant's defence itself, there is no mention of seeking a stay of execution. A stay of execution is sought in the witness statement of Mr Beer. In my judgment, having failed to mention it at all in the pleading, it has not been sufficiently pleaded.

(7) If not, can the court consider the matter of stay of enforcement?

36. In case I am wrong in finding that setting out a request and reasons for a stay in the witness statement of Mr Beer is inadequate, I should in any event consider the matter of a stay of enforcement. The issue of enforcement is usually dealt with after a judgment is given. The fact that the defence did not set out the basis for seeking a stay does not prevent such an application being made. Indeed, if it had not been made in the witness statement of Mr Beer, an application could have been made after judgment was given. Such an application is not required to be in writing and it should therefore be considered in any event.

(8) Would any subsequent judgment requiring the Claimant to repay monies to the Defendant go unsatisfied? and

(9) Is any such evidence sufficient to provide special circumstances which render it inexpedient to enforce the adjudicator's decision?

37. I propose to deal with issues 8 and 9 together. In his witness statement, Mr Beer set out various reasons why he asserted that the court should exercise its discretion to stay execution of the judgement if the court granted summary judgment in respect of the adjudicator's decision. He argued in his witness statement that the burden of the risk

of insolvency or liquidity or non-payment was initially borne by the Claimant but after enforcement of the adjudicator's decision, it has shifted to the Defendant.

38. Mr Beer further set out his assertion that "the financial covenant of Bexhill has deteriorated, as is clear from the "Red Flag Alert" report. He described that, at the point of contract in May 2021, the Claimant was given an amber flag which meant that: "*Companies are newly incorporated or have only passed the lower threshold of the credit score algorithms, and display some financial, payment or filing characteristics that make them an elevated risk. Moderate risk and open credit is only recommended with caution*".

39. As the Claimant was a newly formed company, there was a reason for that amber status and thus it was not a concern, especially as it was a labour only subcontract. However, the rating changed on 27 January 2023 when the Claimant went from an amber flag to a red flag which meant:
"*Companies are in the weakest 20% in their size category and display risk factors that might include a deteriorating financial position, sub-optimal gearing or liquidity, and the possible presence of recent or significant legal notices. The risk is elevated, and suppliers should seek suitable assurances or guarantees*."

40. Mr Beer exhibited the Red Flag Alert documents generated in respect of the Claimant, which he asserted showed a deteriorating position which he presumed was as a result of being unable to secure profitable work in the previous 12 months. He also set out that Mr Tracey, the sole director of the Claimant and the person with significant control of the Claimant company, had previously held a similar position with another company which had gone into liquidation. It was therefore argued that the enforcement of the decision should be stayed.

41. In considering the documentation relied on, Mr Beaumont took me to another part of the report which showed that there was only 3.23% possibility of a catastrophic failure, meaning the likelihood of the Claimant going from an active rating directly to insolvent. This, Mr Beaumont argued, showed that in fact there was a very low risk to support the Defendant's argument. Further, there was no detail on the report to show what the issue was with this particular Claimant, just that there were some high level

risk factors, some of which could be explained by suboptimal gearing or liquidity. There was no evidence, Mr Beaumont argued, which established a probable inability to repay. Financial issues of a previous company with the same director should not be taken into consideration as there was inadequate information to assist the court at all.

42. I prefer and accept the submissions made by Mr Beaumont in respect of stay. Although the status of the Claimant has worsened between May 2021 and January 2023, there is no explanation for that change of position. In addition, when one looks at the events table concerning the company, the Claimant initially improved from amber to bronze between May 2021 and May 2022 before the one red flag is noted.

43. In terms of risk and the likelihood of repayment, I do not accept that the risk shifting from the Defendant to the Claimant is a factor which I can or should take into account. That is the inevitable result of the Act and the Scheme being applied. Further, I do not accept that the Defendant has established on the balance of probabilities that there is a probable risk of the Claimant not being able to repay. As Mr Beaumont noted, the assessed risk of insolvency was only 3.23%. There is insufficient evidence about previous companies and the criticism of the director to enable me to make any finding that would be relevant to this decision.

44. For all of the reasons given above, the Claimant's application for summary judgment in the sum of £49,664.80 is granted and the Defendant's application for a stay of enforcement is dismissed.

45. I am grateful to counsel for their very able assistance in this matter.