Neutral Citation Number: [2015] EWHC 412 (TCC)

Case No: HT-2014-000113

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Rolls Building, 7 Rolls Buildings

London EC4A 1NL

Date: 27 February 2015

Before :

MR. JUSTICE EDWARDS-STUART

- -

Between :

Galliford Try Building Ltd **Cla**

- and -

Estura Ltd **Defe**

- -

- -

Alexander Hickey Esq, (instructed by **Pinsent Masons LLP**) for the **Claimant**

Adrian Williamson Esq, QC (instructed by **Mishcon de Reya**) for the **Defendant**

Hearing date: 15th January 2015

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Judgment

Mr. Justice Edwards-Stuart:

Introduction

1.
This is an application for summary judgment by the claimant contractor, Galliford Try Building Ltd, ("GTB") to enforce the decision of an adjudicator dated 20 November 2014, by which he ordered the defendant, Estura Ltd, ("Estura") to pay GTB £3,928,227 (plus VAT as applicable), together with interest.

2.
GTB was engaged by Estura, as employer, under an amended JCT Design and Build Contract 2011, dated 26 April 2012, to design and build certain works at the Salcombe Harbour Hotel, in Devon. The contract contained payment terms that complied with the Housing Grants Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009, ("the Act").

3.
Under the provisions relating for interim payments the contract provided that if, following receipt of an application for an interim payment, the employer did not agree with the amount stated in the application it was entitled to serve a payment notice within five days of the due date or, if later, receipt of the application. If it did not serve a payment notice, then the amount payable under the application became the amount stated in the application. In addition, the employer had a right to serve a further notice, a pay less notice, if it considered that it was entitled to set off against the amount claimed other sums which were not the subject of the application. The adjudicator noted that it was not in dispute that Estura had failed to serve either notice with the result that GTB became entitled to the sum stated in the application.

4.
Estura submits that, in what it describes as the exceptional circumstances of this case, it should not be required to submit to summary judgment in respect of the sums awarded by the adjudicator.

5.
Mr. Alexander Hickey, instructed by Pinsent Masons, appeared for GTB. Mr. Adrian Williamson QC, appeared for Estura, instructed by Mishcon de Reya.

Estura's case

6.
The application in dispute is GTB's Interim Application 60 ("IA 60"). It is described on its face as "Indicative Final Account and Valuation Summary". The sum stated as the anticipated Final Account was £12.66 million. That is almost £5 million more than the contract value. The value of the work as stated in IA 60 was only about £4,000 less than the amount of the anticipated Final Account.

7.
Estura submitted that IA 60 represented an increase on GTB's previous application of only about £147,000, made up of about £72,000 for Employer's Instructions and about £76,000 for "Anticipated Instructions". Estura's case, as advanced before the adjudicator, was that the sum due on that application was in truth £147,000 plus VAT, and not the sum claimed by GTB. That case was rejected by the adjudicator.

8.
Thus the effect of the adjudicator's award is that GTB has recovered almost everything that it was hoping to recover and so, submits Estura, it has no incentive whatever to submit its final account so that the sum that is properly due to it can be challenged and reassessed. This is the real reason why Estura is resisting this application.

9.
The adjudicator held (at paragraph 11) that the issues that he had to address were as follows:

i)
Is GTB entitled to payment and, if so, how much?

ii)
Is GTB entitled to interest and, if so, how much?

iii)
Is GTB entitled to the RICS adjudicator nomination fee?

10.
In its evidence before the court Estura submitted that the notice of adjudication gave rise to three potential questions for the adjudicator. They were:

i)
What was the sum stated as due in the application?

ii)
What sum should have been stated as due in the application?

iii)
Whether the sum that was stated as due in the application was in fact payable?

11.
It can be seen at once that the second and third of these questions were not ones identified by the adjudicator. This is understandable, because at paragraph 4 of its Rejoinder Estura said this:

“Estura continue to submit that this adjudication raises a very short point: what was the sum that the Contractor considers to be due to him in Application 60? This can admit, on any proper reading of the application, of only one answer: £147,266 plus VAT (£158,679.41 inclusive of VAT). GTB’s Reply represents an elaborate attempt to cover this simple fact with a complex smokescreen.”

(original emphasis)

12.
Estura accepts that in so far as the conclusion reached by the adjudicator was one that was within his jurisdiction and otherwise in accordance with the applicable principles in adjudication, his decision would be unassailable. This is because it is well accepted that an error - however glaring - committed by an adjudicator acting within his jurisdiction will not of itself, and absent a breach of natural justice, be a bar to enforcement: see for example Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 49.

Summary judgment

13.
Mr. Williamson submitted in his skeleton argument that the decision of the adjudicator was perverse because he did not address himself to the second and third of Estura’s three questions. In my view, this point can be disposed of at once. In the light of Estura’s submissions during the adjudication, as reflected in the extract from the Rejoinder that I have quoted above, the adjudicator clearly answered the question that was referred to him. There is nothing whatever in this point and I did not understand Mr. Williamson to press it.

14.
In my judgment, therefore, on this aspect there is no available defence to the application for summary judgment. The adjudicator determined the question that was referred to him and there is no allegation that he failed to observe the rules of natural justice. Accordingly, his decision, right or wrong, is not amenable to challenge on this application.

15.
The point which was really at the heart of Mr. Williamson’s submissions arises out of a decision of this court in ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC). Judgment in that case was delivered on 3 December 2014 and published on BAILII shortly afterwards. That judgment was, therefore, delivered shortly after the adjudicator’s decision. Mr. Williamson was, I think, submitting

that this decision provided a compelling reason why the issue should be disposed of at a trial and not by way of summary judgment pursuant to CPR 24.2 (b).

The decision in ISG v Seevic

16.
That case involved an application for summary judgment by ISG to enforce an adjudicator's decision, Adjudication No 1, and for a declaration that a decision by the same adjudicator following a later Notice of Adjudication, in Adjudication No 2, was invalid for want of jurisdiction.

17.
The facts are set out in paragraphs 2-5 of the judgment as follows:

"2. In Adjudication No 1 the adjudicator, a Mr. Robert Juniper, decided that ISG was entitled to £1,097,696.29 being the sum claimed in ISG's Application No 13 plus interest, because the Defendant ("Seevic") had not served either a payment notice or a pay less notice in accordance with the provisions of the contract.

3. The Notice of Adjudication in Adjudication No 2 was served four days before Mr. Juniper made his decision in Adjudication No 1. It is clear that Seevic, aware that it had not served the relevant notices in time, was seeking to frustrate or reduce the impact of the likely decision in Adjudication No 1 in the hope that it could obtain a decision in Adjudication No 2 that the value of ISG's works up to the date of the application was less than the amount claimed by ISG.

4. In that it succeeded. By his decision dated 10 October 2014 (as corrected under the slip rule on 13 October 2014) the adjudicator decided in Adjudication No 2 that the value of ISG's works as at the date of Application No 13 was £315,450.47. In fact, the adjudicator accepted ISG's valuation of its measured works but did not accept the sum claimed by ISG for loss and expense, which was a little over £1 million. He concluded that the true value of the loss and expense claim was a little over £300,000 so that ISG had been overpaid. He therefore directed, on the assumption that Seevic had already paid ISG against Adjudication No 1 that ISG should repay the difference, which was £768,525.36.

5. Seevic did not comply with the decision in Adjudication No 1, although it now accepts that it must do so, subject to the decision in Adjudication No 2. On 15 October 2014 Seevic issued a cheque for the sum of £315,450.47 in favour of ISG."

18.
I held that if an employer fails to serve the relevant notices under this form of contract it must be deemed to have agreed the valuation stated in the relevant interim application, right or wrong. Accordingly, the adjudicator must be taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.

19.
However, I made it clear that this agreement as to the amount stated in a particular interim application (and hence as to the value of the work on the relevant valuation date) could not constitute any agreement as to the value of the work at some other date (see paragraph 31).

20.
This means that the employer cannot bring a second adjudication to determine the value of the work at the valuation date of the interim application in question. But it does not mean any more. There is

nothing to prevent the employer challenging the value of the work on the next application, even if he is contending for a figure that is lower than the (unchallenged) amount stated in the previous application. If this was not made clear by my judgment, then it should have been, and it is certainly made clear by the decision of the Court of Appeal in Rupert Morgan Building Services (LLC) Ltd v Jervis [2004] 1 WLR 1867, in particular the passage from paragraph [14] that is set out in paragraph 30 below. My judgment in ISG v Seevic was not intended to go behind that.

Estura's submissions at the hearing

21.
Mr. Williamson submitted that that decision prevents Estura from challenging the adjudicator's decision because it prevents a second adjudicator from determining the value of GTB's work as at the valuation date for IA 60, even though that was an issue that the adjudicator in the first adjudication expressly refrained from deciding - correctly, in the light of the question referred to him.

22.
In the ordinary course of events any errors in an interim application, or the consequences of an employer's failure to issue the relevant notices, can often be put right on a subsequent interim application. Thus an inadvertent failure to serve a payment notice usually has the result that an employer will find itself liable to pay in respect of the interim application in question more than it thinks appropriate, but in circumstances where the overpayment can be put right on the following applications or, possibly, when the final account is determined.

23.
However, in certain cases, of which this is one, the usual means of correcting an error in an interim application may not be available. There are three reasons for this. The first, which is a point of general application, is that this form of contract does not provide for a negative valuation. Although this point was not fully argued during the hearing, I am prepared, in principle, to accept that it is correct in the light of the wording of clause 4.9 of the contract. Mr. Hickey pointed out that this is what the parties signed up to and they should not be indulged if it proves to be inconvenient.

24.
The second reason is the extraordinarily high amount of the interim application in this case - almost equal to the anticipated claim in GTB's final account. The third is its timing: IA 60 was in effect one of the last interim applications for payment that was likely to be made. There was no prospect of a series of further interim applications that would enable Estura to correct the position. [1] Indeed, submitted Mr. Williamson, the position was worse. GTB, having a decision in its favour for virtually everything that it was hoping for, has no incentive whatever to present a final account which would then be subject to negotiation in the ordinary way. Any dispute arising out of that final account could be referred to adjudication, but only if and when the dispute had arisen. Until there was a final account, there could not be a dispute about it.

25.
Mr. Williamson submitted that the decision in ISG v Seevic was inconsistent with the earlier judgment of this court in Harding v Paice [2014] EWHC 3824 (TCC). In my judgment, that submission is not correct. I should make it quite clear that when preparing the judgment in ISG v Seevic I had my decision in Harding v Paice well in mind. In the latter case I held that a failure to serve a valid pay less notice in time did not deprive the employer forever of the right to challenge the contractor's account. However, there were two significant differences between the facts of Harding v Paice and the facts of ISG v Seevic. The first is that the former case was not concerned with interim payments, but

with the final payment following termination of the contract. The second is that the entitlement to payment on termination was "… the amount properly due in respect of the account" (that is the account that the contractor has to submit on termination). That provision was quite different from the provisions relating to interim applications, where the amount of the interim payment is, in the absence of any notices served by the employer, "… the sum stated as due in the Interim Application". It is not the sum that ought to have been stated as due in the Interim Application. There is, therefore, a fundamental difference between the payment obligations that arise on an interim application and those that arise on termination.

26.
Mr. Williamson submitted also that the decision in ISG v Seevic (and also that in Watkin Jones and Son Ltd v Lidl UK GmbH [2002] EWHC 183 (TCC), which it followed) was also inconsistent with the earlier decision of this Court in VHE Construction plc v RBSTB Trust Co Ltd [2000] BLR 187. Superficially, that looks as if it may be a good point. In VHE Construction there were two adjudications. In the first adjudication the adjudicator decided that the sum claimed in the contractor's application for an interim payment was the sum due because the employer had failed to serve the required notice. The award was for a sum in excess of £1 million. The employer then started a second adjudication in which it submitted that the adjudicator had power to open up, review and revise the relevant interim payment application. That adjudication went ahead and the adjudicator concluded that the properly calculated sum that should have been included in that application was about £250,000. His Honour Judge John Hicks QC held that the employer was bound by the first decision, but that the effect of the second decision was that VHE could not enforce the first decision without immediately becoming liable to repay the difference between the two awards.

27.
It does not appear to have been in dispute that the second adjudicator had the power to revise and open up the interim payment application. I suspect that that was so because of the very wide wording of the arbitration clause that was incorporated in that form of contract. In the present case there is no such arbitration clause and so the powers of the adjudicator must be found either in the contract or in the legislation. Paragraph 20 of the Scheme for Construction Contracts ("the Scheme"), which applied to this adjudication, provides that an adjudicator may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. It then says this:

"In particular, he may-

(a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

(b) decide that any of the parties to the dispute is liable to make a payment under the contract … when that payment is due and the final date for payment,

(c) [this deals with interest]."

28.
In my view, those words are not wide enough to entitle an adjudicator in the position of the second adjudicator in this case to revise the sum claimed in an interim application. I cannot see how the sum stated in an interim application made under this form of contract can be described as a "decision taken … by any person". Accordingly, in my judgment the procedure that the second adjudicator in the VHE Construction case was asked to adopt, apparently without opposition, is not a procedure that the

second adjudicator in this case could have adopted. For these reasons I do not consider that the subsequent decisions are inconsistent with the decision in VHE Construction.

29.
Mr. Williamson relied also on the decision of the Court of Appeal in Rupert Morgan Building Services (LLC) Ltd v Jervis, to which I have already referred. The contract was in a standard form provided by the Architecture and Surveying Institute which provided for interim certificates on a 14-day basis. If the employer wished to withhold payment of the sum stated in the certificate it had to give an effective notice of intention to withhold payment. Jacob LJ, giving the principal judgment of the court, said, at [8]:

“The interim certificates, as is conventional, are on a ‘global’ basis. By this I mean that each interim certificate takes account of the total work done to date and the total payments to date. It follows that if there is an error (e.g. a double charging) in an interim certificate, it can and should be corrected in the next. That is not so for the final certificate.”

He continued in the same vein, at [11], as follows:

“So it is not the actual work done which either defines the sum or when it is due. The sum is the amount in the certificate. The due date is 14 days from certificate date. This certificate may be wrong - the architect may (though this is unlikely because he will be working from the builder’s bill) have missed out work done (which would operate against the contractor) or he may have included items not in fact done or items already paid for (which would operate against the client). In the absence of a withholding notice, section 111(1) operates to prevent the client withholding the sum due. The contractor is entitled to the money right away. The fundamental thing to understand is that section 111(1) is a provision about cash-flow. It is not a provision which seeks to make any certificate, interim or final, conclusive.”

30.
Finally, at [14], Jacob LJ concluded as follows:

“(b) It provides a fair solution, preserving the builder’s cash flow but not preventing the client who has not issued a withholding notice from raising the disputed items in adjudication or even legal proceedings.

...

(d) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings.”

31.
In the light of these decisions, Mr. Williamson submitted, with his usual tact, that the decision in ISG v Seevic was misguided because in cases such as this it would leave an employer who, through inadvertence (in this case the inadvertence of its agents, P H Warr) had failed to issue the relevant payment notice, and in consequence had paid too much on the last interim application, without any effective remedy short of litigation. Leaving aside, for one moment, the remedies that may have been open to Estura, I do not consider that there is anything in the judgments in the Court of Appeal in Rupert Morgan Building Services that amounts to authority for the proposition that, in the absence of the relevant notices, the employer can resist paying the sum stated in an interim application by asserting that work has not been done to the value claimed. Indeed, the judgment of Jacob LJ is to

contrary effect. If in those circumstances the employer is not allowed to withhold payment on the ground that the sum stated in the application is wrong, which is clearly the case, I cannot see on what basis he can immediately refer that issue to adjudication: to permit that would be to undermine the provisional validity of an unchallenged interim application. Furthermore, under this form of contract there would be no dispute to refer to adjudication because an interim application is not a statement of the correct value of the work, it is a statement of what the contractor considers to be due to him based on the Gross Valuation of the work: as Jacob LJ put it, "… it is not the actual work done which … defines the sum".

32.
Mr. Williamson submitted that the decision in ISG v Seevic had "… changed the legal landscape". I will revert to this point later in this judgment.

The second adjudication

33.
About one week after the adjudicator's decision, on 28 November 2014, Estura commenced a second adjudication seeking a decision that the amount of the gross valuation stated in IA 60 should have been much lower, namely about £9.892 million. At paragraph 18.5 of the Notice of Adjudication, Estura said:

"By virtue of clause 4.14 GTB's Gross Valuation does not include and should not have included amounts which were not ascertained under clause 4.20 and was or should have been £12,656,645.49 less £2,764,427.73, i.e. £9,892,217.76 (at the maximum)."

So there Estura is submitting that the sum stated in the application was too high by £2.76 million, implying that about £1.3 million was, on its face, payable. This is made clear at paragraph 18.6, where it said that the sum due was £9.89 million less the aggregate of the retention, any advance payment and the amounts already paid, and at paragraph 23.3, where it sought a declaration to the effect that the sum stated as due should have been £1.3 million odd (before deduction of the sum of £147,266.27 which was paid on 29 October 2014).

34.
On 6 December 2014 the adjudicator appointed in the second adjudication declined to proceed on the basis that he lacked jurisdiction. His ground for doing so was this:

"It seems to me clear, pursuant to that authority, that it is not now possible for either party to open up the question of what the proper value of works actually was at the time of application 60 and, as a result, I do not possess the jurisdiction to continue with the matter referred."

35.
The authority to which he was referring in that passage was a decision of His Honour Judge Humphrey Lloyd QC in Watkin Jones. But it is likely, submits Mr. Williamson, he must have known of the decision in ISG v Seevic, in which the case of Watkin Jones was cited and followed.

36.
Be that as it may, Mr. Williamson submitted that this case demonstrates starkly the problem to which the decision in ISG v Seevic gives rise. In the light of this submission it is necessary to consider what Mr. Williamson described as "the legal landscape".

The background and "the legal landscape"

37.
In 1998, following the Latham report, which investigated amongst other things contractual arrangements in UK construction contracts, the Housing Grants Construction and Regeneration Act 1996 came into force. This made it compulsory for construction contracts in the UK to incorporate a regime for interim payments to contractors and subcontractors, which included provisions relating to dates for payment, the issue of notices where an employer or main contractor objected to paying the amount claimed and so on. In addition, the Act introduced a statutory right by which any party to a construction contract can refer a dispute to adjudication at any time. Adjudication is a fast track process that, in effect, requires the nominated adjudicator to determine the dispute referred to him within 28 days of its referral, a period which may be extended by consent: under the provisions of the Scheme (which apply in default of compliant provisions in the relevant contract) it may be extended to 42 days with the consent of the referring party and even beyond that, but only with the consent of both parties. It follows that if the referring party is not prepared to grant any extension of the time by which the decision must be issued, it remains at 28 days.

38.
The Act requires that the parties must comply with the decisions of adjudicators. Where an adjudicator finds that a sum of money is due by one party to the other, that sum is typically ordered to be paid within seven days.

39.
Thus, allowing seven days for the nomination of the adjudicator, a party who refers a dispute to adjudication claiming a sum of money can expect payment within six weeks (if the time is not extended) of issuing the notice of adjudication, which is the document that starts the process: that is seven days for the appointment of the adjudicator, 28 days for the process leading to the decision and seven days thereafter for payment following the issue of the decision. As I have said, with the consent of the parties this period may be extended by a further two weeks. This is truly a fast track process and surveys in the industry have shown that there is a high degree of satisfaction with it.

40.
What happens if the losing party refuses to pay? To deal with this the Technology and Construction Court (“TCC”) has adopted a similarly fast process for enforcing adjudicators’ decisions. The procedure is set out in Section 9 of the TCC Guide. On a failure to comply with an adjudicator’s award the successful party can issue proceedings in the TCC seeking an abridged time for acknowledgement of service and thereafter early determination, by way of summary judgment, of its entitlement to payment of the sum awarded by the adjudicator.

41.
In practice this procedure generally operates as follows. When the seven days for payment of the sum awarded by the adjudicator has expired without payment having been made, the successful party will instruct solicitors to issue proceedings for enforcement. If the solicitors are sufficiently resourced and efficient, this may be done within two to three days of the expiry of the date for payment, so that will be within nine to ten days of the date of the adjudicator’s decision. As soon as the claim form and the application are filed in the TCC Registry, the papers are passed to a judge for the issue of appropriate directions. The judge, usually the Judge in Charge, will then issue directions in a standard form. These directions, in the form of an order, are usually issued within two days of receipt of the papers in the Registry, and a copy of the unsealed order is immediately sent by e-mail to the parties’ solicitors for information (or to the claimant’s solicitors alone, if those acting for the defendant not known) so that

the claimant's solicitors can serve the relevant papers on the defendant without waiting for the sealed order.

42.
The directions given by the court abridge the time for filing the acknowledgement of service, typically to four working days, and make provision for the service of evidence. Usually the defendant is given 14 days in which to serve its evidence in response to the application and the claimant is given a further seven days thereafter in which to serve any evidence in reply. At the same time a date for the hearing of the application for summary judgment is fixed, usually about four weeks from the date of the order, subject to judicial availability. In practice, save for cases where there is an intervening public holiday (where the timetable may be extended appropriately), the hearing is almost invariably fixed for a date that is within four to five weeks of the date of the order. [2]

43.
The relevance of this detailed explanation is that it shows how a referring party can obtain a decision from an adjudicator within 35 days of starting the process if it refuses to extend the time for the decision. By contrast, it takes a little longer to obtain a hearing of an application for summary judgment to enforce the decision. That is because the successful party has no cause of action until the date for payment has passed, usually seven days after the decision. Thereafter it must instruct its solicitors to issue proceedings, file them with the court and obtain an order from a judge. Assuming that the successful party waits until non-payment of the award before instructing solicitors, this means that, at best, a further three to four days will usually elapse before the order is made by the court. Thereafter there will be a further 28 days or so until the hearing of the application for summary judgment. In practice, therefore, the hearing for summary judgment will be fixed for a date that is likely to be at least 38 or 39 days after the adjudicator's decision.

44.
Where the referring party is claiming a sum of money, often a contractor or sub-contractor claiming the sum alleged to be due in an interim payment application, one of the issues before the adjudicator will often be whether or not the employer (or main contractor, as the case may be) had issued the appropriate payment or "pay less" notices in time. If it has not, then, as I have explained, under the provisions of most forms of contract the contractor or sub-contractor would become entitled to the sum claimed in the interim application. If this issue is decided against the employer or main contractor because it had either failed to issue the relevant notices or the notices that had been issued were not in the proper form or were out of time, the losing party is often disinclined to pay the sum determined by the adjudicator. In these circumstances, there has been a developing practice by which the losing party, immediately on receipt of the decision, refers a further dispute to adjudication about the value of the work that was the subject of the interim application. In this way the losing party hopes to achieve, and often does achieve, a reduction in the amount that was the subject of the interim application.

45.
Because of the small disparity between the time taken to obtain an adjudicator's decision and the time it takes to obtain a judgment enforcing an adjudicator's award, the losing party can, if it moves sufficiently swiftly, obtain a fresh award from an adjudicator (sometimes the same adjudicator) as to the value of the work carried out up to the relevant valuation date before the application for summary judgment to enforce the first decision comes on for hearing.

46.

It is now established that parties must comply with the decisions of adjudicators in the order in which they are made, even if an earlier decision is overtaken by a later decision (see Interserve Industrial Services Ltd v Cleveland Bridge [2006] EWHC 741 (TCC), per Jackson J). So, in the examples that I have given, the right of the successful party in the first adjudication to enforce the first decision would be overtaken by its obligation to comply with the second decision. In other words, assuming that the adjudicator in the second decision valued the work in an amount lower than the sum claimed in the application that was the subject of the first adjudication, the claimant would be entitled only to interest on the difference between the two sums between the date for payment ordered by the first adjudicator and the date of the second decision.

47.
The effect of this tactic is that the successful party in the first adjudication is effectively kept out of his money between the contractual date for payment following the interim application and the adjudicator's decision in the second adjudication - thus defeating the very purpose that the Act was intended to achieve.

48.
A further potential anomaly is presented by the application of the principle in the Interserve case, in that the rights of the parties may be determined differently, albeit on a provisional basis only, depending on the order in which the adjudications take place: see ISG v Seevic, at [49]-[51].

The problem in this case

49.
Estura submits that it cannot be the case that a party who has failed to give the correct notices can never challenge a palpably wrong interim application in an adjudication. That, submits Mr. Williamson, would be to drive a coach and horses through the Act.

50.
The first answer to this submission is that it is not the case that a party can never challenge a palpably wrong interim application. Take this case: since the only issue in the first adjudication was the question of what sum was stated as due in IA 60, and an adjudicator's decision is only final until the dispute is resolved by litigation, there was nothing to prevent Estura from starting Part 8 proceedings for a declaration as to the true sum stated in that application. [3] If Estura had moved swiftly, those proceedings could have been brought on for hearing at the same time as GTB's application for summary judgment: as happened in, for example, Geoffrey Osborne Ltd v Atkins Rail Ltd [2010] BLR 363.

51.
So it is not correct to say that Estura was prevented by the decision in ISG v Seevic from challenging the amount to which GTB was entitled under IA 60. What it cannot do now, except by way of Part 8 proceedings of the type I have mentioned (or otherwise by litigation), is to challenge the adjudicator's decision as to the sum to which GTB became contractually entitled on the due date in respect of IA 60.

52.
Alternatively, Estura will be able to start proceedings for a determination of GTB's final account, albeit that this remedy will not provide much comfort to Estura in terms of cash flow. Its position, if it is correct that GTB's final account has been grossly overvalued, is that it must pay now and wait for the outcome of the litigation to reverse the position. That will mean that it is kept out of its money for a long time, which is clearly unsatisfactory. Indeed, Estura submits that it is more than unsatisfactory

because not only is it not in a position to pay the sum awarded by the adjudicator if a judgment were to be enforced now but also it would not be able to afford the litigation that will be necessary to ensure a proper valuation of GTB's final account.

53.
Even though this is a situation which Estura has brought on itself by its failure to comply with the notice provisions in the contract (or, alternatively, the failure by its agent, P H Warr, to comply on its behalf), that does not mean that the court must refuse the grant of a stay of enforcement of any judgment irrespective of how unfair that might be to Estura.

54.
Mr. Williamson referred me to the decision of Coulson J in Hillview Industrial Developments (UK) Ltd v Botes Building Ltd [2006] EWHC 1365 (TCC), where he said:

"Finally, I must consider whether or not to grant a stay in the circumstances of this case. I am satisfied that Hillview is entitled to judgment but I am also satisfied that the purpose of the 1996 Act is to provide a statutory framework which would enable justice to be done between parties to a dispute. It was not intended to cause injustice. This can, in appropriate cases, be dealt with by the grant of a stay. 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."

55.
I agree entirely with those observations. Mr. Williamson submitted that enforcement should be stayed until the earlier of:

i)
The recovery by Estura of damages from P H Warr flowing from their breaches of contract and/or negligence in failing to issue the required payment notice. Estura has brought adjudication proceedings against its agents claiming damages in respect of these breaches.

ii)
The conclusion of the final account process pursuant to clause 4.12 of the contract, although it submits that the difficulty here is that the initiation of that process lies in the gift of GTB.

GTB's submissions

56.
Mr. Hickey submitted that there is no precedent for a stay of enforcement of a judgment to enforce an adjudicator's decision just because the court considers that the decision might be wrong. To do that, he says, would run counter to the consistent robust policy of the court which has been followed from the outset to require compliance with adjudicators' decisions, right or wrong.

57.
Mr. Hickey referred me to another decision of Coulson J in Wimbledon Construction Company 2000 Ltd v Vago [2005] BLR 374, in which he set out principles that were to be applied in relation to the grant of a stay. However, whilst I respectfully agree with his summary of the principles in the context in which they were made, the ground for seeking a stay in that case was the probable inability of the claimant to repay the judgment sum (that is the sum awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial in the event that the defendant was successful.

58.
The position in this case is different. There is no suggestion that GTB might not be good for the money if the adjudicator's decision was overruled in subsequent litigation. The problem here is the predicament in which Estura will find itself between now and the conclusion of any litigation (assuming that it would be in a financial position to pursue such litigation if no stay were granted).

59.
In this type of situation I consider that the overarching observations of Coulson J in Hillview are the ones that are applicable. Having regard to the figures that I have already mentioned, it is certainly possible that the adjudicator's decision has given GTB a windfall as Estura submit, although I am in no position to say whether or not this is in fact the case. However, it is clear that the unusual combination of factors that has arisen in this case may give rise to a risk of irreparable prejudice to Estura if the adjudicator's decision is enforced in full.

60.
I must therefore consider whether in the unusual circumstances of this case it is appropriate to stay enforcement of the judgment to which GTB is entitled, either wholly or in significant part. I will first consider the prejudice that is alleged by Estura.

Estura's submissions on prejudice

61.
Estura's case is that it "… would be unable to pay the sum awarded by the Adjudicator if the Decision were to be enforced now": see paragraph 29.2 of the witness statement of Mr. Peter Clyde, an assistant solicitor at Mishcon de Reya. That was the only evidence in relation to Estura's means that was before the court at the hearing of the application.

62.
That was a very unsatisfactory state of affairs. In M V Yorke Motors v Edwards [1982] 1 All ER 1024, the House of Lords made it clear that a successful defendant on an application for summary judgment, but one whose defence appears to be decidedly weak, cannot complain because a financial condition imposed on him as a condition of the grant of leave to defend is difficult to fulfil; he can complain only if it is impossible to fulfil and that impossibility was or should have been known to the court on the basis of evidence placed before it.

63.
In his speech Lord Diplock, with whom the other members of the House agreed, approved the respondent's submission that the onus was upon a defendant to put sufficient and proper evidence before the court as to his financial position. In my view, a bare assertion of an inability to pay any sum will not usually be sufficient. Still less is it sufficient to assert that the defendant would not be able to pay the sum awarded by the adjudicator without providing any indication of what sum the defendant would be able to pay.

64.
This, of course, is not a case where the defendant has been successful in resisting an application for summary judgment, but it seems to me that the same principles must apply in a situation such as this. In the circumstances, although the evidence put forward by Estura as to its means was manifestly inadequate, it did not seem to me to be fair or right that Estura should be deprived of the opportunity to put evidence before the court as to its financial position. I therefore gave it seven days within which to do so. GTB has put in submissions in response.

65.
Estura's response, which was filed within the seven days directed, took the form of two further witness statements and a ring binder of exhibits. To describe the financial position in relation to Estura as complicated would be an understatement. Estura is a limited company that was incorporated in the Isle of Man on 1 December 2009. It acts as the General Partner of a limited partnership registered in the Isle of Man and known as "Salcombe LP" ("SLP"). The other partner in SLP is Estura (LP) Ltd, a company incorporated in the Isle of Man on 30 June 2011, although there were originally two other partners, one of whom has since resigned. Estura (LP) Ltd is the successor in title to the other of them. Estura has a 0.1% share in SLP.

66.
It appears that initially SLP entered into a facility with Barclays Bank to the extent of £10,625,000 secured by a charge over the Salcombe Harbour Hotel site, of which the owners are Estura and a company called Westgarth Ltd, another company registered in the Isle of Man. It acts as a nominee of SLP.

67.
Before the facility with Barclays was entered into, another Isle of Man company, unconnected with Estura or SLP, called DFFL, had provided a facility in the sum of £14 million secured against the site. This facility was subsequently subordinated to the Barclays facility.

68.
It is said, and I have no reason to doubt it, that prior to entering into the contract GTB knew that Estura was entirely funded by secured borrowings and had limited assets of its own.

69.
The summary of the facts that I have set out above is taken from a witness statement prepared by Mr. Richard Jones, a director of Estura. This witness then goes on to explain at great length the course of the building contract. It is said that GTB was in substantial delay and failed to issue any notices seeking extensions of time, as the contract required. There was a substantial dispute between GTB and Estura about Warr's valuations of the works and there were serious issues about the causes of the delay. Mr. Jones goes on to say that disputes exist about the existence of defects and what work is required to achieve practical completion.

70.
None of this is evidence for which the court had given permission during the hearing. Although I have read it for good measure I propose to give it very little weight.

71.
Mr. Jones describes how the project debt was restructured in May 2014. It is said that six of the villas that formed part of the development were sold to pay off the loan to Barclays. In addition, DFFL wrote off about £4.5 million in respect of accrued interest and in return had transferred to it various properties, one of which was sold.

72.
Mr. Jones says that the present position is that SLP has net assets of about £70,000 and that there is cash at bank, held in Estura's name, of about £380,000. In the light of this Mr. Jones says "… having regard to [Estura's] current financial position, if the Adjudication Decision is enforced, [Estura] will become insolvent" (paragraph 75). It appears that Estura and SLP have remained solvent so far because the payment of fees owed to another connected company, NJG Ltd, which acts as a consultant

to Estura, has been waived or postponed. In addition, NJG has lent money to Estura. I note that a company called Nicolas James Trustee (No 4) Ltd was one of the original partners of SLP, but resigned on 1 September 2011. It seems that NJG has also been funding Estura's ongoing legal fees but no information whatever has been provided about the assets of NJG or the person or persons behind it. The picture painted suggests that the moving spirit behind Estura's activities may well be a person called Nicolas James, but if that is the case the nature of his interest and resources remains a complete mystery.

73.
Mr. Jones submits that Estura's current impecuniosity has been largely, if not entirely, caused by GTB. He asked the court to stay enforcement of any judgment against Estura in order to avoid manifest injustice and to allow the parties to follow the final account procedure in the contract. However, Mr. Jones does make an offer, on behalf of Estura, to pay £300,000 into court, such sum to be paid to GTB as soon as practical completion has been certified, and to pay into court a further £150,000 on account of any money payable to GTB in respect of its final account. Apparently a loan of this amount has been negotiated with NJG.

74.
GTB has, unsurprisingly, objected to the admission of this evidence from Mr. Jones. It makes it clear that it does not accept his criticisms of GTB's conduct and, by way of example only, points out that nearly £2 million has been certified in respect of change instructions (against £3.2 million claimed), which is a very substantial amount on a project where the contract sum was £7.75 million and suggests that GTB might have suffered a substantial amount of disruption as a result of these instructions. GTB notes also that Estura holds about £965,000 which has been deducted by way of liquidated damages for delay.

75.
As to Estura's financial position, GTB points out that no information has been provided about the entities or people behind Estura, although it submits that it is apparent that they can provide Estura with funds when required to do so.

76.
GTB makes a number of specific criticisms of the financial information provided by Estura, and points out that certain transactions suggest that Estura Holdings Ltd may have substantial means. GTB does not accept that Estura's financial position has been brought about otherwise than through its own making.

77.
However, GTB's fundamental submission is that the court should not condone the failure by Estura to comply with its contractual obligations and should exercise its discretion in a way that upholds the decision of the adjudicator rather than undermines it.

The issue for the court

78.
Taking the financial position as a whole, it is clear that Estura is almost entirely dependent on others to finance its involvement with the project. However, it does hold cash to the extent of about £380,000.

79.

I am prepared to accept, albeit not without some hesitation, the evidence of Mr. Jones that Estura would be unable to pay the adjudicator's award in full if ordered to do so, in the sense that those behind Estura would not be prepared to support it to that extent. Accordingly I consider that I am bound to find that payment of the award in full would probably be impossible for Estura to achieve.

80.
However, it is clear that Estura can find £450,000, because it has offered to pay that sum into court. Perhaps of more significance is that Mr. Jones does not say that this is all that Estura could pay: it is described as the amount that Estura would be "prepared to pay", which is far from the same thing. I note in particular that if the second adjudication had been determined in Estura's favour, it would still have had to pay about £1.164 million. There would not have been much point in starting that adjudication if Estura was in any event in no position to pay a sum of that order.

81.
To the extent that it is a relevant consideration, I am not prepared to conclude that Estura's financial position has to any material extent been brought about by the conduct of GTB. It seems that Estura has not paid (or admitted) the claims made by GTB, apart from about £900,000 that has been paid (mainly in respect of changes, together with a fairly small sum in respect of loss and expense). On the other hand, Estura has retained about £900,000 by way of liquidated damages, from which I infer that it has not paid anything in respect of GTB's claims for delay. Estura asserts that it has overpaid GTB by about £66,000, but that is less than 1% of the contract value. This figure includes the sum of about £147,000 that has been paid in respect of IA 60 and a further £64,000 that was paid in respect of IA 61 (again because no notices were served).

82.
In my view, therefore, the only ground for Estura's stated inability to pay the sum awarded by the adjudicator is that, quite independently of anything done by GTB, it does not have the money. Indeed, it appears that it was set up in that way from the outset.

83.
Clause 4.12 of the contract requires GTB to submit its Final Statement [4] following practical completion. If it is not issued within three months of practical completion, Estura may give notice that if the Final Statement is not submitted within a further two months from the date of the notice, Estura may itself issue a Final Statement.

84.
The due date for final payment is one month after either the end of the Rectification Period or the date of issue of a Final Statement (whether by GTB or by Estura), whichever occurs last. The Rectification Period is twelve months from the date of practical completion of each section of the works. Thus final payment will not be due until at least twelve months after practical completion of the final section of the works.

85.
The very unusual circumstances of this case yield the result that, if GTB were to be paid the full sum awarded by the adjudicator, it would have little or no incentive to remain on site and complete the works. I do not find that this is what GTB would do, but it cannot be ruled out as a real possibility were the parties to fall out. This would leave Estura with no alternative but to bring a further adjudication for a declaration as to the value of the work carried out up to the time when GTB left site. That would be a fairly costly process and is not one that could be started straightaway.

86.
An alternative scenario is that GTB remains on site and attempts to complete the work, but that Estura's agent may not be prepared to issue a certificate of practical completion, perhaps on account of alleged defects, with the result that issue of the Final Statement is not triggered.

87.
Yet another scenario is that the work is completed, a certificate of practical completion is issued and that in the course of the next six months or so one or other party issues a Final Statement. That Final Statement could then be challenged by way of adjudication.

88.
The difficulty facing Estura is that even under the last of these alternatives, being perhaps the most favourable from Estura's point of view, it could well take six to nine months before it could obtain an adjudicator's decision as to the value of the works carried out by GTB.

89.
It seems to me that the court has two alternatives. The first is to take a robust approach and refuse to grant a stay on the grounds that to do otherwise would be contrary to the policy of the court to enforce the decisions of adjudicators. This would leave GTB with the choice either of insisting on payment of the award in full with the risk of forcing Estura into insolvency, or of seeking to negotiate some compromise. The second is to stay enforcement of part of the amount of the judgment.

90.
For the avoidance of doubt, I should make it clear that I rule out the grant of a stay to the extent of the full amount of the judgment as an appropriate course; it plainly is not. GTB has, on the face of it, done nothing wrong and the adjudicator's decision is a direct consequence of the failure on Estura's side to serve the relevant notices. Further, Estura's financial situation has not been caused by anything done by GTB.

91.
Whilst I have been very tempted by the solution of simply refusing to grant a stay at all, thereby leaving the parties to negotiate a solution for themselves if they can, I have come to the conclusion that, in the very unusual circumstances of this case, that would not be fair to Estura. I should make it very clear that I regard the facts of this case as being exceptional, and those in the industry should take note that the course that I propose to adopt in this case will be appropriate only in rare cases.

The appropriate order

92.
For the reasons that I have now given, I consider that there is no available defence to the application for summary judgment. There must therefore be summary judgment for GTB in the sum claimed, namely £3,928,227.04 plus VAT (where applicable and to be assessed), being the amount awarded by the adjudicator. To that is to be added the interest awarded by the adjudicator, namely £33,739.78. Further interest is due from the date of the adjudicator's award at a daily rate of £591.92 until payment.

93.
Since I have concluded that it would not be fair to Estura to enforce the judgment in full, but neither would it be right to stay the full amount of the judgment, the question remaining is the extent to which GTB should be allowed to enforce it.

94.
The breakdown of GTB's claim in IA 60 for £4.075 million is, according to Estura:

i)
£1.174 m in respect of "Employers Instructions" (I understand this to be the balance claimed in excess of what GTB has already been paid)

ii)
£136,000 in relation to "Anticipated Instructions"

iii)
£2.764 m for loss and expense.

95.
In deciding the extent to which enforcement of the judgment should be stayed I propose to take into account the following factors. First, the terms of the stay should not be such as would be likely to stifle further pursuit by Estura of its rights. Second, and to the extent that assessment is possible at this stage, GTB should not be placed in a worse position then it would have been if its entitlement had been correctly assessed. Third, Estura should be placed in no better position than it would have been if the second adjudication had resulted in the declarations that it was seeking. Fourth, any recovery by GTB under the terms of the order should not be such as to remove significantly the incentive to complete. Fifth, Estura is withholding about £900,000 in relation to liquidated damages.

96.
Doing the best I can with these considerations in mind I propose to stay enforcement of the judgment above the sum of £1.5 million, subject to certain conditions. I have arrived at the figure of £1.5 million in the following way.

97.
I propose to ignore the claim in relation to Anticipated Instructions. In relation to the Employers Instructions, bearing in mind that GTB has already been paid nearly £2 million in respect of these I propose to take 50% of the balance claimed, which I will round up to £600,000. In relation to the loss and expense I propose to take about one third of the £2.764 m. The starting point here is that experience shows that loss and expense claims are frequently significantly overvalued, and that quite often the true value is about a third of the figure claimed. One third of the sum claimed for loss and expense is roughly £900,000. However, since Estura is withholding an equivalent sum in respect of liquidated damages, the true proportion of GTB's potential claim for loss and expense represented by a figure of £900,000 may well be significantly less. The irony of this position is not lost on me: Estura's basis for withholding liquidated damages is GTB's alleged failure to serve the relevant notices.

98.
I therefore consider that the judgment should be enforced to the extent of £1,500,000 and that enforcement of the balance should be stayed until further order. However, it is necessary to impose conditions on this.

99.
GTB is, within 14 days of handing down this judgment, to provide Estura with a VAT invoice showing the amount of VAT that is due on the sum of £1,500,000. That sum is to be added to the sums that I have already mentioned.

100.
GTB is to be at liberty to apply to vary the stay in the event that fresh information comes to light in relation to Estura's financial position or if there is any other significant change in circumstances. In this context, I received, just after finalising this judgment in draft, a copy of the Adjudicator's Decision in the adjudication between Estura and Warr. That does not affect my conclusions in this judgment.

101.
However, at the same time I am concerned to ensure that GTB has the necessary incentive to achieve practical completion and submit its Final Statement. I therefore impose the following conditions which must be satisfied before any application is made by GTB to vary or lift the stay. These are that:

i)
Fresh information has come to light in relation to Estura's financial position and GTB reasonably considers that such information would be material to the terms of the stay.

ii)
Save in the case of (i) above, GTB has served its Final Statement, and has done so at least 28 days before filing any such application.

102.
Further, in the case of (i) above, GTB is to notify Estura in writing of its conclusion in relation to the decision or fresh information, and its reasons for that conclusion, at least seven days before issuing any application to vary or lift the stay. This is to give Estura the opportunity of making an appropriate offer in response.

103.
In principle, I consider that GTB should have the costs of this application. Although Estura has succeeded in resisting enforcement of the judgment to some extent, its success in doing so is very much less than any offer made to GTB of which I am aware. However, if the parties are unable to agree an appropriate order as to costs, I will hear counsel on that and any other questions in relation to the form of relief.

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[1] There were some others, but they were for modest amounts which would not have given Estura any opportunity to make any significant adjustments to IA 60.

[2] In this case the application was filed on 25 November 2014 and the order was made on the following day, 26 November 2014, but since the hearing could obviously not be fixed during the Christmas and New Year holiday, it was fixed for the first week of the next term. It is usual in the construction industry in the UK for companies to close down for two weeks over Christmas and so the timetable in adjudication enforcement orders is adjusted to take account of this.

[3] This is because there was no arbitration clause in the contract and so any final determination of a matter decided by an adjudicator would be resolved by litigation, not by arbitration.

[4] Under this contract this is the equivalent to what I have referred to as the final account.