Case No: HT-2016-000299 & HT-2016-000305
Neutral Citation Number: [2017] EWHC 15 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18/01/2017

Before :

MRS JUSTICE O'FARRELL DBE

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Between :

KERSFIELD DEVELOPMENTS (BRIDGE ROAD) LIMITED **Cla**

- and -

BRAY AND SLAUGHTER LIMITED **Defe**

and between:

BRAY AND SLAUGHTER LIMITED

- and -

KERSFIELD DEVELOPMENTS (BRIDGE ROAD) LIMITED

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Mr Justin Mort QC (instructed by **Royds Withy King**) for the **Claimant**

Mr Michael Wheater and Mr Michael Levenstein (instructed by **Temple Bright LLP**) for the **Defendant**

Hearing date: 13 December 2016

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Judgment

Mrs Justice O'Farrell :

Introduction

1.
There are two matters before the court. By way of a Part 8 application the claimant ("Kersfield") seeks against the defendant ("Bray"):

i)
a final determination of the dispute between the parties determined in the adjudication decision of Mr Peter Gracia dated 31 October 2016; and

ii)
a declaration that:

“Without prejudice to the claimant’s obligation arising under section 111(1) of the Housing Grants, Construction and Regeneration Act 1996 as amended (“the Act”) to pay the “notified sum,” the claimant is entitled to dispute such valuation if and insofar as it conflicts with what the parties have agreed is to be paid at clauses 4.7 and 4.14 of the contract conditions, and to refer such dispute to adjudication or other proceedings.”

2.
By way of separate proceedings, Bray seeks summary judgment pursuant to Part 24 of the Civil Procedure Rules to enforce the adjudication decision of Mr Peter Gracia dated 31 October 2016, in which he directed Kersfield to pay Bray the sum of £1,131,751.96 plus VAT and interest, and to pay the adjudicator’s fees and expenses in the sum of £17,836.50.

3.
Kersfield’s case is that Bray is not entitled to the sums awarded by the adjudicator because, on a proper interpretation of the contract and relevant documents, Bray’s application for interim payment no.19 was not in accordance with the contract and/or Kersfield issued a valid payment notice and/or a valid pay less notice. There is also an objection to enforcement of the award on the grounds of procedural unfairness. Kersfield’s alternative case is that, even if the adjudication decision is correct, it is entitled to dispute Bray’s contractual entitlement to the interim application payment on the substantive merits of the valuation and is entitled to refer such dispute to a further adjudication.

4.
Bray’s case is that the adjudicator was correct to find that the application was in accordance with the contractual requirements and that Kersfield failed to serve a valid payment or pay less notice. There was no procedural unfairness and Bray is entitled to the sum claimed in full. Bray opposes the declaration sought by Kersfield on the basis that a further adjudication in respect of the underlying valuation of the works would be an improper attempt to refer to adjudication the same or substantially the same dispute decided by Mr Gracia.

5.
Kersfield applies for a stay of any judgment in favour of Bray on the grounds that it is not in a position to pay the sum awarded by the adjudicator and Bray will not be in a position to repay that sum if found not to be due on a proper valuation of the claim. On the application of Kersfield, I permitted the parties to submit further evidence and written submissions following the oral hearing so as to provide the court with the best available information in respect of this issue.

Factual Background

6.
By a contract dated 5 January 2015 made between Kersfield and Bray, Bray agreed to carry out the refurbishment and conversion of a mansion house and stable block, and construction of detached houses at Burwalls, Bridge Road, Leigh Woods, North Somerset BS8 3PD for the contract sum of £4,959,000 or such other sum as should become payable in accordance with the contract.

7.
The contract incorporated the conditions of the JCT Design and Build Contract (2011 edition) as further amended by the parties.

8.
The contract makes provision for periodic interim payments to be made, the first payment being due on 5 February 2015 and thereafter on the same date in each month or the nearest Business Day in that month.

9.
On 5 August 2016 Bray issued an interim application for payment ("Application No.19") in the sum of £1,208,279.39 exclusive of VAT.

10.
It is common ground that the final date for payment in respect of the application was 19 August 2016.

11.
Kersfield failed to pay the sum claimed by Bray by 19 August 2016.

12.
Article 7 and clause 9.2 of the contract provide for disputes between the parties to be referred to adjudication in accordance with the Statutory Scheme.

13.
On 23 September 2016 Bray commenced adjudication proceedings in respect of the unpaid sum. In the adjudication, Bray claimed that it was entitled to payment in full in respect of the sums claimed in Application No.19 by reason of Kersfield's failure to serve a valid 'payment notice' or 'pay less notice' as required by the contract.

14.
Kersfield's position was that Application No.19 did not clearly or unambiguously set out how the sum claimed had been calculated and therefore was not a valid application for payment in accordance with the contract.

15.
In his adjudication decision dated 31 October 2016, Mr Gracia determined that the application for payment by Bray was valid and that no valid payment notice or pay less notice was given by Kersfield. He ordered Kersfield to pay Bray the sum of £1,131,751.96 (the value of the interim application less the sum already paid by Kersfield) plus VAT and interest, and to pay the adjudicator's fees and expenses in the sum of £17,836.50.

16.
Bray now seeks to enforce this adjudication decision.

17.
Kersfield's position is that the adjudicator's decision was wrong and seeks a substantive determination on the matter. In addition, its seeks a declaration that it is entitled to have the underlying valuation dispute in respect of Application No.19 referred to and determined in a further adjudication.

The Issues

18.
The issues before the court are:

i)

whether Application No.19 was a valid application for payment under the contract and/or whether Kersfield is estopped from challenging its validity;

ii)
whether Bray is precluded from relying on the late service of the payment notice to challenge its validity;

iii)
whether the pay less notice was late and therefore invalid;

iv)
whether the court should decline to enforce the adjudication award on the ground of procedural unfairness;

v)
whether Kersfield is entitled to refer to adjudication a dispute concerning the proper valuation of the claims in Application No.19;

vi)
whether there should be a stay of any judgment.

Application No.19

19.
Clause 4.7.1 of the contract provides that interim payments shall be made by the employer to the contractor in accordance with section 4.

20.
Clause 4.7.2 provides that the sum due as an interim payment shall be an amount equal to the gross valuation of the works less retention, any advance payment and amounts paid in previous interim payments.

21.
Clause 4.8.1 states:

“In relation to each Interim Payment, the Contractor shall make an application to the Employer (an ‘Interim Application’) in accordance with the following provisions of this clause 4.8, stating the sum that the Contractor considers to be due to him and the basis on which that sum has been calculated.”

22.
Clause 4.8.3 states:

“Where Alternative B applies, for the period up to practical completion of the Works, Interim Applications shall be made as at the monthly dates specified in the Contract Particulars for Alternative B up to the date of practical completion or the specified date within one month thereafter… The due date in each case shall be the later of the specified date and the date of receipt by the Employer of the Interim Application.”

23.
Clause 4.8.4 states:

“Interim Applications may be made on or after completion of the relevant stage or the monthly date and shall be accompanied by such further information as may be specified in the Employer’s Requirements.”

24.
The Employer’s Requirements contain the following provisions in respect of interim payment applications at section 462 of volume 1, section 1:

“1. At least 2 days before the established dates for interim payments submit to the Employer’s Agent a detailed application for amounts due under the Contract together with all necessary supporting information.

2. Such application details are to be based on the elemental breakdown of the Contract Sum Analysis to the approval of the Quantity Surveyor including:

Percentage completions in respect of each element of the Contract Sum Analysis …

Supporting evidence of the above by means of progress reports …

Full substantiation of all sums claimed in respect of changes including labour, plant and material expenditure, detailed calculations, measurements and invoices (where applicable) together with a copy of the instruction giving rise to the change …

No variations will be included in the valuation until a valid Change Order is issued.

Comprehensive list of materials on site with proof of cost.

3. At the same time submit a statement from each of the specialist sub-contractors stating:

The gross amount claimed for inclusion in the current valuation …”

The application

25.
Application No.19 was issued on 5 August 2016 in the sum of £1,208,279.39 exclusive of VAT and comprised:

i)
an excel spreadsheet, setting out a breakdown of the works, percentage completion and value, materials on site and variations;

ii)
a loss and expense claim, set out in the variations part of the above spreadsheet and a supporting spreadsheet, containing a narrative of the claims, pictograph and extracts from Bray’s sage records, and pdf cost reports from individual agency resources;

iii)
an excel spreadsheet showing a breakdown of the external works.

Submissions

26.
Kersfield’s case is that Application No.19 was not a valid application for an interim payment for the reasons set out in the Part 8 Claim, namely:

i)
it included an item in the sum of £150,000 identified as “Scott Ref – 128” with the description: “Disruption – Groundworks, brickwork and following trades” but there was no explanation of the calculation of this item, no detailed calculations and it did not include the required substantiation or supporting documentation;

ii)
it included an item in the sum of £307,965 identified as “Scott Ref – 112” with the description: “additional labour and supervision to carry out and complete the balance to the £2.0m additional works to the Main Contract” but did not include the required substantiation or supporting documentation.

27.
Kersfield submits that the contract contains reasonable requirements for supporting information and documentation to establish an entitlement to payment, particularly where, as in this case, the employer is dependent on third party funding and the lenders require oversight of expenditure.

28.
Item 128 in Bray’s application was an arbitrary assessment having no basis or substantiation. It did not satisfy the requirements of section 110A(4)(a)(ii) of the Act in that it failed to set out the basis on which the sum was calculated. It did not satisfy the requirements of section 462 of the Employer’s Requirements in that there was no breakdown or substantiation of the item and no supporting documentation.

29.
Item 112 was similarly deficient and CS2, the Employer’s Agent, specifically directed Bray to provide proper substantiation on 20 July 2016 i.e. prior to submission of the application.

30.
Bray’s position is that the application was valid under the contract. The application was clear and unambiguous as an application for payment. Section 462 of the Employer’s Requirements expressly required the application details to be to the approval of the Quantity Surveyor and that role was performed by CS2. Application No.19 was in the same format as all previous interim applications and they had been accepted as contractually compliant by CS2. The combined value of items 112 and 128 is £457,695 out of a total gross valuation of £7,406,411.31, less than 6.2% of the value of the works. The sums included represented Bray’s best assessment of the value of the claims.

Validity of Application No.19

31.
For the purposes of the payment provisions in the Act, an application for interim payment must be sufficiently clear and unambiguous in form, substance and intent so that the parties have notice of the application made: Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855 per Coulson J at Para.37; Henia Investments Inc v Beck Interiors Limited [2015] EWHC 2433 per Akenhead J at Para.17; Jawaby Property Investment Limited v The Interiors Group Limited [2016] EWHC 557 per Carr J. at Paras.39-43. An interim application must be obviously identifiable as such and it must set out, as a minimum, the sum claimed as due and the basis on which such sum is calculated.

32.

The parties are free to agree additional requirements as to the form, content and substantiation of the application, provided that they do not conflict with the statutory regime.

33.
Not all irregularities or deficiencies will have the effect of invalidating an otherwise compliant application. There is a distinction to be drawn between: (a) the validity of an application that must be issued in accordance with the requirements of the contract such that it is a valid application which falls to be considered and valued by the employer; and (b) the validity of the claims within an application, that may or may not be sufficiently substantiated so as to entitle the contractor to the sums claimed.

34.
In this case, clause 4.8.1 mirrors the requirement of section 110A(2) of the Act in that Bray must state in each interim application the sum that it considers due and the basis on which that sum has been calculated. Clause 4.7.2 sets out the basis on which the sum should be calculated. Clause 4.8.3 and the Contract Particulars set out the timetable for the interim applications.

35.
Clause 4.8 stipulates that interim applications shall be accompanied by such further information as specified in the Employer's Requirements but does not expressly provide that applications are not valid in the absence of such supporting information. There is no basis for the implication of such a term; it would introduce uncertainty into the payment process. The purpose of the notice regime in the Act is to require each party to identify promptly and clearly the basis on which interim sums are claimed or rejected so that undisputed sums are paid and any disputes can be resolved. That purpose would be undermined if an employer could avoid the requirements to serve any payment or pay less notices simply by challenging the contractor's entitlement to component parts of the application.

36.
It is a matter of fact and degree as to whether the information and supporting documentation supplied in respect of any claim within an application is sufficient to comply with the substantiation requirement in section 462. However, although deficiency in substantiation of a claim might justify rejection of such claim, in part or in full, it would not of itself render the application invalid.

37.
In the event that the contractor fails to provide adequate substantiation as required by the contract, the employer's remedy lies in issuing a payment notice that excludes that claim, or in issuing a pay less notice that deducts from the sums due the unsubstantiated claim.

38.
In my judgment, Application No.19 complied with the requirements of clause 4.8 so as to constitute a valid application under the contract. The application was clearly identified as an interim application for payment. There is no suggestion that Kersfield did not recognise it as such. The basis of calculation of the sum claimed was contained in the accompanying spreadsheets. The spreadsheets forming part of the application itemised the component parts of the claim, the nature of the itemised claims and the basis on which the sums were calculated, including assessments on account. CS2 was able to value each of the component claims, accepting, revising or rejecting each claim, so as to assess the overall sum due by way of interim payment.

Estoppel by convention

39.
Although it is not necessary to determine the issue of estoppel by convention, having heard submissions on it, for completeness I set out my findings.

40.
Bray submits that if, contrary to its primary case, the application did not conform to the requirements of the contract, the parties' course of dealing in respect of the payment procedure gave rise to an estoppel by convention.

41.
Bray relies on the evidence of Mr Munro, who explains in his witness statement the regime adopted by the parties for all applications up to Application No.19. Bray would issue its application by email with the electronic spreadsheets. The parties would meet to discuss the application and any issues arising. CS2 would issue a payment certificate by email and enclose an amended version of the relevant spreadsheet to reflect its own valuation and provide comments on specific items. Bray would issue its invoice for the amount specified in CS2's certificate. Kersfield would pay the invoice.

42.
Mr Wheater submits that:

i)
CS2 agreed the format of the applications;

ii)
CS2 allowed Bray to believe that its applications were valid and certified payments on account pending further information, which reinforced Bray's belief;

iii)
Bray acted to its detriment in continuing to submit the applications in that form;

iv)
it would be unconscionable now to permit Kersfield to resile from that shared assumption.

43.
In response, Mr Mort QC submits that Bray is not assisted by the alleged course of dealing:

i)
CS2 had no authority to vary the terms of the contract;

ii)
there was no unequivocal conduct on the part of Kersfield in issuing payment notices and making interim payments as that could equally be seen as co-operation on the part of the employer to ensure continued cash flow for the contractor;

iii)
there was no reliance by Bray on any course of dealing; in truth the reason that Bray did not provide the substantiation of its claims was that it did not have such substantiation;

iv)
there would be nothing unconscionable about permitting Kersfield to rely on the requirements of the contract in order to defeat Bray's claim for unsubstantiated sums.

44.

I accept Mr Mort's submission that, as Employer's Agent, CS2 did not have authority to vary the terms of the contract. The issue is whether Bray can establish and rely on estoppel by convention.

45.
Where parties to a transaction proceed on the basis of an underlying assumption on which they have conducted their dealings between them, neither will be allowed to go back on that assumption when it would be unfair or unjust to do so: Amalgamated Property Company v Texas Bank [1982] 1 QB 84 (CA) per Lord Denning pp.121-122; Brandon LJ pp.131.

46.
The essential requirements of estoppel by convention were set out in the cases of Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396 per Akenhead J at Para.51; and HM Revenue & Customs v Benchdollar Ltd [2009] EWHC 1310 per Briggs J at Para.52. There must be a shared assumption communicated between the parties in question. The party claiming the benefit of the convention must have relied on the assumption. It must be unconscionable or unjust to permit the other party to assert the true position. The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.

47.
In this case, during the first few months of the project, the parties established the format of the interim applications and the procedure for discussing them in meetings before the relevant notices were issued but there is no evidence of any agreement or understanding as to the content of the applications. The agreed format did not amount to an agreement or assumption that compliance with the contract was not required, or that claims would be accepted and paid without proper substantiation and supporting documentation. I accept Mr Mort's submission that payment against the applications, whether on account or otherwise, could be equivocal and therefore would not establish the relevant conduct: Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWHC 168 per Stuart-Smith J at Para.40. It is clear, also, that CS2 identified deficiencies in the information provided with some of the claims, so that Bray would not have been entitled to assume those claims would be treated as substantiated or payable.

48.
Mr Wheater relied on two recent decisions in which it was found that a course of dealing in respect of payment applications gave rise to estoppel by convention. In Leeds City Council v Waco UK Ltd [2015] EWHC 1400, Edwards-Stuart J found that the parties established a course of conduct by treating interim applications that were a few days late as valid. In Jawaby Property Investment Ltd v Interiors Group Ltd [2016] EWHC 557, Carr J found that the parties established a course of conduct by permitting interim applications to be submitted by e-mail. However, in those cases, the course of dealing went directly to the irregularity identified i.e. the timing or mode of service. That can be contrasted with this case where there is no evidence that unsubstantiated claims were accepted. Further, in those cases the irregularity in question did not go to the underlying validity of the application, which in this case is governed by clause 4.8 of the contract.

49.
I have found that Application No.19 was a valid interim application for the purposes of the contract. However, if I had found it to be invalid e.g. if it simply claimed a sum of money without identifying the basis on which the sum was calculated, the mere fact that payment had been made against earlier applications would not have given Bray a contractual entitlement to further payment against an invalid application.

Payment Notice

50.
Clause 4.8.3 of the contract provides that interim applications shall be made as at the monthly dates specified in the Contract Particulars. It is common ground that the due date for payment in respect of Application No.19 was 5 August 2016.

51.
Clause 4.9.2 provides that not later than 5 days after the due date the employer shall give a payment notice to the contractor in accordance with clause 4.10.1 and, subject to any pay less notice given by the employer under clause 4.9.4, the amount of the interim payment to be made by the employer on or before the final date for payment shall be the sum stated as due in the payment notice. In the case of Application No.19, the date for Kersfield's payment notice was 10 August 2016.

52.
Kersfield, through its Employer's Agent, served a payment notice by email and letter dated 12 August 2016. It is common ground that this should have been issued by 10 August 2016 and therefore was late. In its covering email, CS2 noted that the payment notice was late and therefore it served the pay less notice at the same time.

53.
Clause 4.9.3 provides that if the payment notice is not given in accordance with clause 4.9.2, the amount of the interim payment to be made by the employer shall, subject to any pay less notice under clause 4.9.4, be the sum stated as due in the interim application. As a result of the late notice, the amount of the interim payment due under clause 4.9.3 was the sum stated in Bray's application.

Factual background

54.
On 17 August 2016 Bray issued an invoice (dated 31 July 2016) seeking payment in respect of the sum identified in Kersfield's payment notice, stating:

"We refer to the … purported Pay Less Notice referencing instalment No.19 … Any queries we have in relation to the certificate/notice which has been issued will continue but will not hold up our invoice."

55.
The invoice was not paid. By letter dated 1 September 2016, Bray gave notice of its intention to suspend works pursuant to clause 4.11 of the contract by reason of Kersfield's failure to pay the sum invoiced:

"We refer to the above Contract and to the purported Pay Less Notice referencing instalment No.19 dated the 12th August 2016 and to our invoice no. 54364 dated 31st July 2016, a copy of each of which we attach for ease of reference.

The contractual final date for payment of the certified and invoiced sum of £78,224.26 is 19th August 2016, however, as at today's date, payment still remains outstanding.

We therefore wish to record the following and hereby provide notice accordingly:

Under clause 4.9.5, we are entitled to be paid simple interest on the outstanding sum …

Under clause 4.11, we give you notice that we intend to suspend all or part of the performance of our contractual obligations, on the ground that you have failed to make payment in accordance with the

Contract, should the above sum not be paid within 7 days after the date of this notice. We note that we will also seek to recover our costs and expenses incurred in the exercise of this right.

In the meantime, our rights remain reserved in their entirety, including our right to commence adjudication or court proceedings to recover the above and any other sums properly due under the Contract."

56.
Subsequently, Kersfield paid the sum stated as due in its payment notice. The balance stated as due in Bray's application was not paid and on 23 September 2016 Bray commenced the adjudication.

Submissions

57.
Bray's case is that the purported payment notice was late and therefore invalid. In the absence of a valid payment notice, clause 4.9 of the contract provides that the interim payment to be made by the employer is "the sum stated as due in the interim application" (subject to any pay less notice).

58.
Kersfield's case is that Bray adopted the payment notice issued by CS2 (despite the fact that it was late) for the purposes of sections 111(1) and 112 of the Act. In those circumstances, Bray is not entitled to contend that the payment notice was invalid or that the "notified sum" was determined by a different document.

59.
Mr Mort submitted that sections 111 and 112 of the Act are directly applicable to the parties' conduct in respect of payment applications and they are not required to draft or add anything to the contract to implement those provisions. However, he conceded that there was no material difference or incompatibility between the provisions in this contract and the relevant provisions in the Act.

60.
He submitted that a party cannot both approbate and reprobate. There can only be one "notified sum" for the purpose of any given obligation to make payment under section 111(1). Bray elected to treat the payment notice as valid for the purpose of issuing its notice of suspension and cannot now contend that the same payment notice was invalid or that the notified sum was determined by a different document.

Finding

61.
The principle of approbation and reprobation applies where a person has the choice of two rights, either of which he is at liberty to adopt but not both. If he makes an election and takes the benefit of one, he will not be allowed to resile from it so as to pursue the alternative inconsistent right: Banque Des Marchands de Moscour v Kindersley [1951] Ch 112 per Lord Evershed MR at p.119; PT Building Services Ltd v Rok Build Ltd [2008] EWHC 3434 per Ramsey J at Paras.20-26. In Banque Des Marchands Lord Russell of Kilowen stated at p.483:

"The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct as, where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit."

62.

In this case, there is no inconsistency of conduct. Bray's position was that it was entitled to payment of the sum set out in its application notice but that did not preclude it from seeking payment of the lesser sum which was acknowledged as due by Kersfield. This is not analogous to the situation in PT Building where ROK had to elect whether to assert that the first adjudication decision was either valid or invalid. This is more akin to the example given by Lord Atkins and referred to by Lord Evershed MR in Banque Des Marchands, namely, that the doctrine would not apply to a judgment debtor who sought a stay of execution and subsequently sought to set aside the judgment.

63.
Kersfield acknowledged in its email dated 12 August 2016 that its payment notice was late. The automatic consequence of the lateness was that Bray's interim application became the 'notified sum' in accordance with clause 4.9.3 of the contract. Subject to any pay less notice, Kersfield became obliged to pay that 'notified sum' by the final date for payment in accordance with clause 4.9.4 of the contract. That was recognised by Kersfield in its email of 12 August 2016 and, as a result, it served its pay less notice at the same time as the payment notice.

64.
There was no unequivocal election by Bray to rely on the payment notice; although the invoice was issued for the amount stated in the payment notice, the references in the covering letter and in the letter of suspension were to the "purported pay less notice" rather than the payment notice.

65.
Bray reserved its rights when issuing its invoice and subsequently in its notice of suspension. The reservations were sufficiently wide to allow Bray to assert that it was entitled to sums in addition to those the subject of the invoice and suspension notice, by reason of its interim application and the effect of clause 4.9.3.

66.
Accordingly, Bray is not precluded from relying on the lateness of the payment notice to establish that it was invalid and that the sum claimed in Application No.19 was payable, subject to any pay less notice.

Pay Less Notice

67.
Clause 4.9.1 provides that the final date for payment shall be 14 days from its due date. In the case of Application No.19, the final date for payment was 19 August 2016.

68.
Clause 4.9.4 of the contract provides:

"If the Employer intends to pay less than the sum stated as due from him in the Payment Notice or Interim Application, as the case may be, he shall not later than 5 days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.10.2 (a 'Pay Less Notice'). Where a Pay Less Notice is given, the amount of the Interim Payment to be made by the Employer on or before the final date for payment shall be the sum stated as due in the Pay Less Notice."

69.
In respect of Application No.19, any pay less notice was required to be served by Kersfield by 14 August 2016.

70.
The Employer's Agent purported to serve a pay less notice by email at 9.50pm on Friday 12 August 2016 together with a letter of the same date.

71.
Clause 1.7.3A provides that:

"Any notice, certificate or other communication (notice) to be given under Section 4 (Payment) may, in addition to any other permitted method of service, be delivered by hand or sent electronically to the e-mail address of the addressee, provided, if sent by email and not delivered by hand, a copy is sent on the same day to the addressee by pre-paid first class post. Any notice served in accordance with this clause 1.7.3A takes effect as being given and served:

(a) if delivered by hand or sent by email by 4.00 pm on a Business Day, on that day; but otherwise

(b) on the next Business Day."

72.
Bray actually received the email on the evening of Friday 12 August 2016. However, as the email and letter were sent after 4 pm on Friday 12 August, they were deemed served on Monday 15 August 2016 and therefore were late.

Submissions

73.
Kersfield's case is that the parties are not entitled to evade the mandatory provisions of sections 111(7) and 116 of the Act, which set out how time is to be calculated for fixing the end date of a prescribed period for the purposes of the Act. The deeming provision of clause 1.7.3A would frustrate the timetable carefully determined by Parliament to achieve uniformity as to how time is calculated for the service of notices.

74.
Bray's case is that section 115 of the Act permits the parties to agree on the manner of service of any notice required to be served under the Act. Clause 1.7.3A was such an agreement. It does not alter the "prescribed period" for the purpose of section 111 of the Act; rather it operates as a process clause by which the parties have agreed how the service of documents by email is to be treated and regulated.

Finding

75.
In my judgment, there is a distinction between the provisions in the Act that identify prescribed periods within which a notice must be given and any agreement between the parties which fixes the date by which the notice is deemed to be given. Section 111 of the Act requires any pay less notice to be served not later than the prescribed period before the final date for payment. That prescribed period may be agreed by the parties or as provided in the statutory scheme. Section 116 stipulates the basis of calculation that should be used to determine the prescribed date by which any act must be done. This would include the calculation of the date by which any pay less notice must be served. However, there is no express provision in the Act for service by email and section 116 does not provide the calculation or fix the date by which any notice sent by email is deemed served. Section 115 of the Act permits the parties to agree the manner of service of any notice. Different modes of

service are likely to produce different times of actual notice to the other party. The deemed date of service of a notice is part of any agreement as to the manner of service.

76.
Clause 1.7.3A of the contract allows the parties the convenience of service by email whilst at the same time providing certainty as to the date on which such notice takes effect. This was a reasonable and sensible provision. There is no frustration of the timetable under the Act.

77.
Kersfield failed to serve a pay less notice in respect of Application No.19 by 14 August 2016. As a result, it was obliged to pay the sum stated as due in Bray's application without any deduction by 19 August 2016.

Enforcement

78.
Kersfield's case is that the adjudication decision should not be enforced because there was procedural unfairness in the adjudication, as set out in the witness statement of Andrew Ash dated 1 December 2016. The matter relied on is that the adjudicator did not draw to Kersfield's attention the particular documents that he considered were relevant to Bray's contention that there had been a course of dealing in respect of the form and format of the interim applications.

79.
The course of dealing issue was raised by Bray in its reply submissions in the adjudication. Therefore, it was an argument that the adjudicator was entitled to consider. Kersfield asked for and was given an opportunity to put in further submissions in response to Bray's argument by way of a rejoinder. The documents relied on by the adjudicator in reaching his decision on this point were part of the submitted material and therefore properly before him. It is not contended by Kersfield that the adjudicator took into account documents or other material that it did not see or did not have an opportunity to consider. The complaint is that the adjudicator didn't tell Kersfield in advance of his decision which documents in the adjudication bundle he considered were pertinent to the issue.

80.
There is no merit in this argument. The adjudicator answered the questions posed in the reference and relied on documents submitted to him by the parties. There was no procedural unfairness.

81.
Mr Mort correctly states in his submissions that the court is in a position to determine the dispute that was referred to the adjudicator on Kersfield's Part 8 claim and therefore the substantive adjudication decision is no longer relevant. However, the enforceability of the decision is relevant to recovery of the adjudicator's fees and expenses which form part of Bray's application.

82.
For the reasons set out above, Application No.19 was a valid interim application under the contract, and Kersfield failed to serve a valid payment notice or pay less notice. As a result, it was obliged to pay the sum claimed by Bray in Application No.19 in full, without any deduction. Subject to the application for a stay of execution, Bray is entitled to summary judgment in the sum of £1,131,751.96 plus VAT and interest, plus the adjudicator's fees and expenses in the sum of £17,836.50.

Further challenge

83.
It is common ground that the interim payment mechanism under the contract and the provisions in the Act entitle Bray to immediate payment of the sum claimed in Application No.19 in the absence of a valid payment or pay less notice but do not preclude correction in later interim payments or determine the ultimate position between the parties as to the sum due on a final and conclusive basis.

Submissions

84.
Kersfield's case is that it is entitled to refer to a further adjudication and obtain an adjudication decision as to the true valuation of Bray's application, taking into account the matters that it would have raised in a valid pay less notice, such as overstated value, inadequate substantiation and any cross claims. Although payment must be made under section 111 of the Act in the absence of a payment or pay less notice, the paying party is still entitled to enforce the terms of the contract. Reliance is placed on the decisions in Rupert Morgan Building Services (LLC) Ltd v Jervis [2003] EWCA Civ 1563 per Jacob LJ at Para.14; Wilson & Sharpe Investments v Harbour View Developments Ltd [2015] EWCA Civ 1030 per Gloster LJ at Para.66; and Matthew Harding t/a MJ Harding Contractors v Paice [2015] EWCA Civ.1231 per Jackson LJ at Paras.68-78.

85.
Mr Mort submits that a failure on the part of an employer to issue the required payment or pay less notice can result in a windfall payment to the contractor. The default payment mechanism in the Act requires the employer to make immediate payment, regardless of the merits of the contractor's application. However, that should not fetter the right of the employer to refer the underlying valuation dispute to adjudication. The scheme rules empower the adjudicator to open up, revise and review any decision or certificate; this includes any payment notice or pay less notice, as evidenced by sections 111(8) and (9) of the Act.

86.
Bray's case is that under this contract the effect of a failure by a party to issue a payment notice and/ or a pay less notice is that the sum payable is determined by the interim application notice and the payer must pay the application sum in full. The agreed valuation can be challenged in a later valuation or in the final accounting process but cannot be re-opened in a subsequent adjudication: ISG Construction Limited v Seevic College [2014] EWHC 4007 (TCC) per Edwards-Stuart J at Paras. 25, 28, 47 & 48; Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC) per Edwards-Stuart J at Paras.18-20; and the decision of this court in Kilker v Purton [2016] EWHC 2616 at Paras.25 & 26.

87.
Mr Wheater submits that the contract expressly differentiates between interim and final payments. The parties are free to agree, as they have here, that the sum due on any interim application will be the sum notified in a payment notice, subject only to a pay less notice. Sections 111(8) and (9) of the Act, under which an adjudicator can determine the sums to be paid, can only be operated by the contractor, and not the employer. However, the employer is free to correct any errors in later interim applications (and there have been further interim applications since Application No.19). Further, clause 4.12 of the contract expressly provides for a final adjustment of the contract sum in accordance with clause 4.2 and a final accounting exercise, resulting in any overpayments to the contractor becoming re-payable to the employer.

Finding

88.
Section 4 of the contract contains the scheme for interim payments due during the currency of the works.

i)
Clause 4.7.2 provides that the sum due as an interim payment shall be an amount equal to the gross valuation of the works (subject to deductions for retention and earlier payments). However, that provision has to be read subject to the provisions that follow, setting out the procedure for determining the amount of any such sum.

ii)
Clause 4.8.1 obliges the contractor to make an interim application for payment, stating the sum that the contractor considers to be due and the basis on which it is calculated.

iii)
Clauses 4.9.2 and 4.10.1 oblige the employer to issue a payment notice, stating the sum that the employer considers to be due and the basis on which it is calculated.

iv)
Clause 4.9.2 provides that where a payment notice is given, subject to any pay less notice, the interim payment to be made by the employer shall be the sum stated as due in the payment notice.

v)
Clause 4.9.3 provides that where no valid payment notice is given, subject to any pay less notice, the interim payment to be made by the employer shall be the sum stated as due in the interim application.

vi)
Clause 4.9.4 provides that where a pay less notice is given in accordance with clause 4.10.2, the interim payment to be made by the employer shall be the sum stated as due in the pay less notice.

89.
The contract makes no provision for any subsequent revision to the amount of the interim payment but does provide for a final accounting exercise on completion.

90.
Section 111(1) of the Act provides that where a payment is provided for by a construction contract, the payer must pay the notified sum on or before the date for payment but subject to other provisions of section 111 entitling the contractor to adjustment of any payment where the payment or pay less notice is disputed.

91.
Section 111(8) provides:

“Subsection (9) applies where in respect of a payment –

(a)
a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or

(b)
a notice under subsection (3) is given in accordance with this section,

but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid."

92.
Section 111(9) provides:

“In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than –

(a)
seven days from the date of the decision, or

(b)
the date which apart from the notice would have been the final date for payment,

whichever is the later.”

93.
I reject Mr Wheater’s submission that section 111(8) can be invoked only by a contractor and not an employer. Wherever there is a dispute under the contract, either party is entitled to refer such dispute to adjudication as provided in section 108 of the Act. There is nothing to stop an employer serving a payment and/or pay less notice and referring the dispute to adjudication so as to obtain a temporarily binding decision on it. However, Mr Wheater is correct that section 111(8) only applies where a valid payment notice or pay less notice has been issued, identifying a dispute between the parties as to the proper sum due in respect of an application for payment. In the absence of a valid payment notice or pay less notice, there is no dispute as to the sum to be paid in respect of the relevant application because the default notice mechanism provides that the “notified sum” must be paid and there is no provision for that sum to be revised: ISG v Seevic; Galliford Try v Estura (above).

94.
I reject Mr Mort’s submission that section 111(8) and the scheme empower an adjudicator to open up and revise a payment notice or pay less notice. A payment or pay less notice is not a decision taken or a certificate given by any person referred to in the contract. The notice sets out the sum that the employer considers is due and payable to the contractor in response to the contractor’s application. Section 111(8) empowers an adjudicator to determine what sum is due and payable in the event that competing valuations are asserted by the parties. The notice is not revised by the adjudicator if a different sum is determined to be due. Section 111(9) simply provides for the payment of any additional sum determined by the adjudicator. Any right to additional payment arises under section 111(9), based on the adjudicator’s decision, and not under a revised payment notice.

95.
Section 108 of the Act entitles the parties to refer any dispute to adjudication at any time. That would include a dispute regarding the proper valuation of the works. However, where a particular interim payment has been fixed by the default notice mechanism under the contract, as in this case, there is no contractual basis on which to revise that payment by reference to a proper valuation of the works and therefore there is no relevant dispute that can be referred to adjudication.

96.
I acknowledge that the default notice mechanism under the Act might result in unfairness or hardship to an employer in circumstances where the contractor received a windfall from the employer’s procedural failure. However, it simply regulates the cash flow as between the parties and does not

affect their substantive rights. The employer could protect its cash flow by serving one or both of the notices that could put in dispute the sum claimed by the contractor. This finding does not preclude a challenge to the valuation of the works and/or any claims and cross-claims for the purpose of subsequent interim payments or for the purpose of determining the sums due on a final and conclusive assessment. In this case, clause 4.12 of the contract expressly provides for a final statement based on the adjusted contract sum in accordance with the terms and conditions of the contract.

97.
For the above reasons, Kersfield is not entitled to refer to adjudication the proper valuation of the works for the purpose of determining the sum payable to Bray in respect of Application No.19.

Application for stay

98.
Kersfield seeks a stay of any judgment against it on the grounds that it is not in a position to pay the sum awarded by the adjudicator, resulting in manifest injustice if judgment is now enforced, and Bray would not be in a position to repay the judgment sum if found to be not due on a final and binding valuation of the claim.

99.
CPR 83.7 empowers the court to grant a stay of execution of a judgment for payment of money if it is satisfied that (a) there are special circumstances which render it inexpedient to enforce the judgment or (b) the applicant is unable from any reason to pay the money.

100.
In respect of the concerns regarding Bray’s ability to repay, the relevant principles are set out in Wimbledon Construction Company 2000 Ltd v Vago [2005] EWHC 1086 per Coulson J at Para.26:

“(a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

(b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

(c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind (see AWG).

(d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see Herschell).

(e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see Bouygues and Rainford House).

(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

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

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

101.
The court must take into account all circumstances when considering such application: Wilson & Sharpe Investments v Harbour View Developments Ltd [2015] EWCA Civ 1030 per Gloster LJ at Paras. 58 & 59.

102.
In respect of Kersfield’s inability to pay the judgment sum, the court may exercise its discretion and grant a stay of judgment to enforce an adjudication decision in order to avoid injustice: Galliford Try Building Ltd v Estura Ltd [2015] EWHC 2616 per Edwards-Stuart J at Paras.53-60. However, it will be rare and exceptional for the court to stay the execution of a judgment sum based on the defendant’s inability to pay: Bewley Homes plc v CNM Estates (Surbiton) Limited [2010] EWHC 2619 per Akenhead J at Para.33; RMC Building & Civil Engineering Ltd v UK Construction Ltd [2016] EWHC 241 per Edwards-Stuart J at Paras.56-62.

103.
Based on Mr Newton’s witness statement dated 1 December 2016, Mr Jefferies’ witness statement dated 6 December 2016 and the documents exhibited to those statements, Bray’s financial position appears to be as follows:

i)
The most recent accounts filed by Bray are for the year ended 31 March 2015, showing a profit on ordinary activities to 31 March 2015 before taxation of £41,000, against turnover of nearly £20 million.

ii)
The balance sheet shows net assets of £1,540,000 as at 31 March 2015. That can be compared with net assets as at 31 March 2014 of £1.9 million, and projected net assets of £156,376 as at 30 September 2016 i.e. a deteriorating position.

iii)
Bray’s draft management accounts show an overall loss of £1.45 million for the 18 months to 30 September 2016 and net current liabilities of £506,142.59, as the result of carried forward losses from its residential projects.

iv)
Bray has secured other sector projects with a value of £12.75 million and considers that it is likely to achieve or exceed its budgeted turnover of £20 million. The draft management accounts show a projected return to profitability for the year ended 31 March 2017.

v)
Bray operates on a cash basis, and has done so since 1934. Between April 2014 and February 2015 it maintained a credit balance in its business account of between £4,043,770 and £6,210,491.

104.

Bray is not insolvent. Its financial position has deteriorated since it entered into the contract with Kersfield but the above evidence indicates that it is improving and that it is likely to return to profitability by next year. It has cash available to meet ongoing liabilities and the evidence before the court does not indicate that it would be unlikely to be able to re-pay the judgment sums, if subsequently found repayable to Kersfield.

105.
Based on Mr Newton's witness statements dated 1 December 2016, 9 December 2016 and 16 December 2016 respectively, Mr Jefferies' witness statement dated 6 December 2016 and the documents exhibited to those statements, Kersfield's financial position appears to be as follows:

i)
Kersfield is a special purpose vehicle set up for the Burwalls development. The works are financed by a secured loan from Wellesley Finance plc and unsecured directors' / shareholders' loans and loans from sister companies.

ii)
Kersfield's total assets are valued at £9,714,928.

iii)
Kersfield's total liabilities are £10,350,667, including unsecured directors' loans of £344,144 but excluding the sums claimed by Bray in these proceedings.

iv)
There is a net deficit of £635,740.

v)
Current borrowing exceeds 90% loan to value, compared with the anticipated 70% maximum loan to value anticipated when the loan facility was taken out.

vi)
There is a facility available to fund the remaining costs to completion of the project of £761,448 but that does not include any funds available to meet the judgment sum and no further support would be available from the shareholders and directors.

106.
Kersfield is not insolvent. The evidence indicates that it is nearly at the limit of its funding facility but, other than Mr Newton's assertion that no further funds would be made available, there is no evidence before the court as to whether funds could be made available from the shareholders, directors or associated companies.

107.
I do not derive any assistance from the parties' conflicting evidence as to what was said regarding the financial position of Bray or Kersfield. Without a hearing to test the oral evidence of the parties, it is not possible to resolve the conflict. In any event, such generalised statements have little or no probative value in ascertaining what is the true financial position of either party.

108.
Completion of the project has not been achieved and it is likely, as Mr Newton claims in his recent witness statement, that this has affected the ability to sell the residential units. However, there are competing arguments as to the allocation of blame for the current situation on the development. The

assertions made on both sides show that there are disputes as to delays, defects and valuations but the court does not have sufficient information on which to make any determination of those issues, or to apportion blame for the loss of any sales.

109.
If the court allows execution of the judgment, it will cause financial difficulty for Kersfield. If the court grants a stay of the judgment, it will cause financial difficulty for Bray.

110.
In those circumstances, where the arguments are finely balanced, following the guidelines in the cases referred to above, the court should lean in favour of enforcement of the judgment.

Conclusion

111.
For the reasons that I have given, Application No.19 was a valid application for interim payment, no valid payment notice or pay less notice was served and Bray became entitled to payment of the sum claimed in its application. The adjudication decision is valid and enforceable and the circumstances are not so exceptional so as to justify a stay of execution.

112.
It follows that Bray is entitled to summary judgment in the sum of £1,131,751.96 plus VAT and interest, together with the adjudicator’s fees and expenses in the sum of £17,836.50, plus interest and costs, which I will deal with following consideration of any further submissions from the parties.