IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 1305 (TCC)

Case No. HT-2020-000090

Rolls Building
Fetter Lane
London EC4A 1NL

Monday, 4 May 2020

Before:

MR JUSTICE FRASER

B E T W E E N :

J & B HOPKINS LIMITED — Claimant

- and -

TRANT ENGINEERING LIMITED — Defendant

MR T. OWEN (instructed by Hawkswell Kilvington Limited) appeared on behalf of the Claimant.

MR A. HICKEY QC (instructed by Humphries Kirk LLP) appeared on behalf of the Defendant.

J U D G M E N T

(VIA SKYPE FOR BUSINESS)

MR JUSTICE FRASER:

I INTRODUCTION

1 On 2 March 2020, an Adjudicator issued a decision that the Claimant was entitled to the sum of £812,484.94 plus VAT. Together with VAT the amount came to approximately £974,000, and that sum had been claimed by the Claimant and was decided to be due and payable by the Adjudicator as a notified sum on Payment Application 26, against which the defendant (to whom I shall refer as 'Trant') was found by the Adjudicator to have issued no valid payment notice, and no valid payless notice. The Adjudicator was called Mr Silver, and he had been appointed by the RICS in January 2020. After he was appointed he conducted the adjudication between the parties and issued the decision, to which I have referred, at the very beginning of March.

2 Trant declined to satisfy that decision, or to pay the amount that was ordered to be paid by the Adjudicator, and so the Claimant issued proceedings in the Technology and Construction Court ('TCC') on 10 March 2020, and applied for expedited directions. Those directions included, as is usual, the habitual provision for the abridgement of time for acknowledgement of service and the seeking of an early date for the hearing of a summary judgment application. Two orders were made by O'Farrell J. She is now the judge in charge of the TCC, having taken over that role just a few days prior to the claim form being issued, on 3 March 2020. The first order that she made in these proceedings was dated 12 March 2020.

3 The world was rather different then than it is now, because that was a date prior to the Covid-19 crisis. She made directions setting down a hearing date and requiring the other necessary procedural steps - for example, the service of evidence - and she also transferred the case to the Central London County Court. That is a system that has been adopted in the TCC to deal with adjudication enforcements of a relatively modest value, by which I mean usually less than £1 million, which, on the papers lodged with the court, do not appear to raise particularly complicated points of law on enforcement. However, that order that she made was prior to the coming into force of the ***Health Protection (Coronavirus Restrictions) (England) Regulations 2020***, and what has become known as 'lockdown'. After that occurred, letters were sent to the court by the parties and O'Farrell J made a second order on 16 April 2020, issuing further directions dealing with how the case would proceed in what was by then the world that was, certainly so far as the majority of Western Europe is concerned, locked down due to the Covid-19 crisis. She directed that the case would remain in, or be transferred back to, the TCC specialist list of the High Court, and she directed a remote hearing using Skype for Business. This is the current procedure adopted by the High Court to deal with a vast number of hearings that would ordinarily be done physically in court. She also gave associated directions to deal with holding what is now called a 'remote hearing'.

4 This hearing has therefore been conducted remotely by Skype for Business. I am grateful for the assistance of the parties in this respect. Conducting a hearing in this way is not always entirely straightforward. It does require a higher degree of co-operation from the parties, in terms both of the provisions of e-bundles and also the parties making themselves available for a trial run to ensure that all the connectivity is working correctly adequately.

The hearing took place without any particular technical difficulty, although at one point I had to invite Mr Hickey (leading counsel for Trant) to proceed on audio only because there was some limited interference to his oral submissions. By switching off his video, I believe this would have provided extra band-width, and there was no problem. He was happy to continue on that basis, and I am entirely confident that I heard all of his submissions without difficulty. The fact that his video feed was not functioning correctly for 100% of the time has not affected the outcome of the application in any respect.

II THE CONTRACT

5 By a contract which was dated 20 April 2018, which was in fact a sub-contract, Trant engaged the Claimant to carry out M&E works at a recycling plant in the Isle of Wight. The original sub-contract sum was £1.669 million. The scope of the works was varied considerably during the project and that value increased. Trant have asserted recently (and this is a quotation from 8 April 2020), contained in a letter which Mr Owen drew to my attention, that "the total sub-contract value, including the current variations, will be in the region of £3.3 to £3.5 million." Therefore the works obviously increased in value substantially.

6 However, those comments are made by way of background because the value of the work as it is today, which is the date that the Claimant seeks an order for enforcement of the decision by way of summary judgment, is not directly relevant to the enforcement of that decision by an Adjudicator.

7 Clause 42 of the sub-contract provided a mechanism for interim payments, and the adjudication concerned Interim Payment number 26. On 30 July 2019, the Claimant submitted Interim Application 26. It set out the sum that it considered to be due, which was a sum of approximately £812,000, and the basis upon which it was calculated. This was said by the Claimant to have been covered in 16 pages of supporting material which went with that application. The Claimant's case was that Trant had issued no effective payment notice or payless notice against that application, and it therefore relied upon s.110B(4) of the Housing Grants, Construction and Regeneration Act 1996, and the sum claimed is stated as being "In Application 26, the notified sum for the purposes of s.111 of the Act". The final date for payment was 11 September 2019. That sum was not paid by Trant, and the Notice of Adjudication that the Claimant issued in respect of that dispute was 17 January 2020.

8 Paragraph 3.9 of the Notice of Adjudication itself stated the following:

> "For the avoidance of doubt, the Adjudicator is not asked, nor does the Adjudicator have jurisdiction to, investigate or consider the merits of any actual valuations of JBH's sub-contract works as part of this adjudication. In this adjudication the Adjudicator's jurisdiction is strictly limited to considering whether the sum applied for by JBH in Application 26 became due and payable by virtue of Trant's failure to serve any valid and/or effective payment or payless notice in response to the same."

9 As I have said, the dispute was referred to Mr Silver after he was appointed. In the adjudication the Claimant was represented by the same solicitors who represent the Claimant today, Hawkswell Kilvington, and Trant were represented by Fenwick Elliott. Trant has since been represented by Womble Bond Dickinson, which is a different firm of solicitors, who provided the acknowledgement of service on its behalf, and is now today represented in these proceedings by another firm called Humphries Kirk LLP. Although

that has been drawn to my attention both in the Claimant's written submissions and by Mr Owen orally today, nothing turns on these changes of representation for Trant, and I recount them in this judgment purely for completeness.

10 Trant argued before the Adjudicator that it had issued a payment notice and it relied on an email of 12 August 2019, and a payless notice, and it relied on a different email of 22 August 2019, as constituting these documents. Trant also contended before the Adjudicator that Application 26 was not substantiated properly. It did not dispute before the Adjudicator that Application 26 was validly issued, and in his decision of 2 March 2020 the Adjudicator decided - and I am just going to identify some isolated parts of his decision - firstly, that the emails relied upon by Trant of 12 and 22 August 2019 were not valid payment or payless notices respectively. He decided that the amount notified in Application 26 of £812,000 was due and payable to the Claimant and "that sum must now be paid by Trant to the Claimant immediately (in full and without deduction)." Thirdly, he decided the Claimant was entitled to interest. Fourthly, he decided that Trant should pay his fees and expenses, but that the Claimant was joint and severally liable in respect of those. Trant refused to pay his fees. It should also be recorded that Trant participated fully in the adjudication and took no jurisdictional objection before him. The Claimant requested Trant pay the fees and the principal sum due, but Trant would not do so. So, on 10 March 2020, the Claimant commenced these proceedings and applied for summary judgment, which is contested. It should also be said that Trant is relying on what are effectively the same grounds to oppose enforcement to justify an alternative application for a stay of execution if summary judgment is granted.

11 I have five witness statements before me. Two are from Mr Silverstein, one is from Mr Hills, one from Mr Swallow and one from Mr Hopkins. I have also had detailed written skeletons and very helpful oral submissions from Mr Owen for the Claimant and Mr Hickey QC for Trant.

III THE APPLICABLE LEGAL PRINCIPLES

12 The procedure for enforcing adjudication decisions in the Technology and Construction Court by way of summary judgment is well known, as is the policy of the court in respect of enforcement. It does merit repetition in this short judgment that there are only very limited grounds upon which adjudicators' decisions will not be enforced by means of summary judgment. The very first case on enforcement was a decision of Dyson J (as he then was, who became Lord Dyson and also the Master of the Rolls) in a case called ***Macob Civil Engineering Limited v Morrison Construction Limited*** [1999] EWHC Tech 254, and [1999] BLR 93, in which it was made clear that an adjudicator's decision will be enforced by summary judgment, regardless of errors of law or errors of fact contained within it, or the merits of the underlying dispute resolved by the adjudicator.

13 The starting point is that if the adjudicator has decided the issues referred to him or her, whether he or she is right or wrong in fact or in law, as long as they have acted broadly in accordance with the rules of natural justice, that decision will be enforced by summary judgment. That is a principle that has been around for, as at today, over 20 years, but if a modern statement of that principle were required the best place to look is ***Hutton Construction Limited v Wilson Properties (London) Limited*** [2017] BLR 344 at [3]. It is *dicta* of Coulson J (as he then was). He also said in that same case at [14]:

> "If the decision was within the Adjudicator's jurisdiction and the Adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later."

14 There are on contested enforcement applications, therefore, two bases only upon which a decision will not lead to summary judgment as the jurisprudence is conventionally understood. These are if the decision was one made without jurisdiction; and the other is if the decision was made in the presence of material breaches of natural justice. Neither of these features are contended for here.

15 The principles of enforcement are subject to two narrow exceptions. They are identified in ***Hutton v Wilson*** [2017] BLR 344 as well at [4]. The first is an admitted error; the second is a self-contained legal point concerning timing, categorisation or description of payment notices or payless notices, in respect of which the potential paying party has issued Part 8 proceedings seeking a final determination of that or those substantive points. That is dealt with at [5] of ***Hutton*****.** Neither of those two exceptions apply here either.

16 Another statement which is worth repeating is at [9] in a case called ***PBS v Bester*** [2018] EWHC 1127 (TCC), a judgment of Stuart-Smith J, who explained the rationale for this approach by the courts on enforcement, which is as follows:

> "Adjudication is all about interim cash flow and it is routine to enforce decisions that require substantial allocations of cash to one party or another in the knowledge that it may prove to be merely an interim measure. The fact that the basis of an adjudicator's decision is to be challenged in other proceedings is of itself seldom, if ever, a ground for non-enforcement."

17 One therefore turns, given those statements of broad principle that have been restated again and again in a number of cases, to the grounds upon which Trant relies before me to maintain an argument, or contend for a refusal of summary judgment by the court to the Claimant, or alternatively for the imposition of a stay of execution.

IV THE ISSUES ARISING ON THIS HEARING

18 I will first identify what is said in Mr Hickey's very helpful written skeleton because it identifies what is in issue today and what is not. In paragraph 3 of his skeleton he accepts that Trant does not contend the Adjudicator was in breach of natural justice in the way the adjudication was conducted. In paragraph 4 he accepts that the Defendant is not making a jurisdictional challenge in respect of the matter decided by the Adjudicator in respect of whether Payment Application 26 constituted a Default Payment Notice and the amount that was payable in respect of Payment Application 26. I should also add at that point, no jurisdictional objection having been taken before the Adjudicator himself, and Trant having conducted itself in that adjudication and taken a full part without reservation of any jurisdictional objection, Mr Hickey, and in fact Mr Hills in his witness statement, are both entirely correct not to raise a jurisdictional objection before the court because it would have faced substantial hurdles. Trant plainly submitted to the jurisdiction of the adjudicator during the adjudication.

19 Going back to Mr Hickey's skeleton at paragraph 5, this states:

> "However, the Defendant resists summary judgment being given on this enforcement action on the basis that by the time that the adjudication was commenced in January 2020 the Claimant was no longer entitled to be paid the sum stated in PA26, because any entitlement under PA26 had been superseded by subsequent interim payment cycles in which the Claimant made further applications for payment which were the subject of valid payment payless notices and which superseded and corrected the sum payable under the Sub-contract as at August 2019. At no point before the Adjudication commenced in January 2020 did the Claimant contend that PA26 represented its current payment entitlement, having gone along with subsequent payment cycles on a cumulative basis which were the subject of payment/payless notices that govern the Claimant's payment entitlement pursuant to s.111 of the HGCRA as amended."

By "having gone along with subsequent payment cycles", Mr Hickey is also referring to the fact that no adjudication was commenced by the Claimant in respect of those subsequent payment cycles, and effectively either was, or intended to, provide further substantiation which had been requested by Trant to justify the amounts claimed, in particular on the variation account.

20 He then in his skeleton goes on at paragraph 6 to say:

> "The current entitlement as at the date of these proceedings is against the Claimant's application PA33 dated 28 February 2020 in respect of which the Defendant served a payment notice/payless notice which constitutes the notified sum of the amount due under the Sub-contract."

In a supplementary bundle that had been provided to the court well in advance of the hearing, a number of the payment notices and payless notices for the period over the last five or six months, if not longer, has been provided to the court to make it clear that Trant has been observing the statutory regime for the service of payment notices and payless notices for subsequent applications following Application 26.

21 However, Mr Hickey accepts that this is effectively a novel point. He has identified, correctly, that there is another adjudication currently on foot at the moment between these parties on this project which started, I am told, last week, which will determine the extent to which the Claimant is entitled to payment of any further sums under the sub-contract. In his skeleton Mr Hickey explained that the defendant had not been able to conclude that adjudication in time for the current enforcement proceedings. It is therefore currently under way, and one imagines that a Decision will emerge at some point in the next few weeks or perhaps the next couple of months. I turn now to Mr Hickey's summary of this at his paragraph 8 - the important passage which is emphasised in the middle of it:

> "In the circumstances, it is submitted that it would be manifestly unjust to permit the Claimant to enforce a decision in respect of PA26, when that sum had ceased to be due, following later payment cycles which the Claimant went along with, before the adjudication started, and no longer represents the current payment entitlement under the Sub-contract. <u>To enforce the decision would be inconsistent with, and undermine, the 'correction' principle set out in the case law, namely, that interim payments can be corrected in the next interim payment cycle.</u> Here that correction occurred long before the adjudication was commenced and so the earlier payment entitlement ceased to exist and is replaced by the current sum due pursuant to s111.

> Alternatively, if the decision were enforced the Court should give effect to the current payment entitlement with the result that payment would be met with an immediate obligation to repay."

(emphasis added)

22 There are, therefore, two aspects to Mr Hickey's analysis. The first is that there is something which is helpfully, for shorthand purposes, referred to as the "correction principle". The second is whether enforcing the decision would be inconsistent with it. I will deal, firstly, with whether there is, in fact, something called the "correction principle", or something that can usefully be termed the "correction principle". In my judgment, on the state of the law as it is currently understood there is a line of cases, or rather two lines of cases, one of which is a decision, of Edwards-Stuart J, who was the judge in charge of the Technology and Construction Court at the time, called ***ISG Construction Limited v Seevic College*** [2014] EWHC 4007 (TCC). In that case the learned judge identified, as he understood the operation of the contract, that even if there had been an adjudicator's decision on, for example, Interim Application 99, and a claimant succeeded on technical grounds in relation to notices failing to have been served in accordance with the Act, there could not be a later correction of the correct value of Interim Application 99 because the adjudicator's decision had effectively set down what the correct figure for that application's value was.

23 It is fair to say that there were two competing lines of authority that emerged. One of them was the *ISG v Seevic* line, which was followed in a number of different cases and by some other judges. Another was an alternative line of cases which did not agree with the analysis of the judge. I will just make it clear that I was one of the judges who did not agree with that analysis, and in a case called ***ICI Limited v Merit Merrell Technology Limited*** [2017] EWHC 1763 (TCC)**,** I declined to follow the analysis of Edwards-Stuart J. Another judge who also, when he was at first instance, did not agree with ***ISG v Seevic*** was Coulson J (as he then was), who, in a case called ***Grove Developments Limited v S&T (UK) Limited*** 2018 EWHC 123 (TCC), decided that the analysis in *ICI* and his own separate analysis (which he reached by means of three separate intellectual routes), all posted a sign that Edwards-Stuart J in ***ISG v Seevic*** had been wrong. I had certainly intended in ***ICI*** to express a view that it was not correct, but I had perhaps expressed myself either in ambiguous terms, or in insufficiently frank terms, such that it was potentially interpreted as my simply declining to follow it.

24 The case of ***Grove v S&T*** went to the Court of Appeal, ***S&T (UK) Limited v Grove Developments Limited*** 2018 EWCA Civ 2488. Jackson LJ agreed with Coulson J and his analysis in ***Grove***. The Court of Appeal therefore approved the approach both in ***Grove*** and also in ***ICI.*** It is, therefore, undoubtedly the case that there is something which, for today's purposes, can helpfully be referred to as, the "correction principle" established by the authorities. By "correction principle" I mean that if an interim application is subject to a failure by a particular party to issue the required notices, leading to the result that by that failure the sum applied for becomes due, any correction to reflect the true value of the work (and the application) is permissible on later applications. However, the *quid pro quo* of that is that the amount due on the original application as a result of the failure to serve the required notices – here, Application Number 26 – is precisely that: the amount due. Here, that amount fell due because the relevant notices were not issued by Trant. But the correction principle cannot be applied to lead to a result that the amount was *not* due at all. The fact that it was an interim application, and the amount can be corrected later, does not

assist Trant on this enforcement of a decision by an adjudicator that it *was* due to be paid on Application 26.

25 I, therefore, turn to the second of Mr Hickey's submissions, which is to enforce a decision in circumstances such as today would, he submits, undermine the correction principle. I am afraid I disagree with that. In my judgment, it would not. The difficulty with Mr Hickey's analysis is as follows. Firstly, it ignores the ability of any party to a qualifying contract - by "qualifying" I mean a construction contract which falls within the framework of Act - which requires adjudication to be included, and imposes upon that contract, if adjudication is not included, the process of adjudication, to adjudicate "at any time". Secondly, Mr Hickey's analysis implicitly includes the categorisation of a party making subsequent interim payment applications in the payment cycle as removing the possibility of any possible disputes on earlier payment applications remaining as disputes. Those possible disputes on earlier applications could be substantive ones, by which I mean disputes about the valuation of particular elements of the works, or the quality of the works, or the valuation of the variations, or more technical disputes in terms of compliance with the statutory regime or contractual regime of payless and payment notices. Those disputes on earlier applications do not disappear and cease to exist because a subsequent application is made on an interim basis. Nor does some sort of estoppel operate because a contractor makes another interim application in the cycle.

26 What, in law, was the notified sum under Interim Application 26 does not, in my judgment, become incapable of adjudication simply because the payment cycle moves on to Interim Application 27 and subsequent applications. Indeed, that can be explained further by considering a worked example. Payment cycles are in a great many contracts usually monthly. If Mr Hickey and Trant were right, then by submitting a subsequent payment application any dispute on Interim Payment Application 26 would be overtaken by events and would cease to be a dispute. Given the period under the Act is a period of 28 days for the making of a decision by an adjudicator, and given that it usually takes a few days, if not longer than a week, for a party to obtain the nomination of adjudicator, have that adjudicator appointed and commence the adjudication by serving a notice of adjudication, it would be verging on impossible for a claimant to react to the non-payment of an application in these circumstances before the next application fell due. Where there no payless notice, a party could not commence an adjudication, conduct that adjudication, obtain a favourable decision and then enforce it before the next application fell due under a monthly payment cycle. Upholding the approach urged upon me by Trant would not only create a wholly novel approach by the courts - which Mr Hickey was perfectly frank enough to accept was a novel point -, but it would, in my judgment, be procedurally unjustified. It would also undermine the policy of enforcement of adjudicators' decisions, as has been developed and evolved in the TCC over the last 20 years. It would also run the risk of undermining the applicability of ss.110A, 110B and 111 of the Act. I would also identify that the correction principle which Mr Hickey has expounded, and which I accept exists, is not one which, in my judgment, is relevant to the enforcement of adjudicators' decisions in circumstances such as today's.

27 It follows, therefore, that, in my judgment, and this is clear because no points on jurisdiction or natural justice are advanced by Mr Hickey, that the decision of the Adjudicator should be enforced by means of summary judgment. The evidence before me on behalf of the Defendant, which includes the evidence of Mr Hill who explained this in his witness statement at the early stage in the enforcement proceedings, is that there are in fact and law other disputes between the parties. Indeed there is another adjudication currently under way between them as of today. The principles which I have explained in this judgment will

apply to any subsequent adjudication decision that may eventuate between the parties which becomes a contested one in an enforcement. If Trant were to obtain a valid decision or decisions in its favour on later applications, then those decisions ought to be complied with by the Claimant in any event.

28 I am now going to turn to the application for a stay of execution advanced by Mr Hickey. It seems to me that if there is anything within the facts before the court today which would justify an order which leads to the claimant not obtaining the money straight away it would be by means of a stay of execution, rather than by way of refusing enforcement by way of summary judgment.

V APPLICATION FOR A STAY OF EXECUTION

29 I turn to the application for a stay of execution that is advanced Trant. There were different statements made in the different witness statements for Trant originally that suggested or hinted at any inability on the part of the Claimant to repay to Trant the sum awarded. However, these evidential points in terms of financial depth or inability to repay on the part of the Claimant are no longer relied upon. What Mr Hickey relies on is manifest injustice. The principles that the court will apply on a stay of execution are well known. They are substantially set out in a case called ***Wimbledon Construction Company 2000 Limited v Vago*** [2005] EWHC 1086 (TCC), and although a further principle was added by me in another case called ***Gosvenor London Limited v Aygun Aluminium UK Limited*** [2019] 2 BLR 99, which was agreed by the Court of Appeal should be added to the list of principles considered in ***Wimbledon v Vago***, that does not apply here.

30 Once the point about inability to repay has been abandoned, which it is therefore not necessary to address, what is said by Trant to justify a stay is that this is necessary to prevent manifest injustice. Two different cases are particularly relied on - one is ***Hillview Industrial Development (UK) Limited v Botes Building Limited*** [2006] EWHC 1365 (TCC), a decision of His Honour Judge Toulmin QC, where he says at the beginning of [33]:

> "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."

He does, however, go on in that paragraph to say the following:

> "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. I asked Ms Jefford …"

That is Ms Jefford as she then was, now Jefford J, who in that case was applying for a stay:

> "… specifically whether or not it was being suggested that if the sum awarded in the adjudication was paid to Hillview, there was a risk that Hillview would be unable to, or would not, repay the sum awarded promptly in the summary judgment application of Botes if it were successful."

Pausing there, that is because in that case there was another summary judgment application which was being heard at a later date with money claimed to be going in the opposite direction. Going back to the judgment, the judge continued:

> "If there had been a serious risk in those circumstances that money paid over on a provisional basis would not be recovered promptly in the event that Botes succeeded in obtaining summary judgment at the hearing on 23 June 2006, I should have given sympathetic consideration to granting a stay for the short time until that date or making other orders to secure the sum which had been paid. That is not the position here."

It can therefore be seen that his comments in the first part of that passage about manifest injustice go to repayment of the sum on a later date, because he then goes on in [34] to say:

> "I see no injustice in ordering Botes to pay the sum awarded by the adjudicator forthwith, nor do I find it a curious result if Botes is required to pay the sum awarded by the Adjudicator in full only (if it be the case) for a substantial part of it to have to be repaid by Hillview in a short time from now. Such a solution is entirely consistent with the legislation."

I would add that such a solution is not only consistent with the legislation, it is also consistent with the *dicta* of Jackson J (as he then was before he went to the Court of Appeal) in a different case, ***Interserve Industrial Service Limited v Cleveland Bridge UK Limited*** [2006] EWHC 741 (TCC), where he said at [43] (and this is quoted in the judgment in *Botes* prior to the passage which I have just recounted at [27]):

> "At [43] of his judgment in *Interserve* Jackson J said the following, the principle with which I respectfully agree …"

Then there is a quotation which is as follows:

> "'Where the parties to a construction contract engage in successive adjudications each focused upon the parties' current rights and remedies, in my view the correct approach is as follows: at the end of each adjudication, absent special circumstances, the losing party must comply with the Adjudicator's decision. He cannot withhold payment on the grounds of his anticipated recovery in a future adjudication based on different issues. I reach this conclusion both from the express terms of the Act and also from the line of authority referred to earlier in this judgment'."

I would add, because Mr Hickey accepted this, that a party also cannot withhold a payment in respect of an adjudication decision on Interim Payment 26, because of subsequent developments in the payment cycles in respect of notices that have been complied with on Interim Payments 27, 28, 29, 30, 31, 32 and 33.

31 When one looks at Mr Hickey's submissions that effectively, as he put it in paragraph 8 of his skeleton, later payment cycles which the Claimant "went along with", I do not accept that by participating in the subsequent payment applications the Claimant lost its ability to adjudicate on what is undoubtedly a dispute - admittedly a dispute of a technical nature - which is whether or not the relevant notices were served in respect of Interim Application 26.

32 I will turn now to the second case which is relied by Mr Hickey, which is called ***Galliford Try Building Limited v Estura Limited*** [2015] 4 BLR 321. This is another decision of Edwards-Stuart J. There are some difficulties with relying upon this judgment today, not least because it was prepared and the case was decided on the understanding by Edwards-Stuart J, as one would accept or understand or expect, that his judgment in ***ISG Construction Limited v Seevic College*** [2014] EWHC 4007 (TCC) was correct. It has now been confirmed by the Court of Appeal in *S&T v Grove* that it was not. The decision in this case, therefore, if I can put it this way, proceeded on a misunderstanding. In that case he dealt with what was perceived to be a restriction which arose as a result of ***ISG Construction v Seevic College*** and the ability to bring successive adjudications dealing with the true value of interim applications. He awarded a partial stay partly as a result of the Defendant's financial position. I am reading from the headnote in the law report as it appears in the Building Law Reports at (9), where it is said:

> "Where there was a risk of manifest injustice there was jurisdiction in adjudication enforcement cases to grant a stay under the provisions of the Civil Procedure Rules. In this case if the Adjudicator's Decision was enforced in full the unusual combination of factors gave rise to a risk of irreparable prejudice to the Defendant …"

and that is taken from [54] to [60] of the judgment. Point (9) continues:

> "The Defendant's financial position was complicated and it depended almost entirely on others to finance the project. The court accepted that the Defendant would be unable to pay the Adjudicator's Award in full if ordered to do so. This was independent of anything done by the Claimant. The unusual circumstances of this case meant that if the Defendant was ordered to pay the Interim Application 60 amount the Defendant would then have to wait several months or more before the final value of the works was determined."

In that case, those unusual circumstances led, as an exercise of discretion, the judge to impose a partial stay on some of the amounts that had been awarded by the Adjudicator. It can be seen that the facts are very unusual. They relate to the financial position of the paying party, not the party seeking to obtain the sum due under the decision.

33 In my judgment, no such unusual features exist here. There is certainly no evidence before the court about the precarious position on the part of the Defendant, and potentially serious or irreparable prejudice that might be experienced by the Defendant if it were unsuccessful in obtaining the stay which it seeks. I do not read the case of ***Galliford Try*** as imposing or creating a wider, or more general, set of principles for granting a stay than those which are generally set out in authorities or wider applications such as ***Wimbledon v Vago*** or ***Gosvenor v Aygun.***

34 There is a danger in considering a stay where the Claimant has a valid Adjudicator's Decision of using the concept of manifest injustice as a wider examination of the supposed "merits" of the underlying dispute. If that were to occur, it would frustrate the purposes of the Act and it would frustrate the intention of Parliament. Parliament has decreed in very clear terms the necessity of certain notices, including payless notices and payment notices, and the failure to comply with that notice regime does lead parties in some circumstances

validly to commence adjudications and obtain decisions in their favour, which are not necessarily based on the merits of the underlying dispute.

35 There are some statements in the witness statements, or some comments, which suggest on the Defendant's part a disapproval of this course of action. Some of the statements are as follows, and I am quoting from the different witness statements, "an unwarranted adjudication on a historical payment by way of wrongful smash and grab as it is known in the industry." Another one is, "a wrongful smash and grab on an unwarranted technicality". Another one states "the adjudication decision was based on a wrongfully applied technicality in a smash and grab demand under a moribund Application Number 26." All of those statements reflect disapproval which, in my judgment, is disapproval not of the dispute that was adjudicated upon but must be disapproval of the Parliamentary framework which has been imposed on construction contracts. This framework very carefully sets out what happens when notices are not complied with. Whether such disapproval is merited or not is a wholly subjective point of view. Serving the relevant and required notices is not an impossible or Herculean task. Failure to do so has certain consequences. These are widely known and this judgment provides another example.

36 I will therefore end this judgment by reiterating the following two points. If an Adjudication Decision has been issued with jurisdiction and without material breaches of natural justice, it will be enforced by way of summary judgment. That is therefore, in my judgment, the correct outcome on this application. I therefore grant the Claimant summary judgment on the Adjudicator's Decision and I dismiss the Defendant's application for a stay.
