Neutral Citation Number: [2024] EWHC 269 (TCC)

Case No: HT-2023-000073
Case No: HT-2023-000190

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KB)

Rolls Building,
London, EC4A 1NL

Date: 12 February 2024

Before :

His Honour Judge Stephen Davies sitting as a High Court Judge

- -

Between :

BELLWAY HOMES LIMITED	**Part 7 Claimant / Part 8 Defendant**
- and -	
SURGO CONSTRUCTION LIMITED	**Part 7 Defendant / Part 8 Claimant**

- -
- -

Nicholas Kaplan (instructed by **Gateley Legal**, Birmingham) for **Bellway Homes Limited**
Brenna Conroy (instructed by **Hay & Kilner LLP**, Newcastle upon Tyne) for **Surgo Construction Limited**

Hearing dates: 15 – 16 January 2024
Supplemental written submissions: 19 January 2024
Draft judgment circulated: 31 January 2024

- -

APPROVED JUDGMENT

Remote hand-down:
This judgment was handed down remotely at 10am on 12 February 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction

1. In this case the Part 7 Claimant (Bellway) seeks summary judgment to enforce the decision of an adjudicator, Mr Jonathan Cope, who decided that the Part 7 Defendant (Surgo) should pay it the principal sum of £1,076,220.82, whereas Surgo seeks various declarations on its Part 8 claim with a view to establishing that the adjudicator's decision was wrong in law so that, even if enforceable, it is not liable to pay the sum due under the decision.

2. The Part 7 enforcement claim raises the issue as to whether or not Mr Cope was validly appointed. Surgo contends that he was not, because the contractual adjudication terms (including those permitting Bellway to select Mr Cope from a panel of 3 named adjudicators) contravened the Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA") in a number of respects, with the result that the contractual adjudication terms fell away and the provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") applied instead. The consequence, says Surgo, is that Bellway ought to have, but did not, refer the dispute to an adjudicator nominating body ("ANB") pursuant to paragraph 2(1)(c) of the Scheme, rather than to Mr Cope as a member of the panel list

3. The Part 8 claim raises the issue as to whether or not there was a proper legal basis for Mr Cope to decide, in a true value adjudication in respect of the current interim payment cycle, that Surgo: (a) had been overpaid on a previous interim payment cycle; and (b) should repay Bellway the amount of the overpayment.

4. The respective cases have been very well argued by counsel for both parties, over the 1½ days provided for in the directions made for the determination of both issues and in their supplementary written submissions, which addressed two particular questions of law raised by me during the course of and after the hearing.

5. In summary, my decision is first that Mr Cope was validly appointed, so that his decision should be enforced, and second that Surgo is not entitled to the declaratory

relief which it seeks, so that Bellway is entitled to be paid the amount decided by Mr Cope.

6. The end result is that Bellway is entitled to judgment on both the Part 7 and the Part 8 claims.

7. I will summarise the key facts, before dealing first with the Part 7 enforcement claim and second with the Part 8 claim.

Facts

8. It is common ground that Bellway as employer employed Surgo as contractor to undertake construction works on a site near Newcastle under a JCT Intermediate Building Contract with Contractor's Design 2016 ("JCT ICD") dated 9 October 2019, which contained a series of bespoke amendments. Thus, the signed contract provided that the standard JCT ICD conditions and the contract particulars should have effect as modified by the Schedule.

The relevant contract terms

9. Of relevance to this case are the amended provisions for adjudication and the amended provisions for interim and final payments.

Adjudication provisions

10. As to the former, Article 8 provided that: "If any dispute or difference arises under the Contract, either Party may refer it to adjudication in accordance with clause 9.2".

11. Part 1 of the Schedule, headed "amendments to the contract particulars" contained a table with the first column identifying the relevant clause, the second identifying the relevant subject and the third containing the relevant entry. The relevant entry read:

Clause etc	Subject	
9.2.1	*Adjudication* *Nominating Body* *(to apply in the event that none of the Adjudicators on the Bellway Panel of Adjudicators indicate willingness to act)*	*The adjudicator is to be chosen from the Bellway Panel of Adjudicators (current as at the date of this contract, a copy of which is available for inspection on request)* *If none of the adjudicators on the Panel are available to act, the nominating body is RICS."*

12. Part 2 of the Schedule, headed "amendments to the conditions", included the following: "Delete clause 9.2 and replace with the following:

9.2.1. If a dispute or difference arises under this Contract which either Party wishes to refer to adjudication, the Scheme shall apply, subject to the following:

1 for the purposes of the Scheme, the Adjudicator shall be chosen by the referring party from the Employer's Panel of Adjudicators current as at the date of this Contract (a copy of which is available for inspection at the Employer's registered office address or on request). Where the chosen adjudicator does not indicate his willingness to act within 2 days of such Notice, then the referring party shall choose a second Adjudicator from the Panel and so on through the list. In the event that none of the Adjudicators on the Panel is able to act then the Adjudication Nominating Body shall be as provided for in the Contract Particulars; and

2 Paragraph 7(1) of the Scheme shall be amended by deleting 'shall, not later than 7 days from' and replacing with 'shall, as soon as reasonably possible after'….

3 New paragraph 27 shall be included in the Scheme as follows: 1 The Adjudicator shall have power to determine more than one dispute at the same time and, if requested to do so by a party, shall determine any matter raised by such party in the nature of set-off, abatement or counterclaim at the same time as it determines any other matter referred to him."

13. Bellway's evidence, which is not disputed by Surgo in this respect, is that the Bellway panel of adjudicators current at the contract date contained three adjudicators, Mr Cope and two others, both of whom are equally well-known and well-respected adjudicators. Unsurprisingly, and entirely properly, Surgo does not suggest that there is any evidence to suggest that any of the three would, by virtue of being on the panel or otherwise, have any tendency to act with anything other than complete impartiality if appointed to act as adjudicator in a dispute involving Bellway. When Mr Cope decided that he did not have jurisdiction in the second adjudication (as to which see below), he very properly volunteered, having checked his records, that he had only acted as adjudicator on two previous occasions through being on the Bellway panel, the first being in 2013 and the second in 2019. However, Surgo contends that the fact that a referring party is first obliged to choose from Bellway's panel introduces a perception of bias which offends against the policy of the HGCRA of having actually and ostensibly impartial adjudicators. This is a point which I shall need to determine.

14. I should also record at this point that the amendment to paragraph 27 of the Scheme is not said to be relevant in this case, since Bellway did not purport to refer more than one dispute and nor did any point about set-off, abatement or counterclaim arise.

Payment terms

15. As to the latter, Ms Conroy produced as an attachment to her written submissions a very helpful summary of the relevant payment provisions, with the bespoke amendments underlined and the deleted text shown struck through, which Mr Kaplan agreed as accurate and which I summarise as relevant as follows.

16. Clause 4.8 was headed: "interim payments – due dates and certificates" and contained standard provisions for interim payments to be made pursuant to interim certificates issued by the contract administrator, which were to state "the sum that he considers to be or have been due to the Contractor at the due date, calculated in accordance with clause 4.9, and the basis upon which that sum has been calculated".

17. Clause 4.9 contained standard provisions for the ascertainment of the interim payment to be certified, so that in the usual way it was to: (a) include the total value of the work properly executed by the contractor but also to be subject to any deductions for specified items such as rectification and non-compliance with instructions; but (b) to have deducted the amount of sums stated in previous interim certificates and paid in respect of payment notices.

18. It is common ground that it did not expressly permit an interim certificate from being in a negative amount, but neither did it expressly prohibit it.

19. Clause 4.9A, added by amendment, is the subject of argument as to its construction and effect. It provided that: "For the avoidance of doubt, the Employer shall be entitled to recover from the Contactor any overpayments made at any time. All interim payments made to the contractor are payments on account only of sums due under the Contract."

20. Clause 4.12, headed "Interim and final payments – final date and amount", identified the final dates for payment of both interim and final payments. Sub-clause 4.12.5 made provision for employer payless notices in two cases, the first being where the employer intended to pay less than the sum stated in a payment certificate or payment notice and the second as being where "if the Final Certificate shows a balance due to the Employer, the Contractor intends to pay less than the sum stated as due". The second is relied upon by Surgo because it envisages a final certificate, but not an interim certificate, as showing a balance due to the employer.

21. Finally, clause 4.21, headed "Final certificates and final payment", contained standard provisions as regards the certification and payment at final account stage.

22. Standard clause 4.21.2 stated that the final certificate should show "a balance due to the Contractor from the Employer or vice versa".

23. Clause 4.21.4, added by amendment, stated: "To the extent that for whatever reason the Employer considers that the Contractor has been overpaid during the course of the Works the amount specified in the final certificate may be adjusted to take into account such overpayment and for the avoidance of doubt the amount so specified can

be a negative sum which negative amount shall be a debt due from the Contractor to the Employer."

The first adjudication

24. The first adjudication was referred by Surgo in August 2022, seeking payment in relation to interim payment cycle 29 on a "notified sum" (also commonly referred to as a "smash and grab") basis. Although some reference was made by Ms Conroy to the fact that Bellway did not, when asked, provide a copy of the panel adjudicator list, and nor did it raise any objection when Surgo requested RICS to nominate an adjudicator, as she accepted these subsequent events are logically irrelevant to the question of whether clause 9.2 contravened the HGCRA, although she maintained her submission that it illustrated the risk which on Surgo's case was posed by that clause. Surgo was successful in that adjudication and Bellway had to pay the sum of £2,395,504.84 on top of the sum already paid of £204,782.35.

25. Bellway did not seek to challenge that by commencing a "true value" adjudication in relation to that payment cycle and it paid the sums certified under two further interim payment certificates, so that by that stage the total cumulative sum paid to Surgo was £11,317,117.85.

Interim certificate 36

26. In February 2023, the contract administrator issued payment certificate 36 in respect of interim payment cycle 36, valuing the works in the gross sum of £8,135,315.00 with the started consequence that the sum due Bellway to Surgo was minus £3,393,887.23.

27. Not surprisingly, Surgo did not accept this, contending that the gross value of the works as at the relevant valuation date was £12,947,334.87 and that it was owed the further sum of £1,423,040.93.

The second and third abortive adjudications

28. Bellway referred its claim to enforce payment of certificate 36 to adjudication on a notified sum basis and alternatively on a true value basis. In accordance with clause 9.2 it selected Mr Cope who was willing to accept the appointment, and made its position clear that it was referring under the contract adjudication procedure in clause 9.2.

29. Surgo raised various jurisdictional challenges, including that clause 9.2 of the Contract was contrary to the provisions of the HGCRA so that the Scheme applied unamended. Mr Cope agreed with that submission and concluded, in an email to the parties dated 6 March 2023, that he did not have jurisdiction on the basis that he had not been validly appointed. After Surgo had said that it would not accept him as adjudicator on an ad hoc basis, he subsequently resigned. He did, however, indicate

his view in his email that, had he been appointed under the Scheme, Bellway could have validly appointed him as one of its named panel adjudicators, because the reference to the panel in the contract particulars did not fall away and because he did not accept that the panel requirement in the contract particulars offended against the HGRCA.

30. Bellway then made a further reference, again seeking to appoint Mr Cope, but it subsequently accepted that this reference was ineffective because it had sought to refer the dispute before he had resigned in relation to the second adjudication.

The instant fourth adjudication

31. Bellway tried again by way of a further notice to refer dated 13 March 2023. It stated expressly that the dispute was referred under the Scheme, however it also sought to appoint Mr Cope on the stated basis that this was in accordance with the contract particulars. In short, it adopted the course indicated by Mr Cope in his email of 6 March 2023.

32. Unsurprisingly, Surgo objected to his appointment on the basis that its argument that the contract particulars fell away as much as did clause 9.2 because of their non-compliance with the HGCRA. However, in his email of 17 March 2023 Mr Cope maintained his view as expressed in his email of 6 March 2023, with the consequence that he decided that he did indeed have jurisdiction to act as adjudicator in relation to this adjudication. In such circumstances, Surgo participated in the adjudication, whilst maintaining its jurisdictional challenge and reserving its position accordingly.

33. In due course Mr Cope rejected Bellway's claim on the notified sum basis but, having accepted that he could and should undertake a true valuation exercise, made the decision now sought to be enforced.

The Part 8 claim

34. Prior to the above referral, Surgo had indicated in correspondence its intention to issue a Part 8 claim if Bellway sought to refer a claim for repayment based on interim certificate 36 to adjudication. On the same day that Bellway did so Surgo duly issued the Part 8 claim.

35. In the Part 8 claim Surgo sought the following three declarations:

    i) There is no entitlement on the part of Bellway to be paid sums by Surgo on an interim basis as a result of the issuing of the Interim Certificate containing a negative valuation.

    ii) There is no entitlement on the part of Bellway to be paid sums by Surgo on an interim basis as a result of a determination of the true value of the works in relation to the Interim Valuation Date.

iii) To the extent that there has been an overpayment or overpayments made during the course of the works, Bellway is not entitled to be repaid in respect of those overpayments until the issuing of the final certificate, subject to a final reconciliation in accordance with Clause 4.21 of the Contract.

36. Because Mr Cope decided against Bellway on its notified sum claim basis, the first declaration would only have utility if I decided that his decision should not be enforced. To guard against that possibility, and in case Bellway decided to refer the dispute to adjudication yet again, the parties agreed and I endorsed with a minor amendment the following declaration:

> "In relation to interim payments, there is no entitlement on the part of Bellway to be paid sums by Surgo on an immediate (or "smash and grab") basis solely as a result of the issuing of the Interim Certificate containing a negative valuation."

37. Given, however, that I have decided that the decision should be enforced, I am only concerned in the Part 8 claim with declarations 2 and 3.

38. With that summary, I can now turn to the Part 7 summary enforcement claim.

The Part 7 summary enforcement claim

39. This raises the issue whether Mr Cope was validly appointed and, therefore, had jurisdiction to determine the dispute. This requires the Court to determine:

i) Whether clause 9.2.1 of the contract falls foul of the requirements of the HGCRA. Surgo contends that it does, whereas Bellway contends that it does not.

ii) If clause 9.2.1 of the contract falls foul of the HGCRA, does paragraph 9.2.1 of the contract particulars nonetheless apply and, if so, does it also fall foul of the requirements of the HGRA. Again Surgo contends that it does not apply but, if it does, it also falls foul of the HGCRA, whereas Bellway contends that it both applies and does not fall foul of the HGCRA.

iii) If clause 9.2.1 applies and is valid whether Mr Cope, appointed pursuant to the Scheme, had jurisdiction to determine the dispute. Surgo contended in its written submissions that, if Bellway is right as to issue (i) above, then it must follow that Mr Cope was not validly appointed. Notwithstanding this risk, Bellway maintained its case that the contractual adjudication provisions did apply in full. It follows that I must determine issue (i) and, if I agree with Bellway, must also determine the consequences, good or bad so far as the enforcement of its claim is concerned.

Issue (i) – do the adjudication provisions of the contract contravene the requirements of the HGCRA?

40. As to issue (i), Surgo relies first on s.108(2)(a) and (b) of the HGCRA, which provide that: "(2) The contract shall include provision in writing so as to (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication; (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice". Further, and secondly, Surgo relies on s.108(2)(e) which imposes a duty on the adjudicator to act impartially.

41. As to the effect of non-compliance, Surgo also relies on s.108(5), which provides that: "(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

42. Surgo's case is as follows.

43. First, the terms of clause 9.2.1.1 have the effect of requiring Surgo first to seek, and second to obtain, the relevant Bellway adjudicator panel list, and third to approach each of the three members of Bellway's adjudicator panel in turn and to wait up to two days for each to accept or refuse appointment before it can approach RICS as the fallback nominating body. This has the cumulative effect both of preventing Surgo from giving notice of intention to refer at any time and of imposing a timetable which does not secure the appointment of an adjudicator and referral of the dispute to him within 7 days. Surgo says that this non-compliant timetable is recognised but reinforced by clause 9.2.1.2. This amends paragraph 7 of the Scheme which, in its unamended form, provides that where an adjudicator has been selected the referring party "shall *not later than 7 days from* the date of the notice of adjudication, refer the dispute in writing". As amended it reads "shall, *as soon as reasonably possible after*, the date of the notice of adjudication, refer the dispute in writing".

44. Second, the requirement to appoint an adjudicator from a party's list of adjudicators breaches the policy of the HGCRA of having actually and ostensibly impartial adjudicators.

45. Bellway's case as to the first objection is that Surgo is exaggerating the practical difficulties which arise for its own tactical purposes, in circumstances where it was open to Surgo to request the list at any time, whether before the contract was concluded, at any time during the contract, or upon becoming aware of the potential that it might wish to refer a dispute to adjudication. It says that even if Surgo failed to take these elementary precautions, under clause 9.1.1 Bellway clearly had an implied duty of co-operation, and could not refuse or unduly delay to comply with a request for inspection or for a copy without breaching that duty and, if it did, permitting Surgo to proceed straight to RICS to nominate. Bellway also contends that, in the real world, the likelihood of each of the three panel adjudicators not only being unwilling to accept appointment, but also taking two days to do so, is extremely remote. Accordingly, applying a realistic approach, the contract does not offend the requirement that the timetable has the object of securing appointment and referral within 7 days any more than would the same possibility in the case of a request to a nominating body (where the Scheme also contains the same two day period for

indicating willingness – see paragraph 2(2)). Indeed, the amendment to the Scheme has the beneficial effect of preventing a party from losing the right to refer by a delay of no more than a day in referring even where it has acted as soon as reasonably possible and, thus, covers off any remote risk that the operation of clause 9.1.1 might cause such a delay.

46. Bellway's case as to the second objection is that since the Scheme itself, by paragraph 2, permits the parties to specify in the contract a person (or persons – see s.6(3) Interpretation Act 1978) to act as adjudicator, and makes provision for selection by a nominating body in default, it can scarcely be supposed that the provisions in this case offend against the policy of the HGCRA. Since the contract applies the Scheme, save as amended by clause 9.2.1, the obligation to act impartially under paragraph 12 of the Scheme still applies, as does the obligation to declare any financial or other interest in any matter relating to the dispute. Any well-informed person, looking at the contract and the panel of adjudicators at the time of formation of the contract, would not perceive any real possibility of bias in this arrangement. The suggestion that any one of such adjudicators would be prepared to breach their obligation to act impartially due to a venal interest in remaining on the list and securing further appointments thereby would be regarded by such a person as being so remote as to be discounted.

47. As to both points, Ms Conroy refers me to the general statement of principle of Coulson J in *Pioneer Cladding Ltd v John Graham Construction Ltd* [2013] EWHC 2954 (TCC) at paragraph 5, to the effect that any clause which serves to discourage a party from referring a dispute to adjudication is in breach of the HGCRA. That principle is not in dispute. However, the clause in question in that case, and indeed the provisions in question in the previous cases of *Yuanda (UK) Limited v WW Gear Construction Limited* [2010] EWHC 720 (TCC) and *Sprunt Limited v London Borough of Camden* [2011] EWHC 3191 (TCC), to which he referred, were very different in their terms and effect that the provisions in question in this case. The application of the principle to the facts of each case will of course vary according to the particular facts.

48. Mr Kaplan referred me to *William Verry Ltd v North West London Communal Mikvah* [2004] EWHC 1300 (TCC), in which HHJ Thornton QC, sitting as a High Court Judge, observed at [28] that: "The language of section 108(1)(b) is not rigid. It requires that the contractual timescale should have the object of securing the referral of the dispute to the adjudicator within seven days of the adjudication notice. Thus, the statute is setting a minimum requirement for the contract. The contract must allow a referring party, if it chooses, to issue a referral notice within the prescribed seven−day timescale". That seems to me, with respect, to be plainly right, and observes the distinction between a hard-edged requirement and a requirement to secure an objective. There must be some room for flexibility inherent in the latter.

49. Mr Kaplan also referred me to the observation of HHJ Peter Coulson QC in *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC), at [28], made

in the context of clause 41A.4.1 of the JCT standard form 1998 applicable in that case, which included a provision that: "If an Adjudicator is not agreed or appointed within 7 days of the notice the referral shall be made immediately on such agreement or appointment". He said this: "… unlike the Scheme for Construction Contracts, Clause 41A expressly recognises that sometimes, because of the involvement of a nominating body and the delays that that can bring, the adjudicator may not be appointed until after the seven day period has expired. Under Clause 41A that does not invalidate the adjudication; it simply means that the referral notice must be served immediately on the appointment of the adjudicator." There was no suggestion that such a clause was contrary to s.108(2)(a) of the Act.

50. In my judgment Mr Kaplan's submissions are correct, for the following reasons.

51. It is apparent that s.108(2)(b) requires the timetable to have the *object* of securing appointment and referral within 7 days of the notice of adjudication. That clearly envisages that the parties are free to agree that so long as the contract secures that objective it is not fatal that it may not prohibit a period in excess of 7 days. The fact that paragraph 7 of the Scheme requires the dispute to be referred not later than 7 days from the notice of adjudication does not mean that a provision which does not have the same mandatory effect automatically contravenes s.108(2)(b).

52. Read as at the time of contracting, which must include knowledge of the adjudication panel list current at that time, it is apparent in my judgment that the contract does provide such a timetable. There is no good reason to think that all, or indeed most, contractors in Surgo's position would wish to wait until the last minute before even asking Bellway for the relevant panel list. Nor is this a case where the terms of the clause are such as to give rise to a well-justified inference that Bellway would be inclined to delay or otherwise frustrate the process. There is, I am satisfied, an implied duty of co-operation upon which a contractor in Surgo's position could rely, either to enforce compliance or if breached to be free to ask RICS to nominate instead. Finally, it is inherently unlikely that all three named adjudicators would each refuse and would also each take the full 2 days to communicate that decision. The position would be very different if, for example, the list comprised 10 adjudicators, and if each was allowed up to 5 days to respond.

53. There is no reason in my view why the amendment to paragraph 7 of the Scheme should be considered objectionable. The parties are still subject to the obligation to refer the dispute as soon as reasonably possible and, anyway, it is in the referring party's interests to do so.

54. As to the argument based on there being a justified perception of ostensibly impartial adjudicators, that submission faces the difficulty that the parties are free to agree in their contract that one or more identified persons should act as adjudicator and to include provision for a specified nominating body in default. In Sprunt the vice identified by Akenhead J was that under the contract the employer was entitled to nominate the adjudicator at the point when the dispute arose and, thus, in his view

there was a perception that it might be inclined to select an adjudicator who might either favour its interests or otherwise deter the other party from adjudicating in the first place (the example he gave of the latter was by selecting a very expensive adjudicator for a very small scale dispute). Whether these objections were sufficiently cogent to justify the decision in that case is not for me to consider. In this case, by contrast, the panel adjudicators were identified at the point of contracting and were all well-respected and independent adjudicators, with no links either to Bellway specifically or to employer or property developer organisations more generally, and no other characteristic which might dissuade a contractor such as Surgo from appointing them. There is no basis for any suggestion that any informed person would have considered that any of them would be inclined to depart from their well-known duty of impartiality when acting as adjudicator. The only evidence which is actually available, which is that volunteered by Mr Cope, indicates that his limited frequency of previous appointment as an adjudicator in cases involving Bellway could not sensibly have given rise to any perception that he would have been swayed in his decision by any perceived desire to obtain a steady stream of lucrative appointments from cases where Bellway was employer.

55. It follows in my judgment that the bespoke contract terms were not contrary to the requirements of the HGCRA or to the policy underlying the HGCRA, so that they applied in full.

56. It also follows in my judgment that the challenge to the appointment of Mr Cope fails.

Issue (ii) – paragraph 9.2.1 of the contract particulars

57. Given my conclusion above, I do not need to deal with this question. If I did, I would have concluded as follows.

58. First, that in my view paragraph 9.2.1 of the contract particulars does not, on a proper reading, survive independently of clause 9.2.1 of the contract, if that was indeed objectionable. The contract particulars are intended to identify in one convenient place specific documents or selections applicable in relation to specific recitals, articles and contract conditions. The standard form version of the contract particulars as regards clause 9.2, adjudication, envisages that if there is a specified adjudicator or specified nominating body they should be identified as such in the relevant section of the contract particulars. Here, the standard form of clause 9.2.1, which provides that any such person or body is as stated in the contract particulars, has been replaced with the bespoke version of clause 9.1.1 already discussed. All that paragraph 9.2.1 of the contract particulars does is to identify the person and the body. In short it does not, in my view, on an objective reading have any independent effect nor, therefore, can it survive the removal of clause 9.1.1 if that was held to offend against the HGCRA.

59. Second, even if that was wrong, I am satisfied that the clear and consistent line of authority, summarised by Sir Peter Coulson in *Coulson on Construction Adjudication* 4th edition at paragraph 4.12, is that in such a case the adjudication provisions of the Scheme are brought in "lock, stock and barrel" and, for good policy reasons, all of the

existing contractual provisions relating to adjudication fall away, so that the parties and the court are not left to grapple with the potentially thorny question as to the extent to which the latter might be said to survive the incorporation of the Scheme.

60. Thus, I would have found against Bellway on this point had I needed to decide it.

Issue (iii) – did Mr Cope, appointed pursuant to the Scheme, have jurisdiction to determine the dispute?

61. Given my finding in relation to issue (i) I must engage with this issue.

62. In her submissions on this point Ms Conroy invited me to apply the overarching principle identified in *Coulson on Construction Adjudication* at paragraph 7.57: "The overarching principle… is that a notice of adjudication, with a purported nomination made under a contractual provision or legislative power which, on a correct analysis does not apply, is invalid."

63. She referred me to the judgment of Edwards-Stuart J in *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC) and his conclusion at [60], following his analysis of the decision of the Court of Appeal in *Pegram Shopfitters v Tally Weijl* [2004] 1 WLR 2082, that: "The jurisdiction of the adjudicator derives from the agreement of the parties, as reflected by the terms of the contract they have entered into. An adjudicator cannot be validly appointed under a contractual provision that does not in fact exist. He or she would have no jurisdiction to take up appointment and, in consequence, any decision that he or she might make would not be capable of enforcement".

64. This vexed topic is the subject of full discussion in *Coulson on Construction Adjudication* at paragraphs 7.49 to 7.65 under the heading "*Was the Appointment in Accordance with the Contract?*". After referring to the *Twintec* case, Sir Peter referred to other decisions, including his own decision in *Dalkia Energy and Technical Services Ltd v Bell Group UK Ltd* [2009] EWHC 73 (TCC). He observed that in that case "there was no dispute that there was a written construction contract between the parties, so there was no dispute that an adjudicator would have had to have been appointed, whether under the Dalkia conditions or under the Scheme. In such circumstances, the adjudicator's decision as to whether or not a particular set of contract conditions were incorporated or not was part of the dispute properly referred to him and was a matter with which the court could interfere on enforcement[1]".

65. He then referred to the decision of HHJ Havelock-Allan QC sitting as a High Court Judge in *Ecovision Systems Ltd v Vinci Construction UK Ltd* [2015] EWHC 587 (TCC). As he said at 7.38: "More widely, *Ecovision Systems* is important because the judge concluded that the adjudicator has no power to determine what rules of adjudication might apply if there was a dispute about the rules, and the dispute made a

[1] On my reading of the judgment: (a) the reference to the *Dalkia* conditions should be a reference to the *Bell* conditions; and (b) what Coulson J held was that this issue was not a matter with which the court could interfere with on enforcement but was a matter which the court could and should address on the Part 8 claim which was before him in that case.

material difference to the procedure of appointment, the procedure to be followed in the adjudication, or the status of the decision". This is a reference to paragraphs 70 and 71 of the judgment in that case.

66. After referring to two further decisions of Edwards-Stuart J, neither of which take the matter further so far as the current issue is concerned, he then referred at paragraphs 7.61 and 7.62 to the decisions of Stuart-Smith J in *Purton (t/a Richwood Interiors) v Kilker Projects Ltd* [2015] EWHC 2624 (TCC) and *RMP Construction Services Ltd v Chalcroft Ltd* [2015] EWHC 3737 (TCC). He concluded, at paragraph 7.63, to suggest that what Stuart-Smith J had said at paragraph 50 of *Chalcroft* was a "useful summary of this entire area of law", which was as follows:

> "The distinction between jurisdictional challenges to enforcement and challenges alleging substantive error suggests that the issue in this case should be approached in two stages. The first question is whether the Adjudicator had jurisdiction. The answer to that question is that he did, on any contractual route being proposed by either party. He had jurisdiction and was to be appointed under the Scheme, on any contractual route being proposed by either party. That distinguishes the present case from *Pegram*. Chalcroft's only point on jurisdiction is that RMP has not properly identified the contract that gives rise to the Scheme route to jurisdiction. This objection is similar to but not precisely the same as the objections being raised in *Purton*. …"

67. At paragraph 7.64 he recorded that Stuart-Smith J continued at paragraph 51 in *Chalcroft* to say that "although it might be linguistically and even technically correct to describe Chalcroft's various alternative formulations as different contracts from the contract alleged by RMP, that difference should not be determinative in circumstances where the court was concerned with one contracting process, with the only question being which party had correctly identified where in that process the relevantly binding contract was formed. Stuart-Smith J had said that where it was agreed that each of the alternatives was sufficient to found jurisdiction under the identical route of the Scheme, it was a return to the formalistic obstacle course identified in *Purton* to rule RMP out of court because it may have misidentified the contractual provisions that would give the adjudicator jurisdiction under the Scheme. In arriving at that view, Stuart-Smith J bore in mind that the adjudication system was meant to provide quick and effective remedies, equally accessible to those who are legally represented as to those who are not, and that the system now covered both written and oral contracts, which increased the likelihood that contracts might be mis-described. Finally, at paragraph 7.65, he described that as a "pragmatic approach", which had been echoed in two subsequent decisions of Fraser J, but concluded that "it must be remembered that, ultimately, the identification of an appropriate construction contract is required in order that the adjudicator has the necessary jurisdiction".

68. In my judgment, what these cases and what this analysis in the textbook demonstrate is that it is always necessary to consider with some care the particular issue arising in the particular case and to see whether or not the identification of the correct

contractual provisions makes a substantial difference as regards the proper contractual basis of jurisdiction, the proper contractual basis of appointment and the proper contractual procedure for the conduct of the adjudication. If it does not, then a defence on these grounds should be rejected as inconsistent with the policy of the HGCRA to provide quick, effective and accessible remedies.

69. Applying these principles, the position in my view so far as this case is concerned is as follows.

70. There was never any dispute between the parties as to the applicable contract. The only possibilities were that the applicable adjudication provisions were either of the following three options: (a) the contractual adjudication provisions, namely the Scheme as amended by clause 9.2 and the contract particulars (as Bellway had initially contended); (b) the Scheme as amended only by the contract particulars (as Mr Cope had concluded in the second adjudication and as Bellway had contended in the instant adjudication); or (c) the Scheme as unamended (as Surgo had always contended).

71. The only material difference between the options in the context of the dispute which had arisen in this case was whether or not the adjudicator was to be selected via the contractual provisions, whether under clause 9.2 and under the contract particulars or under the contract particulars alone (i.e. in each case from one of the Bellway panel and in default by RICS nomination) or via any nominating body under the Scheme. Whether Bellway's initial view was right (as I have held) or Mr Cope's view (as subsequently adopted by Bellway) was right made no material difference to that outcome, as Mr Cope would have been appointed under the contractual provisions in any event. It would only be if Surgo was right that there would be a material difference, because that would prevent an adjudicator being appointed from the Bellway panel.

72. Although the contractual provisions also contained a provision making an amendment to paragraph 7 of the Scheme and a new paragraph 27, those provisions made no material difference to the dispute referred in this case or to the validity of the appointment of Mr Cope. Whilst it might be said that the amendment to paragraph 7 might make a potential difference to the validity of the appointment, in the hypothetical circumstances that the referral took place more than 7 days from the notice of adjudication but nonetheless as soon as reasonably possible, I would not be prepared to accept that this made a material difference to the appointment of the adjudicator, given that this was not the position as at the point in time when Mr Cope was in fact appointed.

73. In summary, what I have now found is that, on a proper analysis, Bellway was correct from the outset and that it was entitled to refer the dispute under the contractual provisions. As already explained, it made no material difference in this case whether the referral was under the contractual provisions, as it should have been, or under the Scheme and the contract particulars, as it was made.

74. It follows, in my judgment, that Surgo cannot now resist enforcement on the grounds that, given my findings, Bellway should not have referred under the Scheme and contract particulars but solely under the contract provisions. Either alternative would lead to the same result, namely Mr Cope having jurisdiction.

75. It follows that in my view there is no defence to enforcement of the decision.

76. For completeness, had I needed to decide the point I would not have felt able to accede to Mr Kaplan's alternative submission that Surgo had agreed to an "ad hoc" adjudication under the Scheme through Surgo having advanced a consistent case that the Scheme applied. Surgo had always made clear that its case was that the Scheme applied and that no part of the contractual adjudication provisions applied, so that no member of the adjudication panel could be appointed by Bellway under that procedure. There was no question of Surgo ever agreeing that Mr Cope had been validly appointed as adjudicator under the Scheme.

The Part 8 declarations claim

77. As I have said, the first declaration only arises if I decided that the decision should not be enforced. Since I have decided that it should be enforced, it is now superfluous. However, in case my decision on enforcement is the subject of a successful appeal, I will make the declaration in the agreed terms.

78. As to the remaining declarations, it is common ground that, since this is a Part 8 claim, it is not enough for me to decide whether or not the adjudicator had jurisdiction to order Surgo to pay the amount he decided was due to Bellway. Surgo does not dispute his jurisdiction to do so. Instead, what I am required to decide is the substantive question as to whether or not Mr Cope was entitled, as a matter of substantive law, to order Surgo to pay such sum, in circumstances where it represented his assessment of the difference between the true valuation of the works as at 30 January 2023 under interim payment cycle 36 and the amount which Bellway had been compelled to pay under adjudication 1 in respect of Surgo's notified sum entitlement under interim payment cycle 29.

79. In summary, Ms Conroy submitted that: (1) nothing in the standard payment provisions or the general law confers such a right upon Bellway; (2) bespoke clause 4.9A does not, properly construed, give Bellway an entitlement to recover via a subsequent interim payment cycle an overpayment made under an earlier interim payment cycle, because the words "at any time" (see paragraph 19 above) refer to the time when any overpayment was made, rather than the time when the employer is entitled to recover such an overpayment and because, unlike bespoke clause 4.21.4, it does not provide a mechanism for repayment; and (3) the decision of the Court of Appeal in *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 ("*Grove*") does not permit Bellway to overcome this difficulty by relying on Sir

Rupert Jackson's conclusion at paragraph 100 that an adjudicator has the right to order repayment as a "dispositive remedy" consequent upon his valuation exercise.

80. In summary, what Mr Kaplan submitted was that: (1) Bellway is entitled to recover the overpayment on the basis of the dispositive remedy identified in *Grove*, in particular pursuant to the analysis of the relationship between what Sir Rupert described as the payment bargain and the valuation bargain, and regardless of the terms of the contract in question; (2) whilst Bellway does not need to rely on the bespoke terms of the contract to achieve this outcome, in fact on a proper construction they support Bellway's case. I will address the second point first.

The true construction of the payment provisions in question

81. The now well-known general principles of contractual interpretation can be found in many recent decisions but, at Supreme Court level, most helpfully in *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619 (particularly per Lord Neuberger at paragraphs 15 to 23) and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [1017] A.C. 1173 (particularly per Lord Hodge at paragraphs 8 to 15). There is no need for me to attempt my own summary or refer to the many summaries both at first instance and at appellate level since.

82. Ms Conroy's starting point is that, leaving aside the bespoke provisions for the time being, there is nothing in the standard provisions which suggests that an overpayment on one interim payment cycle can be recovered under a subsequent interim payment cycle and, indeed, on a proper analysis such right is impliedly excluded.

83. In my judgment:

i) clauses 4.8 and 4.9 do envisage that the interim payment procedure will result in a payment being due to the contractor, not surprisingly since this will obviously be the position in the great majority of cases, however the process mandated in clause 4.9 does not exclude the possibility that an interim payment will be in a negative amount;

ii) clause 4.12.5 does provide some support for Surgo's case, because it envisages that contractor will only need to give a payless notice where a final – as opposed to an interim - certificate shows a balance due to the employer;

iii) clause 4.21.2 also provides some support for Surgo's case, because the specific reference to a balance due from the contractor to the employer only appears in the context of the final account stage.

iv) I would not, however, accept that the wording of clauses 4.12.5 and 4.21.2 compels the conclusion that no interim payment may show a balance due to the employer. In my judgment the standard provisions are equivocal, although as I have said I accept that they do provide some support for Surgo's case.

84. What about clause 4.9A? A number of points may be made.

i) First, the opening words "for the avoidance of doubt" indicate an intention to make clear what may be thought was arguably unclear from the remainder of the contract.

ii) Second, it appears unlikely that the right to recovery of overpayments made is intended to apply only in relation to the final account stage. On the clear wording of the rest of the contract – indeed on the very clauses 4.12.5 and 4.21.2 relied upon by Surgo – the employer plainly has this right anyway at final account stage.

iii) Therefore, it seems clear to me that the words "at any time" are intended to make clear that this entitlement is not limited to final account stage and applies also to interim payment stages as well. Indeed, inserting this bespoke clause in a section dealing with interim payments reinforces this conclusion.

iv) In my judgment it is inherently unlikely that the words "at any time" are intended to refer to the time at which the overpayments are made, because again that would add nothing if the only time at which they could be recovered was final account stage.

85. I would accept that the final sentence ("All interim payments made to the contractor are payments on account only of sums due under the Contract") is seeking to make clear that what is finally due under the contract will be finally determined at final account stage and, if applicable, any dispute resolution procedure undertaken subsequently. However this, in my judgment, is simply there to emphasise that interim payments are only payments on account which, thus, justifies the employer's entitlement to recover overpayment at any time should there be proper justification for so doing.

86. In short, in my view clause 4.9A provides powerful support for Bellway's case that the contract terms, as amended, recognise and confirm Bellway's right to recover overpayments made at interim payment stage at any time, whether under a subsequent interim payment stage or at final account stage.

87. Ms Conroy submits that this conclusion is inconsistent with the other bespoke clause 4.21.4, which introduces an express provision for recovery of an overpayment as a debt at final account stage. She submits that these clear and express words make plain that it is only at final account stage that the right to recover an overpayment made "during the course of the works" is explicitly provided for, by way of debt. However, that analysis does not seem to me to sit well with the other contractual provisions already referred to.

88. First, under the final certificate procedure wording of this clause, as I observed in argument, the final certificate would already be net of sums already included in interim certificates, so that any overpayment would already be included in the interim certificate and, if it produced a balance in the employer's favour, would already represent a "balance due to the contractor from the employer or vice versa (clause 4.21.2). It follows, in my judgment, that clause 4.21.4 is directed to something

different which, by its express words, involves an adjustment to the final certificate in circumstances where the employer (and not the contract administrator, who issues the final certificate) considers "for whatever reason" that the contractor has been overpaid. This, therefore, seems to give the employer a further right which is not provided for by the remainder of the contract.

89. Second, the closing words ("and for the avoidance of doubt …") again seem to me to make it clear that the adjusted specified sum is, if it results in a negative amount, a debt (or balance) due to the employer as already provided for in relation to the non-adjusted sum.

90. Thus, whilst I am prepared to accept that clause 4.21.4 is not a masterpiece of clarity, it does not on a true analysis persuade me away from the view I have already reached as to clause 4.9A. In the circumstances, I would accept that as a matter of contract construction alone Bellway is right in its case on this point.

General principles

91. It is also worth considering some of the textbooks and some of cases before *Grove*, insofar as they shed any light on the wording of the contractual clauses or indeed on *Grove* itself.

92. *Keating on Construction Contracts* 11th edition says this at [5-017]: "Where negative interim certificates are issued their validity and effect will depend on the express terms of the contract. Some standard forms contemplate such certificates: see, for instance, Cl.51.1 of the NEC4 Form, Cl.50.2 of the NEC short form contract and consequent upon termination pursuant to Cl.8.12.5 of JCT Intermediate Form 2011. In the absence of any express provision, it is thought unlikely that a negative certificate would create an obligation on the contractor to pay a sum to the employer. In appropriate cases, if an interim certificate contained an overpayment, the employer could seek to reopen and revise that certificate and obtain reimbursement of the excess by way of an adjudicator's decision, a judgment of the court or award of an arbitrator. In many cases, any negative certificate will in practice simply be taken into account by reducing sums due in subsequent certificates when the contractor continues to carry out work which properly falls to be included in later certificates".

93. I have referred to the various cases cited in this paragraph but none, so far as I can see, include any statement of general principle, so that the views expressed appear to be those of the editors as to the general principles which do, nonetheless, command respect.

94. *Hudson's Building and Engineering Contracts* 14th edition says this at [4-012]: "In principle it is possible for negative certificates to be issued, particularly in the case of certificates of valuation. However, the contract may prohibit such certificates in certain circumstances or permit them only in specified circumstances thereby, perhaps, by implication prohibiting them in other circumstances."

95. Again, the view expressed appears to be those of the editors as to the general principles which again, however, command respect.

96. Finally, *Emden's Construction Law* says this at [6-154]: "Sometimes sums are paid against interim certificates, and it subsequently appears that the works have been over-valued and too much has been paid. In this situation recovery of the overpayments can usually be made by deduction from subsequent certificates. The opportunity for deduction may not occur if the contract is prematurely terminated. Where a contract was terminated owing to the contractor's insolvency, the employer tried to recover an interim payment on the ground of total failure of consideration or on the ground of mistake of fact, the mistake being the incorrect belief that the works would be completed. It was held that there was not a total failure of consideration, because work had been done and materials supplied, and the contract was not to be regarded as 'entire'. It was also held that the payment had not been made under a mistake of fact: it had been made pursuant to the contract and there was no mistake as to the facts existing at the time of payment. Where a contract ends by repudiation, existing rights and obligations remain in existence. These include the right on the part of an employer to recover an overpayment made before the repudiation. An employer's repudiation does not relieve the parties of an analysis of the value of the works and does not freeze the contractor's entitlement to payment at the amount already received. Similarly, the employer remains entitled to recover any overpayments on the basis that the sum paid includes sums which were paid under temporarily binding adjudicator's decisions which on a final basis can be proved not to be due."

97. The first case referred to is the decision of HHJ Newey QC in *Tern Construction Group Ltd (in Administrative Receivership) v RBS Garages Ltd* (1992) 34 Con LR 137. It turns on its own facts and the arguments, which might fairly be said to be ambitious, advanced by the defendant and rejected by the judge. It is however of some interest insofar as the judge said that whilst the arguments raised by the defendant were rejected he accepted (at p.146) the submissions made by counsel for the defendant (Ms Jefford) at p.144 that the interim certificates could be the subject of review by him (acting as arbitrator, under the power conferred by the contract upon the court) so as to take account of defects in the contractor's performance.

98. The second and third cases referred to are both decisions of Fraser J, *ICI Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC) and *J&B Hopkins Ltd v Trant Engineering Ltd* [2020] EWHC 1305 (TCC).

99. In the former, in an analysis referred to by Sir Rupert in *Grove*, Fraser J posed the question as to whether an employer could recover any balance of interim payments made to a court following on a repudiation by the employer. He addressed the question first by reference to the contractual provisions which applied in that case, which are not the same as those which apply here, and concluded at [212] that "the accrued rights which ICI had under the contract as at 17 February 2015 include the right to recover any [part of any interim] payment already made to MMT that was an

overpayment, meaning a payment in excess of MMT's entitlement for the works it had executed". This part of the judgment did not in my view, contrary to Ms Conroy's submission, depend on the particular terms of the contract in that case.

100. He then turned to consider the non-contractual route of restitution. Although his observations in that respect were obiter dicta, and although his observations as regards the restitutionary route were cautious, nonetheless he accepted that: (a) previous decisions had established that a restitutionary claim could be pursued using an apportionment approach; (b) the reasoning of the Supreme Court in *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38 justified the same conclusion where the claim involved recovery of sums paid under an adjudicator's decision – as is the case here in that the decision of Mr Cope represented a true value determination of the value of the works undertaken by Surgo, including the works the subject of its successful notified sum claim in adjudication no. 1.

101. This approach was endorsed by Coulson J at first instance in *Grove*.

102. In the latter case the judge, referring to the decisions at first instance and on appeal in *Grove*, said at [24] that: "… 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 …"

103. In my judgment these observations in the textbooks and the decisions of Fraser J and Coulson J provide support for the proposition that both a court and a (validly appointed) adjudicator may, subject always to any contrary provision in the contract in question, undertake what is a true valuation assessment of sums included in an interim payment, whether specifically in relation to that interim payment or in relation to a subsequent interim payment, and, to the extent that they conclude that the interim payment was overstated and that the employer has overpaid, order or decide repayment of that overpayment, either under the terms of the contract, express or implied, or by way of restitution applying the principle of apportionment or applying the decision in *Aspect v Higgins*.

104. In her supplementary submissions Ms Conroy submitted that the authorities referred to in *Grove*, to which she referred in impressive detail, demonstrate that:

    i) The authorities arise out of an employer's failure to protect itself by issuing the relevant notice in a particular interim payment cycle or at final account stage. Accordingly, they are all decisions where a notified sum has been paid and the employer is seeking to mitigate against that payment by obtaining a true value decision in its favour.

    ii) Some of the authorities do suggest that the effect of payment of the notified sum can be mitigated against in subsequent payment cycles. This arose

because of the line of authorities that determined that an employer was bound to the value in the payee's notice for that payment cycle in the absence of issuing its own notice.

iii) However, the authorities do not provide any guidance as to whether this means that an employer is entitled to a repayment at interim stage and if so, on what basis.

iv) The authorities do make clear that there has to be a contractual basis so as to allow a party to recover sums on an interim basis.

105. It is unnecessary to lengthen this judgment by examining each of the authorities referred to. Whilst I accept in general terms Ms Conroy's summary I would also make these two points.

i) As to her point (ii) I do not agree that the reason for the reference in some of the authorities to overpayments in one payment cycle being put right in subsequent payment cycles was because of the line of authority exemplified by *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC) 545, which was regarded as wrongly decided in *Grove*. I refer for example to the judgment of Jacob LJ in *Rupert Morgan Building Services (llc) Ltd v Jervis* [2003] EWCA Civ 1563 at paragraph 14: "… If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings".

ii) As to her point (iv), the authorities establish that there must be a contractual basis or a restitutionary basis; either will suffice.

106. Turning then to *Grove* itself in the Court of Appeal, the key paragraph for present purposes is [100], in which Sir Rupert accepted the analysis that: "If an adjudicator finds that the employer has overpaid at an interim stage, he can order re-payment of the excess as the dispositive remedy flowing from the adjudicator's re-evaluation", saying that: "I agree with that analysis. The parties have agreed (albeit under statutory compulsion) that the adjudicator should have jurisdiction to deal with disputes between them, including any dispute concerning the correct valuation of work under clause 4.7. Having determined the true value of the works at an interim stage, the adjudicator (whose powers are co-extensive with the powers of the court in matters such as this) must be able to give effect to the financial consequences of his decision."

107. In my judgment this is not the same, as Ms Conroy submitted, of granting substantive relief on the back of declaratory relief, without identifying a legal basis for that relief, which was said to be wrong in *Aspect v Higgins* at paragraph 20. Instead, it is a recognition that, on a proper construction of the HGCRA and the terms which it requires a construction contract to include, the adjudicator has jurisdiction to undertake a true value adjudication at the instance of the referring party once it has paid a notified sum adjudication, in the same way as a court would also have such

jurisdiction to do so. It follows that the adjudicator is doing so on the basis that the referring party has a substantive legal entitlement to the true value determination and, therefore, to repayment to the extent that it succeeds in establishing a repayment, as would the court in an equivalent situation. On the basis of the authorities, that substantive legal entitlement arises as a matter of construction of the contract in question and/or on the basis of a restitutionary right, applying the analysis of Fraser J in *ICI Ltd v Merit Merrell*.

108. It is only fair to acknowledge that Sir Rupert did not deal in terms with the question of whether or not there was an implied term or a restitutionary basis, because he did not need to do so. However, it might be thought unlikely that he would have reached the conclusion which he did had he concluded that there was no substantive legal basis for the adjudicator undertaking that exercise. Indeed, his reference to the adjudicator's powers being co-extensive with the powers of the court in relation to determining the true value of the works at the interim stage strongly indicates that his conclusion was that the court had such powers and that those can only have derived from some substantive legal basis for doing so. In that regard I note that his footnote 2 in this part of his judgment refers to the earlier decisions of *Beaufort Developments (NI) Ltd* [1999] 1 AC 266 and *Henry Boot Construction Ltd* [2005] 1 WLR 3850 which he had discussed above (see paragraphs 62 and 63 of his judgment), and which in my view support this analysis.

109. I do accept that I must be cautious of treating some of the decisions to which I was referred, which only deal with the enforceability of an adjudicator's decision where all that is necessary is to conclude that he has jurisdiction to determine the issue, as if they were decisions on the substantive entitlement which a party has as a matter of law to seek and obtain a true value revaluation of amounts included in an interim certificate repayment prior to final account stage and to obtain a repayment of any overpayment, which is the issue here.

110. However, nonetheless the authorities to which I have referred make it clear in my judgment that, unless there is something in the terms of the contract or some particular feature of the case militating against, the general principle is that there is a right to repayment in such circumstances, whether by way of express or implied term or restitution, and whether there has already been a notified sum and/or a true value adjudication or not, and whether the issue arises within the same interim payment cycle or a later interim payment cycle. In my judgment this is consistent with the general principle, implicit in the typical building contract even if not express, that interim payments are only payments on account and any overvaluation can and should be corrected and any overpayment reclaimed, either in subsequent interim payment cycles or at final account stage including, if necessary, by a true value determination by any tribunal with jurisdiction to do so, which includes a validly appointed adjudicator and a court.

111. The general proposition, which I accept, is that both an adjudicator and the court has, in all such cases, jurisdiction to determine the question as to what, on the merits, is the

true entitlement of a party under an interim certificate and to order payment or repayment as the case may be if that is different from the amount stated in any interim payment and required to be paid under the terms of the contract and, if such be the case, under the decision of an adjudicator.

112. From a practical perspective, no doubt, it is the availability of adjudication as a speedy dispute resolution option which has meant that it is feasible for parties to engage in such an exercise, because it would normally be difficult to persuade a court to order expedition at the expense of other litigants. However, that does not affect the general proposition that either may do so and, it follows, in my view, that Mr Cope was both entitled and right to do so in his decision having made his determination on the merits. In my view he was right to do so as a matter of a proper analysis of the relevant express terms of the contract, as a matter of the terms which would fall to be implied in a case such as this if, contrary to my first conclusion, the express terms were not clear anyway, and/or as a matter of restitution.

113. In the circumstances I do not consider that Surgo is entitled to the declarations sought in paragraphs 27.2 and 27.3 of its Part 8 claim.

[end]