Neutral Citation Number: [2023] EWCA Civ 54

Case No: CA-2022-000848

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS ANS PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mr Justice Eyre
[2022] EWHC 1186 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2023

Before:

LADY JUSTICE KING
LORD JUSTICE COULSON
and
LORD JUSTICE POPPLEWELL

- -

Between:

A & V Building Solutions Limited	**Appellant**
- and -	
J & B Hopkins Limited	**Respondent**

- -
- -

Charles Edwards (instructed by **Direct Access**) for the **Appellant**
James Frampton (instructed by **Hawkeswell Kilvington Limited**) for the **Respondent**

Hearing date: 17 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1. Introduction

1. This appeal raises issues arising out of the parallel jurisdictions of a construction adjudicator, on the one hand, and the courts, on the other. It also raises a number of discrete points about the proper interpretation of the Sub-Contract agreed between the parties. One curious feature of the case is that, although between January and April 2022 the appellant ("AVB") was in possession of an adjudicator's decision in their favour, the sum due in consequence was never paid by the respondent ("JBH"), and the judgment of Eyre J ("the judge"), given *ex tempore* on 12 April 2022 and granting various declarations in favour of JBH, barely made any reference to the adjudicator's decision at all.

2. Since permission to appeal against the judge's order was granted, there has been a second adjudication which was resolved in favour of JBH. AVB did not pay the sum identified by the second adjudicator. The hearing of the enforcement application in respect of the second adjudicator's decision was due to take place after the hearing of this appeal but, for our purposes, it is sufficient to note that, on the face of it, the second decision means that no sums are now due to AVB. That confirms that this appeal is academic from a financial point of view, and one can only lament the costs that have been incurred to achieve such a stalemate. One thing, however, is clear: the guiding principle of construction adjudication, namely 'pay now, argue later', has been comprehensively ignored by both parties in this case. How that happened, and how it is to be avoided in future cases, forms another element of this judgment.

2. The Sub-Contract

3. JBH were the main mechanical and electrical contractors on the Moulsecoomb University Project, in Sussex. Pursuant to a written Sub-Contract dated 18 December 2019, JBH engaged AVB to carry out certain mechanical and electrical engineering works at the site. The Sub-Contract sum was £368,000.

4. It is only necessary to set out a few of the general terms, which were in JBH's own standard form. Clauses 9.1-9.8 were concerned with interim payments. Clauses 9.1-9.4 provided as follows:

> "9.1. The Sub-Contractor shall be entitled to payment by instalments.
>
> 9.2. It is a condition precedent to payment that the Sub-Contractor shall make monthly applications ("Interim Application") for payment to the Contractor on the dates specified in Appendix 6. Such applications for payment must specify the sum that the Sub-Contractor considers to be due to him and the basis on which that sum has been calculated identifying:
>
> (1) The total value of the work properly executed (including the value of any materials or goods intended for incorporation into the works in a priced Schedule format provided the same had been delivered to or adjacent to the site); and

> (2) Variations, if any, carried out pursuant to clause 8 of this Agreement itemised separately and fully substantiated and costs referenced to instructions issued; and
>
> (3) Any other amounts properly due to the Sub-Contractor under this Agreement.
>
> 9.3. The payments shall be in accordance with Appendix 6.
>
> 9.4. Interim payments shall be due at regular intervals calculated from the date when the first payment was due. The final date for payment shall be in accordance with Appendix 6"

5. This case is concerned with the interim payment application which, in the Sub-Contract at least, was designated as number 17. The relevant entries in Appendix 6 were as follows:

	(A)	(B)	(C)	(D)	(E)	(F)
Application No.	Date which Sub-Sub Contractors to Issue Application to J&BH	The Valuation Date	Due Date as Required by Construction Act	Payment Notice Date	Notice to Pay Less	Final Date for Payment
17	21/03/2021	31/03/2021	14/04/2021	19/04/2021	03/05/2021	05/05/2021

It is clear that each of the dates in column A were mechanically calculated, in that they were always 10 days before the valuation dates in column B, which were in turn always the last day of each month.

6. In essence, these various dates (which were required by the complexities of the amendments to the *Housing Grants (Construction and Regeneration) Act* 1996 ("the 1996 Act")) suggested the following timetable. AVB would make interim payment application number 17 on 21 March 2021. The valuation date was 31 March. JBH would respond, indicating their valuation by way of a Payment Notice, on 19 April 2021. If JBH wished to serve a Payless Notice they had to do so by 3 May 2021. The final payment date was 5 May 2021.

7. Appendix 6 went on to provide as follows:

> "In the event that Interim Payments become due beyond the dates set out in the schedule above then the Due Dates shall continue to occur at the same intervals as set out above and dates for submission of applications, valuations, Payment Notices, Pay Less Notices and Final Date for Payment shall occur at the same time from the Due Date as for every month as set out above.
>
> For the avoidance of doubt if applications are not received from the Sub-Contractor 7 days prior to the Valuation Date then the Sub-Contractor shall not

> be entitled to any payment, whether or not a payment notice is served by the Sub-Contractor until the procedure set out above is repeated in relation to the next Valuation Date."

8. Reverting to clause 9 of the Sub-Contract, there were detailed provisions as to the content of the Payment Notice and the Payless Notice at clauses 9.5-9.7. It is unnecessary to set those out because no part of the appeal turns on them.

9. Other relevant parts of JBH's standard sub-contract terms include:

(a) Clause 20.3, which provided that "the decision of the adjudicator should be binding until it is found to be finally determined by legal proceedings or by agreement".

(b) Clause 23.1, which dealt with illegality and waiver. That provided that:

> "23.1. No waiver by J & B Hopkins of any breach of the Sub-Contract by the Sub-Contractor shall be a waiver of any subsequent breach of the same or of any other provision of the Sub-Contract. No failure by J & B Hopkins to exercise any right or remedy arising under the Sub-Contract or at law shall be a waiver of its right to exercise such rights arising subsequently."

(c) Appendix 5, paragraph (5)(b), which set out "the normal Working Hours for the site" indicated that, on Sunday, the site was "closed". That was confirmed in the pre-order meeting minutes (also a contract document), dated 19 September 2019, at paragraph 9.11.

3. The Factual Background

10. The works did not go smoothly and there were disputes between the parties. On Monday 15 March 2021, AVB sent JBH its interim application number 13, setting a value for the works carried out in the gross sum of £520,890 and net amount claimed of £106,619.10.

11. On Monday 22 March 2022, AVB sent JBH its interim application number 14. The application itself was dated the previous day, 21 March 2021, which was a Sunday. Application 14 showed a gross value of the works of £601,000 and a net amount due in the sum of £211,773.60.

12. On 1 April 2021, JBH responded to interim application 14. The first paragraph of their email read:

> "Please see attached our initial summary of your application number 14 dated 21/3/21 and issued 22/3/21. We note that you have issued two applications for the period, the first being application 13, dated and issued 15/3/21 are we to assume number 14 supersedes the aforementioned application 13?"

13. The email of 1 April then went on to detail the areas of dispute raised by application 14. It concluded:

> "A full and formal sub-contract payment or payless notice should be issued in due course and in accordance with the dates set out within appendix 6 of the Sub-contract."

The valuation attached to the email indicated that JBH considered, as at the date of interim application 14, that no further sums were due to AVB, who on JBH's case had been overpaid.

14. On 16 April 2021, JBH sent AVB a "sub-contractors payment certification". Despite that title, the covering email described it as payment notice 14 and it is clear that the document was intended to be a Payment Notice under clause 9.5. It related specifically to application 14. The covering email said that "comments made within the attached email dated 1 April 2021 [paragraphs 12 and 13 above] remain and as such have been reflected within the formal payment notice". This certificate indicated that, on JBH's valuation, AVB had been overpaid in the sum of £68,946.25. There were subsequent discussions and correspondence between the parties between April and November 2021 concerning AVB's claim based on application 14, but they did not lead to a resolution of the dispute.

15. Throughout this period, JBH apparently treated application 14 as having been validly made: the dispute was on the detail. On 12 October 2021, a dispute having arisen in respect of application 14, AVB's consultants wrote indicating that, if the sum due was not paid, they would commence adjudication. In their reply dated 19 October 2021, JBH's solicitors asserted, for the first time, that application 14 was not served in accordance with the provisions of the Sub-Contract. The letter did not explain how or why that was the case. At no time prior to the commencement of the first adjudication did JBH expressly take the point that application 14 was invalid because it was issued one day late.

16. On 17 November 2021, AVB commenced adjudication proceedings seeking a net payment of £211,773.60 plus VAT, interest and fees, based on application 14. JBH's submission that application 14 was provided one day late was first expressed in their solicitors' letter dated 26 November 2021, after the adjudication had commenced.

17. In my view, this first adjudication was made more complicated than it needed to be, in particular because JBH's solicitors raised a number of unmeritorious jurisdictional challenges and generally failed to provide the sort of assistance to a lay adjudicator that I would expect. In the event, the jurisdictional challenges were correctly rejected by the adjudicator at [115] onwards of his decision of 19 January 2022.

18. One of the issues which the adjudicator had to decide was whether application 14 was invalid because it was served on Monday 22nd March, not Sunday 21st March. Accordingly Mr Edwards, who represented AVB in the appeal, was wrong to assert that, in some way, the validity of application 14 was irrelevant to the first adjudication. It was not: if there had been no valid application, and the subsidiary arguments as to variation and waiver failed, there could be no valid claim for payment.

19. The first adjudicator's detailed decision, running to 67 pages, was dated 19 January 2022. He found at [162], [163] and [260] – [265] that interim application 14 was valid. He identified a net sum due to AVB by way of a further interim payment of £138,010.86. The adjudicator also made awards in respect of interest, costs and his fees.

20. Notwithstanding clause 20.3 of the contract, (see paragraph 9(a) above), JBH failed to pay any part of this sum to AVB.

4. The Part 8 Proceedings and the Judgment

21. On 2 December 2021, at a time when the adjudication was ongoing, JBH issued Part 8 proceedings against AVB in which, amongst other things, they sought declarations as to the invalidity of application 14 and the validity of their own Payment Notice of 16 April 2021. No explanation is provided in the papers for why, despite the fact that the adjudicator was seized of these disputes and had not yet decided them, JBH commenced parallel court proceedings. It appears that the proceedings were issued as a pre-emptive strike by JBH to allow them a further vehicle to avoid enforcement if or when they lost the first adjudication. I address the propriety of the Part 8 proceedings in Section 7.2 below.

22. Also for reasons that are unexplained, AVB did not commence enforcement proceedings in respect of the first adjudicator's decision until 24 March 2022. By then, an order had already been made for directions in the Part 8 claim. In this way, the Part 8 claim came on for hearing on 12 April 2022, whilst the enforcement claim was not due to be heard until May. It is not clear why the two sets of proceedings were not consolidated, since they both ultimately went to the same point: were AVB entitled to summary judgment, or was there a procedural glitch which rendered application 14 invalid and therefore deprived AVB of any relief at all? Consolidation would have been for AVB to seek.

23. The judgment given at the hearing on 12 April 2022 is at [2022] EWHC 1186 (TCC). Perhaps because of the way in which the matter had come before him, the judge did not deal with the adjudicator's decision at all, save to note at [2] that the adjudicator's findings were not binding on him. He said that he would "approach the matter on the footing of my interpretation of the documents and of the submissions before me". He did not therefore approach the hearing from the starting-point that there was an outstanding adjudication decision in AVB's favour, and that JBH were in breach of clause 20.3 of the Sub-Contract in failing to make payment of the sum found due to AVB.

24. At [24] the judge found that a valid payment application could only be made on the specific date set out in Appendix 6. He therefore found that AVB's application 14 was one day late and thus invalid. He explained his reasons for that conclusion from [25] onwards. Amongst other things, he said:

> "26. First, the use of the words "condition precedent" in clause 9.2. Those words are followed by a reference saying that the Sub-Contractor "shall" make monthly applications and that those applications should be made on the date specified in the Appendix.
>
> 27. Next at the date of the contract 21st March 2021 was going to be a Sunday. It was always going to be a Sunday. It was known to all concerned or capable of being known by all concerned that it would be a Sunday.
>
> 28. Next, the dates in the second column in Appendix 6, the dates when the applications were to be made, are not all the 21st day of the relevant month.

> They are all there or thereabouts but for example in cycle 16 the date is 18th February and in other cycles, it is the 19th of the month, in others 20th and in others the 21st…
>
> 33. Mr Edwards did say that the consequence of the interpretation that the Payment Application has to be on 21st March would lead to an unfair result. He says that as a consequence and applying normal principles the court should hesitate before adopting an interpretation which comes to an unfair result in the absence of clear words. However, although the consequence of an interpretation requiring the notice to be on the Sunday is an unusual one it is not one in my judgment which leads to an unfair result such as to cause the court to say clear words are needed before that conclusion can be reached."

25. At [40] and [41], the judge rejected AVB's secondary submission that there had been a variation or a waiver of the date of 21 March 2021, either by reference to a similar event in 2020, when JBH had without objection made an interim payment in respect of an application notice due on a Sunday but sent on the following Monday; or by reference to the parties' contemporaneous treatment of application 14. The judge did not expressly address estoppel.

26. At [42] onwards, the judge explained how and why the Payment Notice served by JBH on 16 April was valid. I refused AVB permission to appeal in respect of that part of the judge's analysis: it seemed to me that the contrary arguments had no prospect of success.

27. Accordingly, in his order of 21 April 2022, the judge made various declarations in favour of JBH. These included: a) a declaration that application 14 was not a valid payment application under the Sub-Contract because it was issued too late; b) a declaration that Payment Notice 14 was a valid payment notice under the Sub-Contract; and c) a declaration that AVB were not entitled to any payment in respect of application 14. Either because of those declarations, or because of their second adjudication, AVB abandoned the application to enforce the first adjudicator's decision.

5. Subsequent Events

28. Thereafter (and unknown to the court until late last month), there was a second adjudication between the parties. This was a Final Account adjudication commenced by AVB in June 2022. The second adjudicator's decision was dated 6 July 2022. He concluded, amongst other things, that AVB had failed to prove any entitlement to the Final Account sum they claimed of £455,526.53 and that the true value of the Sub-Contract works was just £289,182.31, which was less than AVB had already been paid. As a result of the decision in the second adjudication, AVB owed JBH the net sum of £82,956.88.

29. AVB have not paid the sum found due. They have made complaints about the cogency of the second adjudicator's decision. However, just as with the first adjudicator's decision, this court has before it a decision which, on the face of it, is valid, and deals in detail with a dispute between the parties. There is no reason to treat the decision of the second adjudicator in any different way to that of the first adjudicator.

6. The Issues On Appeal

30. I granted permission to appeal on 26 May 2022. Ground 2 was concerned with a complaint that the judge did not require a particular witness from JBH to give evidence. I refused permission to appeal on that ground, considering it to be unarguable.

31. I gave permission to appeal on three other grounds. The first (Ground 1) concerned the substantive and procedural propriety of the Part 8 proceedings: were JBH permitted to commence and/or to continue such proceedings or should they have been struck out? That raised a subsidiary issue: if the Part 8 proceedings were valid, how should they have been addressed in the context of an outstanding adjudicator's decision in favour of AVB?

32. The second issue (Ground 3) concerned the judge's conclusion that application 14 had to be made on Sunday 21 March 2021, and that the application made the following day was invalid and of no legal status. Was that the right construction of the Sub-Contract? The third issue (Ground 4) concerned the judge's rejection of AVB's arguments as to variation and/or waiver and/or estoppel. Was he correct in dismissing those points as unarguable?

33. I deal with those three issues in that order.

7. Ground 1: Were The Part 8 Proceedings An Abuse Of Process?

7.1 The Law

34. The starting point for any consideration of the Part 8 proceedings in this case, which found no mention in the judgment, is the guiding principle behind construction adjudication: 'pay now, argue later'. As Chadwick LJ noted in *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358; [2006] BLR 15 at [86]:

> "The task of the adjudicator is to find an interim solution that meets the needs of the case. Parliament may be taken to a recognise that, in an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly."

35. It is unrealistic to say, as Mr Frampton on behalf of JBH does in his skeleton argument, that the Part 8 proceedings were in some way separate from and unconcerned with the decision in the first adjudication. That can be tested in this way. If the adjudicator had found that application 14 was invalid, then there would have been no need for the Part 8 proceedings at all. The Part 8 proceedings were only relevant because they represented a second opportunity for JBH to argue about the validity of application 14.

36. That does not mean that parallel court proceedings like these are of themselves invalid or an abuse of process. It has long been the position that court proceedings are open to the parties, even in an ongoing adjudication: see, for example, *Jarvis Facilities Limited v Alston Signalling Ltd* [2004] EWHC 1285 (TCC); *Walter Lilly & Co. Ltd v DMW Developments Ltd* [2008] EWHC 3139 (TCC); and *Dalkia Energy & Technical Services Ltd v Bell Group UK Ltd* [2009] EWHC 73 (TCC); 122 Con LR 66.

37. However, as the law of adjudication enforcement developed, the TCC became increasingly wary of allowing Part 8 proceedings to be used to circumvent or undermine an ongoing adjudication. It was made plain that declarations of the type sought in the present case would be the exception rather than the rule: see *WW Gear Construction Ltd v McGee Ltd* [2012] EWHC 1509 (TCC); [2012] BLR 255; and *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC).

38. The proper approach to parallel proceedings was outlined by O'Farrell J in *Structure Consulting Limited v Maroush Food Production Limited* [2017] EWHC 962 (TCC). The judge should usually give judgment on the claim based on the adjudicator's decision and then – to the extent possible – endeavour to sort out the Part 8 proceedings. The same point was made in *Hutton Construction Limited v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] BLR 344, where the judge said that the Part 8 claim should be dealt with *after* the enforcement, unless the point raised was straightforward and self-contained, and the parties were agreed that it could be dealt with at the enforcement application without adding to the time estimate.

39. Warnings have continued to be given as to the over-liberal and inappropriate use of Part 8 in adjudication cases: see Jefford J in *Merit Holdings Ltd v Michael J Lonsdale Ltd* [2017] EWHC 2450 (TCC); [2017] 174 Con LR 92, and Ms Joanna Smith QC (as she then was) in *Victory House General Partner Linted v RGB P&C Limited* [2018] EWHC 102 (TCC).

40. These concerns are reflected in the clear words of the TCC Guide dated October 2022. The relevant paragraphs say this:

> "**9.4.4** It sometimes happens that one party to an adjudication commences enforcement proceedings, whilst the other commences proceedings under Part 8, in order to challenge the validity of the adjudicator's award. This duplication of effort is unnecessary and it involves the parties in extra costs, especially if the two actions are commenced at different court centres. Accordingly, there should be sensible discussions between the parties or their lawyers, in order to agree the appropriate venue and also to agree who shall be claimant and who defendant. All the issues raised by each party can and should be raised in a single action.
>
> **9.4.5** However, in cases where an adjudicator has made a clear error (but has acted within his jurisdiction), it may on occasions be appropriate to bring proceedings under Part 8 for a declaration as a pre-emptive response to an anticipated application to enforce the decision. In the light of this guidance, a practice had grown up of applications to enforce an adjudicator's decision being met by an application for a declaration that the adjudicator had erred often without proceedings under Part 8 being commenced. This approach was disruptive and not in accordance with the spirit of the TCC's procedure for the enforcement of adjudicator's decisions. It is emphasised, therefore, that such cases are limited to those where:
>
> a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;

b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing for enforcement; and

c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore; and further that there should in all cases be proper proceedings for declaratory relief."

7.2 Analysis

41. Applying those principles to the present case, it is clear to me that the judge was right not to accede to AVB's application to strike out the Part 8 proceedings as an abuse of process. That application, which was made very late in the day, on 7 April 2022, had no basis in law. The authorities to which I have referred make it crystal clear that court proceedings remain open to parties to construction adjudication. There is nothing in the 1996 Act to suggest otherwise. Whilst I regret JBH's costly decision to set up two competing sets of proceedings, with the Part 8 claim relevant only if JBH lost the first adjudication, it was an approach that, as a matter of law, was open to them.

42. That is sufficient to dismiss Ground 1 of the appeal (and the related complaint, concerned with the utility of the Part 8 claim). The judge was right not to strike out the Part 8 claim. And whilst I consider that, in accordance with those same authorities and paragraphs 9.4.4 and 9.4.5 of the TCC Guide, the judge should have considered the Part 8 proceedings through the prism of AVB's successful claim in the first adjudication, and the decision of 19 January 2022 in their favour, it is much too late for that to change anything now.

43. So, as at the hearing on 12 April 2022, the position was that JBH were in breach of contract because they had not paid the first adjudicator's decision and that, in the light of the 'pay now, argue later' mantra, that should have been the first order of business. Having determined the enforcement position, the secondary question for the judge was whether AVB should lose their entitlement to enforce the decision in the first adjudication on the basis of JBH's Part 8 claim.

44. I readily accept that some elements of JBH's claims raised issues of pure construction. Those may be suitable for Part 8 determination, even in the context of an adjudication enforcement: see, for example, *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC). That leads on to Ground 3.

8. Ground 3: Was Application 14 A Valid Interim Application?

8.1 The Law

45. The correct approach to contractual interpretation is set out in the trilogy of Supreme Court cases of *Rainy Sky SA v Kookmin Bank* [2011] UK SC50; *Arnold v Britton* [2015] UK SC36; and *Wood v Capita Insurance Services* [2017] UK SC24. In particular, it has been emphasised that what is sometimes referred to as commercial common sense should not be invoked to undervalue the importance of the language of the provisions being construed.

46. There are two canons of construction, as summarised in Chapter 7 of *The Interpretation of Contracts* (7th edition) by Sir Kim Lewison, which are potentially relevant to the

dispute between the parties. The first is that, when interpreting a contract, all parts of the contract must be given effect where possible, and no part of it should be treated as inoperative or surplus: see, for example, *Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526. The second principle is that, where a contract contains general provisions and specific provisions which potentially contradict each other, the specific provisions will be given greater weight: see, for example, *Woodford Land Limited v Persimmon Homes Limited* [2011] EWHC 984 (Ch), in which this principle was described as "a principle of common sense".

8.2 Analysis

47. The judge's approach was simple: the date of 21 March for the relevant interim application set out in Appendix 6 was described as a 'condition precedent' in clause 9.2, so it did not matter if that day was a Sunday or Christmas Day: the date was sacrosanct. If that date was missed, the entire application was invalid and AVB had no entitlement to make any claim for that monthly cycle.

48. In my view, the position was more nuanced than that. Some general flexibility in the Appendix 6 dates is suggested by clause 9.4, with its reference to interim payments being "at regular intervals calculated from the date when the first payment was due". If all the dates in Appendix 6 were rigidly fixed, then the interim payments would only be due on those specified dates, not (as clause 9.4 provided) "calculated from the date when the first payment was due".

49. More significantly, there are the two paragraphs after the table in Appendix 6, set out at paragraph 7 above. On any view, those paragraphs are plainly designed to allow for flexibility in the interim valuation/payment timetable. The first of those paragraphs expressly talks about payments becoming due "beyond the dates set out in the schedule". It allows for (different) due dates continuing to occur "at the same intervals" set out in the table. That seems to me to be contrary to the general suggestion that the dates for valuation and payment were inflexibly set in stone as per the table in Appendix 6.

50. Mr Frampton rightly emphasised that what we are really concerned with in this appeal are the dates in column A of the table, which are the dates for AVB's interim applications. Those are the dates, always 10 days before the monthly valuation date (which is always the last day of every month), which gave rise to the judge's declarations. But, in my view, the second paragraph in Appendix 6 is critical to a proper understanding of how the interim application process was supposed to work. On the face of it, that paragraph provides some flexibility in relation to AVB's interim applications. It provides that, if such applications were not received 7 days prior to the valuation date, then that would bring to an end that particular monthly cycle and AVB would have to wait until the next valuation date before making another claim. So, for example, if the application was received 8 or 9 days before the valuation date, the same draconian result would not apply. The provision that applications would be invalid if not received 7 days or more before the valuation date necessarily carries with it a provision that applications made 7 days or more before the valuation date would be timeously valid. The reference to a 7 day period is otherwise meaningless.

51. Applying that provision to application 14 (application 17 in the Sub-Contract), the position is this. The valuation date was 31 March 2021. Seven days prior to that was 24

March 2021. In accordance with the paragraph in Appendix 6, the interim application had to be made no later than 24 March 2021 if AVB did not want to drop into the next payment cycle. It is an agreed fact that the application was sent and received on 22 March 2021. On that basis, therefore, application 14 was within the time limit set out in that paragraph of Appendix 6.

52. Although it appears that this paragraph in Appendix 6 was not expressly drawn to the judge's attention, Mr Frampton properly accepted that he had to address the construction issues that the paragraph raised. He had three points. First, he said that clause 9.2 referred to "dates" in the plural, and that this was plainly a reference to the dates in the table in Appendix 6. Secondly, he said that, because the relevant paragraph started with the words "for the avoidance of doubt", it should not be allowed to cut across other provisions. Thirdly, he said that the clause did not say that if the application was made 7 days or more prior to the valuation date, it would be paid. Persuasively though these points were argued, I do not accept them.

53. First, as to the reference to "dates" in the plural, it seems to me that no significance can be attached to that. The clause had to refer to "dates" in the plural because the 1996 Act required JBH to pay AVB in instalments. There were always going to be multiple interim application dates. Moreover, there is no reason to limit the dates referred to in clause 9 simply to those in the table in Appendix 6. Clause 9.2 does not limit the reference to that table: it refers to Appendix 6 as a whole. That must therefore include, not only the dates in the table, but also the potential modifications to those dates contained in the subsequent paragraphs of Appendix 6.

54. As to the second point raised by Mr Frampton, I consider that the flexibility identified in the second paragraph of Appendix 6 is confirmed (not undermined) by the use of the words "for the avoidance of doubt" at the start of that paragraph. The words emphasise the fallback nature of this provision. The target date was 21 March in accordance with the table. But, "for the avoidance of doubt", it was only an application made after 24 March (i.e. less than 7 days before the valuation date) that meant that AVB "shall not be entitled to any payment".

55. As to the third point raised by Mr Frampton (that the words do not say that a claim submitted 7 days or more prior to the valuation date will be paid), I cannot accept that as a sensible interpretation of the words used. The words of the paragraph expressly prohibit claims made less than 7 days prior to the valuation. It would turn the language of the provision on its head to say that claims made 8 or 9 days prior to the valuation date would also be of no legal effect.

56. When it came down to it, Mr Frampton was really arguing that the court should not give any effect to the words in the paragraph, or certainly the operative part concerned with applications made less than 7 days before the valuation. He suggested that they were redundant. But in my view that would be contrary to the first canon of construction, referred to in paragraph 46 above (that the court should always try and make sense of and interpret all parts of a contract). It would also mean that the court was giving effect to the draconian element of the Sub-Contract, and ignoring its more flexible qualification.

57. In my view, construing everything together is a relatively easy task here. The primary dates which AVB had to meet were those set out in column A of the table in Appendix

6, namely 10 days prior to the valuation date. But there was some leeway, as provided by the second paragraph in the Appendix, such that it was only applications made less than 7 days before the valuation date that would be invalid. In addition, so it seems to me, that is a sensible commercial arrangement.

58. At one point, Mr Frampton argued that to give effect to the paragraph in Appendix 6 in this way would be "to let the tail wag the dog". I disagree: in that regard, it is important to remember the second canon of construction noted in paragraph 46 above, that in the event of a clash or an inconsistency between different types of contract terms, specific or bespoke terms will usually outweigh the general. Here, the condition precedent provision in clause 9.2 was a part of the general provisions within JBH's standard terms. Appendix 6, on the other hand, was a bespoke agreement between the parties relating to this particular Sub-Contract. To that extent, therefore, if there is a clash between clause 9.2 and the second paragraph of Appendix 6, the second paragraph - as a specific provision rather than a general one - must prevail.

59. On this point, during the course of submissions, I put to Mr Frampton that, if the payment provisions were simply those contained in Appendix 6, he would not be able to argue that application 14 was out of time. He accepted that. That would involve, on his case, a conflict between the general provisions and Appendix 6. In that event, the specific provisions of Appendix 6 must trump the general provisions in clause 9. Again, therefore, valuation 14, provided more than 7 days before the valuation date, was in accordance with the Sub-Contract, and therefore valid.

60. For all these reasons, therefore, I consider that the judge was wrong to find that all that mattered was the date in column A of the table at Appendix 6. His interpretation either ignored the relevant paragraph in Appendix 6 altogether, or rewrote that paragraph by deleting the reference to 7 days, and replacing it with a reference to 10 days. Both were impermissible. The judge's declarations in his order of 12 April 2022 at a) (that application 14 was invalid because it was issued too late) and c) (that AVB was not entitled to any payment in respect of application 14) were therefore wrongly granted.

61. I would therefore allow Ground 3 of the appeal. The new Ground 5 does not add anything to that.

9. Ground 4: Variation/Waiver/Estoppel

9.1 Introduction

62. It is strictly unnecessary to reach a concluded view on Ground 4. That is because Ground 4 goes to AVB's alternative case that, even if the date of 21 March 2021 was set in stone, the judge should have found that that provision was varied and/or waived and/or that JBH are estopped from relying on the alleged invalidity. In circumstances where I have concluded that the date of 21 March 2021 was not inflexible, and that an application made on 22 March was within time as per the paragraph in Appendix 6, these points do not arise.

63. However, given that the court heard argument from both sides on this Ground and since these sorts of arguments regularly arise in adjudication enforcement, particularly arising out of 'smash and grab' adjudications, it may be helpful if I set out briefly my conclusions on these matters.

64. There were two grounds put forward to support the variation/waiver/estoppel. The first relied on a prior event, in 2020, when the application date fell on a Sunday and an application made on a Monday was not treated by JBH as being invalid ("the prior event case"). The second basis of the variation/waiver/estoppel argument turned on parties' treatment of application 14. Save where it is important to do so, I do not distinguish further between variation, waiver or estoppel.

9.2 The Prior Event Case

65. I start with the prior event case. In my view, the judge was right to say that this was quite incapable of sustaining any variation/waiver/estoppel argument. It is trite law that the making of a payment in respect of a prior application is normally equivocal conduct that does not establish a common understanding sufficient to found a variation/waiver/estoppel: see *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWHC 168 (TCC), 165 Con LR 153 at [40] and *Kersfield* at [47]-[48]. Thus one instance of paying a late payment application is not generally sufficient to amount to a waiver: see *Leeds City Council v Waco UK Limited* [2015] EWHC 1400 (TCC), 160 Con LR 58 at [53]-[54].

66. In addition, clause 23.1 (paragraph 9(b) above) was a clear agreement that an alleged earlier waiver by JBH could not amount to a subsequent waiver of the same provision. That was held to be the effect of a similar non-waiver provision in *Sumitomo Mitsui Banking Corp v Euler Hermes Europe* [2019] EWHC 2250 (Comm) at [573].

67. For these reasons, I consider that Mr Frampton was quite right to submit that the prior event case, when the date for an earlier application fell on a Sunday and the application was made on a Monday, could not in law found a variation/waiver/estoppel case in respect of application 14.

9.3 The Treatment of Application 14

68. I consider that the position in respect of the variation/waiver/estoppel argument arising out of the party's treatment of application 14 is different. Mr Frampton properly accepted that clause 23.1 does not assist on that argument. His principal submission was that there was no unequivocal representation by JBH that application 14 was a valid application.

69. I disagree. On the contrary, I consider that the necessary ingredients of a simple estoppel would appear to be made out here. JBH said in their email of 1 April 2021 that they would deal with application 14 as a valid application; that they would assume that it had replaced valuation 13. What is more, they then proceeded to do just that. They considered the detail of application 14 and responded to that detail with their own valuation in the email of 1 April and their Payment Notice of 16 April 2021. These documents assumed throughout the validity of application 14. Neither document suggested that application 14 was invalid, and did not even seek to reserve the position in respect of validity. In this way, I consider that JBH unequivocally affirmed the validity of application 14.

70. Throughout the period between March and November 2021, both parties were operating on the basis that application 14 was a valid application. It seems clear that AVB relied on that common assumption to make application 14 the focus of their Notice of

Adjudication. If at any time prior to that time, JBH had indicated that they considered application 14 to have been served one day late, then AVB could have taken the necessary steps to resolve that debate, by repeating the claim for the next monthly cycle in April (or indeed for any month prior to the commencement of the adjudication in November). AVB did not do so because JBH had not taken the point.

71. Even when JBH first suggested that the application was somehow invalid, in October 2021 (paragraph 15 above) they still did not say that the application had been served one day late. That was only said after the adjudication had started. As I said during argument, if I had had to decide this issue at first instance, I would not have permitted JBH to conduct themselves in this way. I consider, therefore, that the judge was wrong not to find that JBH had unequivocally represented that application 14 was valid.

9.4 Summary

72. For these reasons, on Ground 4, I have concluded, having heard argument, that the judge was right about the prior event case, but wrong about the parties' treatment of application 14. I readily acknowledge that this misstep may well have been induced by the erroneous suggestion made to the judge on behalf of AVB that this point went to the proper interpretation of the Sub-Contract, rather than comprising a separate, stand-alone variation/waiver/estoppel argument.

10. Conclusions

73. For the reasons that I have given, if my Lady and my Lord agree, I would dismiss Ground 1 of the appeal, but I would allow Ground 3. On that basis I would quash the declarations granted by the judge at a) and c) of the order of 21 April 2022.

74. However, I would make no other orders. Although I consider that AVB were entitled to enforce the first adjudicator's decision back in April 2022, that entitlement has long been overtaken by events and, in particular, by the result of the second Final Account adjudication, which result JBH have applied to enforce. Moreover, as Mr Frampton correctly noted, no part of this appeal sought the payment of any sum by JBH to AVB, so this court does not have the power to award any such sum in any event. This all reflects the largely academic nature of this appeal, to which I referred at the outset of this judgment.

Lord Justice Popplewell:

75. I agree.

Lady Justice King:

76. I also agree