Neutral Citation Number: [2022] EWHC 2881 (TCC)

Case No: HT-2022-000192

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 14 November 2022

Before :

Mrs Justice O'Farrell DBE

- -

Between :

NORTHUMBRIAN WATER LIMITED	**Claimant**
- and -	
(1) DOOSAN ENPURE LIMITED **(2) TILBURY DOUGLAS CONSTRUCTION LIMITED** **(formerly Interserve Construction Limited)**	**Defendants**

- -
- -

Alexander Hickey KC (instructed by Holman Fenwick Willan LLP) for the **Claimant**
Justin Mort KC (instructed by Fenwick Elliott LLP) for the **Defendants**

Hearing date: 21st July 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 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.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 14 November 2022 at 10.30am

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This is an application by the claimant ("NWL") for summary judgment to enforce the adjudication decision of Mr Michael Turgoose dated 23 May 2022, directing the defendants, acting in an unincorporated joint venture ("the JV"), to pay to NWL the sum of £22,458,540.04 (including VAT) plus interest and 90% of the adjudicator's fees and expenses.

2. The JV resists enforcement of the sum claimed on the ground that the dispute the subject of NWL's claim is required to be referred to arbitration. The JV has an application for stay of the proceedings pursuant to section 9 of the Arbitration Act 1996.

3. The central issue for the court is whether any dispute about non-payment of the adjudicator's decision, including enforcement, must be referred to arbitration.

Background to the Dispute

4. NWL is a statutory undertaker engaged in the supply of potable and raw water and the collection, treatment and disposal of sewage in England. It serves 2.7 million people in the North East of England, including the major population centres of Tyneside, Wearside and Teesside, and rural areas such as Northumberland and County Durham. NWL services an area from Berwick in the North, to Darlington and Middlesbrough in the South.

5. The JV, comprising Doosan Enpure Limited and Tilbury Douglas Construction Limited (formerly known as Interserve Construction Limited), was formed for the purpose of performing a contract with NWL.

6. On about 23 March 2016 NWL entered into a contract with the JV based on the NEC3 Engineering and Construction Contract Option C for the design and construction of the 'Phase 2 Horsley Water Treatment Works' ("the Contract").

7. The works, the subject of the Contract, are described in the contract data as the design, supply, construction, installation, testing, commissioning and putting into operation an upgrade to Horsley Water Treatment Works (WTW) to achieve a maximum 150Ml/d with a rapid turn up / down rate of change from the existing capacity of 120Ml/d with a slow turn up / down rate.

8. The Contract Data defines the Conditions of Contract as the core clauses for NEC3 Engineering and Construction Contract Option C (Target Contract with Activity Schedule), dispute resolution Option W2 and secondary Options X2, X4, X7, X15, X16, X18, Y(UK)2 and Y(UK)3 and Z, as amended by the Employer's Amendments to the Conditions of Contract in the Z Clause Appendix.

9. The law of the Contract is stated to be the law of England and Wales.

10. Clause Z37.2 of the Contract provides that each of the JV parties are jointly and severally liable to NWL for the performance of the Contractor's obligations under the Contract and for all obligations and liabilities of the Contractor arising under or in connection with the Contract.

11. In the Contract Data, "the tribunal" is specified as "arbitration". The arbitration procedure is the Institution of Civil Engineers Arbitration Procedure (2012) or any amendment or modification to it in force when the arbitrator is appointed.

12. Dispute resolution procedure Option W2 is stated to be used in the UK when the Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act") applies. Although parts of the works include water treatment works which the parties agree would not fall within the ambit of the Construction Act, the parties explicitly agreed in the Contract that Option W2 should apply.

13. Dispute resolution Option W2 includes the following provisions:

> "W2.1 (1) A dispute arising under or in connection with this contract is referred to and decided by the *Adjudicator*. A party may refer a dispute to the *Adjudicator* at any time.
>
> …
>
> W2.2 (1) The Parties appoint the *Adjudicator* under the NEC Adjudicator's Contract current at the starting date.
>
> (2) The *Adjudicator* acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.
>
> W2.3 …
>
> (4) The *Adjudicator* may
>
> - review and revise any action or inaction of the *Project Manager* or *Supervisor* related to the dispute and alter a quotation which has been treated as having been accepted,
>
> - take the initiative in ascertaining the facts and the law related to the dispute
>
> …
>
> (8) The *Adjudicator* decides the dispute and notifies the Parties and the *Project Manager* of his decision and his reasons within twenty-eight days of the dispute being referred to him. This period may be extended by up to fourteen days with the consent of the referring Party or by any other period agreed by the Parties. The *Adjudicator* may in his decision allocate his fees and expenses between the Parties.
>
> (11) The *Adjudicator's* decision is binding on the Parties unless and until revised by the *tribunal* and is enforceable as a matter of contractual obligation

> between the Parties and not as an arbitral award. The *Adjudicator's* decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with a matter decided by the *Adjudicator* and intends to refer the matter to the *tribunal*.
>
> …
>
> W2.4 (1) A Party does not refer any dispute under or in connection with this contract to the *tribunal* unless it has first been decided by the *Adjudicator* in accordance with this contract.
>
> (2) If, after the *Adjudicator* notifies his decision a Party is dissatisfied, that party may notify the other Party of the matter which he disputes and state that he intends to refer it to the *tribunal*. The dispute may not be referred to the *tribunal* unless this notification is given within four weeks of the notification of the *Adjudicator's* decision.
>
> (3) The *tribunal* settles the dispute referred to it. The *tribunal* has the powers to reconsider any decision of the *Adjudicator* and to review and revise any action or inaction of the Project Manager or the Supervisor related to the dispute. A Party is not limited in *tribunal* proceedings to the information or evidence put to the *Adjudicator*.
>
> (4) If the *tribunal* is arbitration, the *arbitration procedure*, the place where the arbitration is to be held and the method of choosing the arbitrator are those stated in the Contract Data…"

14. Disputes arose between the parties arising out of cost-overruns, delays to the works and quality issues. On 7 May 2021, NWL issued a notice to the JV under Clause 90.1 of the Contract, terminating the JV's obligation to perform the works on the grounds that the JV had substantially failed to comply with its obligations under the Contract; alternatively, relying on termination for convenience. The JV disputed NWL's purported termination and claimed that NWL was in repudiatory breach, which the JV purported to accept on 7 June 2021.

15. NWL claimed that the amount due to it following the termination for Contractor default was £50,999,343.30 (including VAT). The JV disputed that any sums were payable to NWL and claimed it was entitled to an adjustment to the Prices under the Contract in respect of Claims and Compensation Events in the sum of £32,854,840.23.

16. The above matters constituted a dispute arising under or in connection with the Contract for the purpose of clause W2.

The Adjudication

17. On 10 March 2022 NWL commenced the adjudication by serving its Notice of Adjudication on the JV, seeking declarations as to the correct assessments of disputed 'Compensation Events', adjustments to the 'Completion Date' and the financial consequences of this under the Contract by reference to DIJV's Pay Less Notice. Further, NWL sought a decision that the JV should pay NWL £26,168,652.47 (including VAT), together with any delay damages that the Adjudicator decided were due and interest.

18. The parties jointly appointed Mr Michael Turgoose as the Adjudicator in accordance with the NEC3 Adjudicator's Contract and additional conditions identified by the Adjudicator.

19. Both parties participated in the adjudication and served documentary evidence and written submissions.

20. The JV's position in the adjudication was that NWL's purported termination of the Contract under clause 90 was wrongful and amounted to repudiatory breach which was accepted by the JV in its letter dated 17 May 2021, as confirmed in its letter dated 7 June 2021. The JV sought declarations that the NWL acted in repudiatory breach, the JV was entitled to extensions of time, NWL had no entitlement to delay damages and correct assessment of its entitlement to Compensation Events. The JV sought an order that NWL should pay to the JV the sum of £1,926,981.99.

21. By agreement, the date for the Adjudicator's decision was extended to 23 May 2022.

22. On 23 May 2022 the Adjudicator issued his decision, finding that the termination by NWL was valid and granting the following relief:

    i) a declaration that the correct assessment in respect of the Disputed Compensation Events on termination was £2,103,491.68;

    ii) a declaration that the JV was entitled to an adjustment to the Completion Date of 378 days;

    iii) a decision that the amount due from the JV to NWL in respect of delay damages was £2,618,145.60;

    iv) a decision that the JV should pay NWL the sum of £22,458,540.04 (including VAT);

    v) a decision that the JV should pay NWL interest up to 23 May 2022 in the sum of £338,518.91 plus VAT and that such interest should continue to accrue at a daily rate of £1,538.26 plus VAT;

    vi) a decision that the sums due pursuant to the decision should be paid within seven days of the date of the decision; and

    vii) the Adjudicator's fees should be paid 90% by the JV and 10% by NWL.

23. The parties paid their respective shares of the Adjudicator's fees but the JV failed to pay the sums directed by the Adjudicator to be paid to NWL.

24. By letter dated 16 June 2022, the JV served on NWL a Notice of Dissatisfaction pursuant to clause W2.4(2) of the Contract, stating:

> "6. Pursuant to clause W2.4(2), we hereby give notice that the Responding Party is dissatisfied with the Decision in its entirety, save for the Adjudicator's determinations as follows:
>
> 6.1 Paragraph 494 of the Decision:
>
> "I find that Fee should not be added to the calculation of Contractor's Share under Clause 93.4"
>
> 6.2 Paragraph 490 of the Decision:
>
> "For the purposes of this Adjudication only NWL accepts DIJV's calculation of the costs of completing the whole of the works in the sum of £6,311,277.82."
>
> 6.3 Paragraph 495 of the Decision:
>
> "I find the calculation of Amount A3 under Clause 93.2 excludes the Contractor's Share"
>
> 6.4 Paragraph 500 of the Decision;
>
> "I find that the calculation of Amount A3 under Clause 93.2 does include delay damages."
>
> 6.5 The sum awarded for 'Amount A3' as detailed in cells E14 in the 'Amount A3' worksheet and in cell G23 in the 'PLN' worksheet within Appendix 2 to the Decision.
>
> "£1,883,032.30"
>
> 6.6 The sum awarded for 'Notified Defects' as detailed in cell G9 in the 'PLN' worksheet within Appendix 2 to the Decision.
>
> "£102,205"
>
> 6.7 Sums in respect of 'Amount A3' and 'Notified Defects' form part of the Adjudicator's determination of the sum due to the Referring Party (see paragraph 502 of the Decision). For the avoidance of doubt, the overall sum of £22,458,540.04, as determined by the Adjudicator to be due, is not accepted by the Responding Party and is necessarily included in this

> Notice of Dissatisfaction, save for the elements relating to 'Amount A3' and 'Notified Defects'…."

25. Paragraph 7 of the Notice of Dissatisfaction stated:

> "Accordingly, the Responding Party intends to refer the matters addressed by the Decision (excluding those matters set out at paragraph 6 above) to the tribunal (as defined by the Contract) for the final determination of the Dispute."

26. Paragraph 8 of the Notice of Dissatisfaction stated:

> "The Responding Party does not admit the validity and/or effectiveness of the Decision. This Notice of Disaffection is given entirely without prejudice to that position."

27. Paragraph 9 of the Notice of Dissatisfaction stated:

> "Further and in any event, all the Responding Party's rights, howsoever arising, are fully reserved."

The proceedings

28. On 1 June 2022 NWL issued these proceedings, claiming the sum of £22,458,540.04 plus interest.

29. By letter dated 8 June 2022, the JV stated:

> "As you are aware, the Contract provides for the resolution of disputes "arising under or in connection with the contract" in arbitration, in accordance with the dispute resolution provisions of clause W2. In breach of that agreement to refer disputes to arbitration, NWL has commenced the Claim in the High Court. In such circumstances, DIJV is entitled to a mandatory stay of proceedings under section 9 of the Arbitration Act 1996 (the "Act") (once it has acknowledged service of proceedings). Further, and pursuant to the terms of section 9 of the Act, it would be inappropriate for us to comment on the merits or otherwise of the Claim, save to note that there is a 'dispute.'"

30. On 13 June 2022 the court issued an order giving directions for abridgement of time for acknowledgement of service and an expedited timetable for the summary judgment hearing.

31. On 27 June 2022, the JV served an application to stay the proceedings pursuant to section 9 of the Arbitration Act 1996.

32. The court has the benefit of witness statements from:

    i) Mr Michael Sergeant, partner of Holman Fenwick Willan LLP, acting on behalf of NWL, dated 1 June 2022; and

ii) Mr Nicholas Gould, partner of Fenwick Elliott LLP, acting on behalf of the JV, dated 27 June 2022.

The parties' positions

33. Mr Hickey KC, leading counsel for NWL, submits that the adjudication decision is valid and should be enforced:

i) The JV did not raise any jurisdictional challenge prior to, or during, the adjudication and the Notice of Dissatisfaction does not raise any breach of natural justice or other challenge to the validity of the decision (save for a general non-admission).

ii) The JV has not indicated any intention to refer the validity of the decision to the tribunal for determination and no challenge to the validity of the adjudication decision has been identified in the evidence of Mr Gould, relied on by the JV.

iii) The Notice of Dissatisfaction indicates the JV's intention to refer parts only of the adjudication decision for final determination, thereby accepting the validity of the decision.

34. Mr Hickey submits that the adjudication decision requires immediate payment by the JV to NWL in the sum of £22,458,540.04 (including VAT) plus interest. Pursuant to clause W2.3(11) of the Contract, the decision is binding on the parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation. In a case such as this, where the Adjudicator has clearly answered the question that was referred to him and there is no breach of natural justice, there is no available defence to an application for summary judgment.

35. Mr Mort KC, leading counsel for the JV, submits that:

i) There are two disputes, namely, (i) the underlying dispute the subject of NWL's reference to adjudication; and (ii) the disputed enforcement of the adjudicator's decision. Both disputes fall within the scope of clause W2.1 and are subject to the agreed dispute resolution regime.

ii) Alternatively, there is one dispute, first decided by the adjudicator and now to be considered in arbitration, whether for the purposes of final proceedings in relation to the claim referred to adjudication, or for enforcement of the decision, or any other issue remaining between the parties following the adjudication.

iii) Whilst clause W2.4(3) refers to the arbitrator's power to reconsider that adjudicator's decision, the arbitral tribunal also has power (a) to enforce the decision by issuing an arbitral award requiring the losing party to comply with the decision; and/or (b) to decide that it is unenforceable.

36. Mr Mort submits that the reference to "dispute" in clause W2.1 is expressed in very wide language: *"a dispute arising under or in connection with this contract"*. A "dispute" as described in clause W2.1 is apt to include NWL's adjudication enforcement claim. Such dispute is subject to the parties' dispute resolution regime

contained in clause W2, including arbitration. The JV has applied to the court under section 9 of the Arbitration Act 1996 for a stay of these proceedings, relying on the arbitration agreement in clause W2. Section 9(4) of the Arbitration Act 1996 provides that in such circumstances the court must grant a stay of the proceedings. Therefore, the JV is entitled to a stay of this adjudication enforcement claim for arbitration.

Adjudication Enforcement claim

37. In considering the issues raised in this case, I start by construing the dispute resolution procedure in clause W2 to determine whether there is a binding and enforceable adjudication decision under the Contract, before turning to the application for a section 9 stay.

38. Clause W2.1(1) provides that any dispute arising under or in connection with the Contract is referred to and decided by the Adjudicator and that a party may refer a dispute to the Adjudicator at any time. It is common ground that the dispute between the parties, concerning termination under clause 90, assessment of disputed Compensation Events, claims for extensions of time and the ascertainment of sums payable by one party to another following termination, constituted a dispute that could be, and was, referred to adjudication under clause W2.1(1).

39. The parties agreed to the appointment of the Adjudicator, the JV did not raise any jurisdictional challenge prior to, or during, the adjudication, and the JV participated in the adjudication by producing substantive written submissions and evidence. The Adjudicator published his decision within the extended time limit agreed by the parties. The decision addressed the key issues identified by the parties in their written submissions and evidence. Therefore, on its face, it is a binding and enforceable adjudication decision.

40. The effect of clauses W2.3(11) and W2.4(2) is that the Adjudicator's decision is final and binding if neither party has notified the other, within four weeks of notification of the decision, that it is dissatisfied with a matter decided by the Adjudicator and intends to refer the matter to arbitration. In this case, the JV served a Notice of Dissatisfaction, indicating its intention to refer some, but not all, of the matters decided by the Adjudicator for final determination in arbitration. The Notice explicitly identified matters determined by the Adjudicator that were not disputed and which, therefore, were final and binding.

41. It was implicit in the JV's stated intention to accept parts of the adjudication decision on the merits that it accepted the underlying validity of the decision. Such inference is supported by the fact that the Notice of Dissatisfaction did not identify any ground on which the validity of the decision would be challenged, such as any breach of the rules of natural justice or want of jurisdiction.

42. I note that general non-admissions and reservations were set out in paragraphs 8 and 9 of the Notice but they were too vague to be effective. This is precisely the mischief against which Coulson LJ cautioned in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical)* 2019] EWCA Civ 27, when he stated:

> "[91] In my view, the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter

of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour. …

[92] In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:

i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (*Allied P&L*).

ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit (*GPS Marine*).

iii) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it (*GPS Marine*).

iv) A general reservation of position on jurisdiction is undesirable but may be effective… Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:

> i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (*Aedifice, CN Associates*);
>
> ii) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open (*Equitix*)."

43. Although *Bresco* was concerned with statutory adjudication, in my judgment, the same principles would apply to contractual adjudication. Having participated in the adjudication without raising any jurisdiction challenge, specific or general, it is now too late for the JV to raise such challenge and the JV is deemed to have waived any right to do so.

44. Further, the JV has identified no grounds of challenge to the effectiveness of the adjudication decision in these proceedings. Mr Mort stated in his skeleton argument that the precise basis upon which NWL obtained the adjudication decision and the JV's grounds for non-payment were not relevant to the JV's application for a stay. He clarified at the outset of his oral submissions that he made no submissions on NWL's application for summary judgment.

45. It is appreciated that the JV has issued an application for a stay of these proceedings pursuant to section 9 of the Arbitration Act 1996 and no doubt wishes to avoid being caught by section 9(3) of the 1996 Act, which provides that the JV would lose the right to make such application for a stay after taking any step in the proceedings to answer the substantive claim. However, in *Patel v Patel* [2000] QB 551 and *Capital Trust Investments Ltd v Radio Design TJ AB and others* [2002] EWCA Civ 135, the Court of Appeal approved the principles applicable under "the old law", including section 4 of the Arbitration Act 1950 (the predecessor to the 1996 Act), namely that an act which would otherwise be regarded as a step in the proceedings will not be treated as such if the applicant has specifically stated that he intends to seek a stay. It follows that it would have been open to the JV to explain to the court the basis on which any challenge to the validity of the adjudication decision would be made without any risk to its application for a stay. It has chosen not to avail itself of this course of action.

46. It is understood that the JV's position is that the court should not consider any aspect of the adjudication enforcement claim; any, and all, issues of jurisdiction, procedure, substance or enforcement should be stayed for arbitration. The JV is entitled to rely on this narrow line of argument but it follows that there are no submissions or evidence before the court identifying any challenge to the validity or substance of the adjudication decision under the Contract.

47. The adjudication decision requires immediate payment by the JV to NWL the sum of £22,458,540.04 (including VAT) plus interest.

48. Clause W2.3(11) of the Contract provides that the Adjudicator's decision is binding on the parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation. The meaning of the word "decision" in this clause is a matter of contractual construction; its plain and ordinary meaning in the context of the dispute resolution provisions in Clause W2 is the decision purportedly made by the Adjudicator on the dispute referred to him. As explained by Dyson J (as he then was) in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 at [19]:

> "… If it had been intended to qualify the word "decision" in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is

> wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all."

49. The courts take a robust approach to adjudication enforcement, enforcing the decisions of adjudicators by summary judgment regardless of errors of procedure, fact or law, unless the adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice. If authority is needed for that proposition, it is encapsulated neatly in the following cases:

    i) In *Macob v Morrison* (above) Dyson J explained the rationale of the court's approach at [12]:

    > "… Parliament has not abolished arbitration and litigation construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

    ii) In *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] EWCA Civ 507 Buxton LJ confirmed that the court's approach to enforcement should be:

    > "If the adjudicator has answered the right question in the wrong way, the decision will be binding. If the adjudicator has answered the wrong question, the decision will be a nullity."

    iii) In *Carillion v Devonport Royal Dockyard* [2005] EWCA 1358 Chadwick LJ stated at [85]:

    > "The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator."

50. The above cases were all concerned with the enforcement of adjudication decisions which were subject to the Construction Act but in each case the essential features were first, the latitude afforded to the adjudicator in the procedure to be adopted in ascertaining the relevant facts and law; and second, the binding effect of the decision on an interim basis pending final determination by agreement or other form of dispute resolution. Those critical features are present in this case as set out in clause W2. Although the background and purpose of the Construction Act formed the context in which the above cases were determined, there is nothing in the statute that would prevent parties not subject to the mandatory provisions from adopting the same regime as a matter of contractual agreement.

51. For the reasons set out above, the adjudication decision is binding on the parties unless and until revised in arbitration and is enforceable as a matter of contractual obligation.

52. Subject to the JV's application for a section 9 stay, which I consider below, the JV has no defence to the application for enforcement of the adjudication decision and NWL is entitled to summary judgment.

Stay of proceedings for arbitration

53. The JV seeks a stay of the proceedings pursuant to section 9 of the Arbitration Act 1996 on the grounds that the parties have agreed that their disputes should be decided in arbitration.

54. Section 1 of the Arbitration Act 1996 sets out the statutory principles that recognise and support the parties' autonomy in selecting arbitration as their chosen form of dispute resolution:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

55. Section 9 of the Act provides:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed…"

56. As Mr Mort submits, section 9 is expressed in mandatory terms. If the material dispute falls within the scope of the parties' arbitration agreement, unless the arbitration agreement is null and void, inoperative or incapable of being performed, the court must grant a stay.

57. The JV's failure to pay the sum awarded by the Adjudicator, however indisputable NWL's claim to the same, amounts to a dispute within the meaning of section 9(1) of the Act for the reasons explained in *Halki Shipping Corporation v Sopex Oils Ltd* [1997] EWCA Civ 3062 per Henry LJ and Swinton-Thomas LJ.

58. The impact of that decision for section 9 applications was confirmed by Clarke LJ in *Collins (Contractors) Limited v Baltic Quay Management (1994) Limited* [2004] EWCA Civ 1757 at [37]:

> "It thus follows from The Halki that it is no answer to an application for a stay under section 9 of the Arbitration Act that the defendant has no arguable defence to the claimant's claim. If there would otherwise be a "dispute" within section 9(1) it is no answer to an application for a stay to say that it is not a real dispute because the defendant has no defence to the claim. That was the very point decided in The Halki."

59. In construing the arbitration provision in clause W2, the court has regard to the approach to the question of construction of arbitration agreements identified in *Fiona Trust v Privalov* [2007] UKHL 40 but notes that it does not override the general rules of contract interpretation. In particular, the court must construe the express words used by the parties in the Contract in accordance with established principles set out in the authorities, including *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, that it is not necessary to repeat here.

60. Clause W2.1 defines "dispute" in very broad terms as: "a dispute arising under or in connection with this contract". As a matter of principle, that is apt to cover the underlying substantive issues in dispute regarding termination, claims for payment, extensions of time and other claims under the Contract. It is also sufficiently wide to cover a dispute as to whether the adjudication decision was outwith the jurisdiction of the Adjudicator or in breach of the rules of natural justice, regardless whether this is considered to be part of, or separate from, the substantive underlying dispute.

61. However, it does not follow that the court must grant a stay for arbitration in this case for the reasons set out below.

62. Firstly, as explained above, in this case the Notice of Dissatisfaction did not include any challenge to jurisdiction or on grounds of any breach of the rules of natural justice. As a result, therefore, the adjudication decision is final and binding in respect of those matters. The JV has lost its right to challenge the validity of the adjudication decision, in court or in arbitration, although it retains its right to refer the underlying

disputed issues to arbitration in accordance with its notification. On that basis, the effectiveness of the adjudication decision is not a matter which under the Contract is to be referred to arbitration and section 9(1) of the Arbitration Agreement 1996 is not engaged.

63. Secondly, regardless of the scope of any reference to arbitration, the parties expressly agreed that the adjudication decision would be binding on an interim basis. Mr Mort's submission that the issue of enforcement of the decision must be stayed for arbitration fails to have regard to the express provisions of Clause W2 of the Contract. The parties agreed a tiered dispute resolution procedure. Clause W2.3(11) expressly provides that the Adjudicator's decision is binding on the parties "unless and until revised by the *tribunal*", that is, in arbitration, and that it is enforceable as a matter of contractual obligation.

64. If there is no challenge to the validity of the adjudication decision in arbitration, any requirement for a party to enforce it by obtaining declaratory relief through an arbitration award (before enforcing such award under section 66 of the Arbitration Act 1996) deprives it of any efficacy in the meantime. If there is a challenge to the validity of the adjudication decision, any requirement for a party to await the outcome of such challenge through the arbitral process likewise deprives it of any efficacy in the interim. The court will strive to construe the Contract so as to give effect to all the express terms of the same. No effect can be given to this provision unless clause W2.3(11) is read as expressing the parties' agreement that the court has power to enforce the adjudication decision pending any revision in arbitration.

65. Having construed the words used by the parties in this way so as to give effect to their intention, the claim to enforce an adjudication decision that is agreed to be binding and enforceable as a contractual obligation is not a matter which under the agreement is to be referred to arbitration for the purpose of section 9(1) of the Arbitration Act 1996.

66. This conclusion is supported by the analysis of Dyson J in *Macob v Morrison* at [34]:

> "I do not consider that the mere fact that the decision may later be revised is a good reason for saying that summary judgment is inappropriate. The grant of summary judgment does not pre-empt any later decision that an arbitrator may make. It merely reflects the fact that there is no defence to a claim to enforce the decision of the adjudicator <u>at the time of judgment</u>."

67. Mr Mort correctly draws to the court's attention the fact that at the time of the decision in *Macob,* the applicable statutory scheme included a modified form of section 42 of the Arbitration Act 1996, empowering the court to make an order requiring a party to comply with a peremptory order made by the adjudicator. However, although Dyson J accepted that the court could grant an injunction under section 42, he questioned whether it served any purpose and stated at [37] that:

> "…section 42 apart, the usual remedy for failure to pay in accordance with an adjudicator's decision will be to issue proceedings claiming the sum due, following by an application for summary judgment."

68. This was endorsed by Neuberger J in *Collins* at [70], where he expressly acknowledged that in cases where there was an arbitration agreement, the decision of the adjudicator could be enforced immediately through the courts and not just through arbitration:

> "Further, it is not as if any decision of the adjudicator could only be enforced, in a case such as this, through the medium of arbitration. It could be enforced immediately through the court, as was indicated by Dyson J in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] 1 BLR 93 at 100, especially second column (see also sections 42 and 66 of the Arbitration Act 1996)."

The second column on page 100 of *Macob* contains the words in [37] above.

69. Thirdly, in *Macob* it was argued without success that a defendant in the position of the JV is entitled to a stay of enforcement proceedings under section 9 of the 1996 Act where the defendant wishes to dispute the effect of the decision:

> "[28] This is an ingenious argument, but I cannot accept it. In my view, if the defendant wished to challenge the validity of the decision, it had an election. One course open to it was (as it did) to treat it as a decision within the meaning of clause 27, and refer the dispute to arbitration. The other was to contend that it was not a decision at all within the meaning of clause 27, and to seek to defend the enforcement proceedings on the basis that the purported decision was not binding or enforceable because it was a nullity…
>
> [29] But what the defendant could not do was to assert that the decision was a decision for the purposes of being the subject of a reference to arbitration, but was not a decision for the purposes of being binding and enforceable pending any revision by the arbitrator. In so holding, I am doing no more than applying the doctrine of approbation and reprobation, or election. A person cannot blow hot and cold: see *Lissenden v CAV Bosch Ltd* [1940] AC 412 , and *Halsbury's Laws* 4th Edition Volume 16, paragraphs 957 and 958. Once the defendant elected to treat the decision as one capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable unless revised by the arbitrator.
>
> [30] I should add that in my view there is nothing in *Halki* which prevents the court from deciding that the defendant is precluded by its election from seeking a stay under section 9. "

70. Mr Mort erroneously interprets this as a suggestion by the court that the losing party in an adjudication must elect whether to challenge the correctness of the decision or its validity in arbitration. But that is not what the court said. The court was simply

concerned with the election facing a losing party at the point of enforcement of an adjudication decision in court. At that stage, the losing party must elect whether to challenge the validity of the adjudication decision in court or treat it as valid and, therefore, capable of being referred to arbitration but, implicitly, binding on an interim basis. This should not be confused with the losing party's right to challenge both validity and merits in arbitration (subject to any loss of the right to challenge as a result of the decision becoming final and binding). The court's reasoning in *Macob* is clear, compelling and correct.

71. Finally, I am fortified in my conclusion by the consistent approach taken by the court in *MBE Electrical Contractors v Honeywell Control Systems Ltd* [2010] EWHC 224 (TCC) and *Sefton MBC v Allenbuild* [2022] EWHC 1443 (TCC), although I recognise that the court must always be astute to consider the express terms of the agreement between the parties and the applicability of the statutory provisions.

72. In summary, in this case the JV has not identified any grounds of challenge to the decision for want of jurisdiction or procedural unfairness, any right to challenge the validity of the decision has been lost and the decision is binding unless and until revised in arbitration.

73. For those reasons, the court refuses the JV's application for a stay.

Conclusion

74. The adjudication decision is valid and enforceable; there is no justification for a stay of proceedings for arbitration.

75. It follows that NWL is entitled to summary judgment in the sum of £22,458,540.04, plus interest and costs, which I will deal with following consideration of any further submissions from the parties.