Neutral Citation Number: (2022) EWHC 3690 (TCC)

Claim no. HT 2022 000164

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Before HH Judge Kramer sitting at the Moot Hall, Castle Garth, Newcastle upon Tyne on 3 February 2022

This is a signed judgment handed down by the judge in open court but in the absence of the parties, with a direction that no further record or transcript need be made

Copies of the judgment have been emailed to the parties on hand down.

BETWEEN:

J A BALL LIMITED (IN ADMINISTRATION)

Claimant

and

ST PHILIPS HOMES (COURTHAULDS) LTD

Defendant

Robert Stokell and Chantelle Staynings (Instructed by Circle Law) appeared on behalf of the Claimant

Mark Chennels QC (Instucted by Browne Jacobson LLP) appeared on behalf of the Defendant

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JUDGMENT

JUDGE KRAMER

1. This judgment deals with the claimant's application for summary enforcement of an adjudication award dated 25th January 2022, by which the defendant, St Philips Homes (Courthaulds) Ltd, was ordered to pay the claimant £102,829.26 together with £5,570 interest and VAT, plus the adjudicator's fees.
2. The claimant is represented by Robert Stokell and Chantelle Staynings, of counsel, and the defendant by Mark Chennells KC. The hearing was conducted by MS Teams on 23 September and 12 October 2022. The claimant relies upon three statements from Gregory McMahon and a statement from Gary Braathen, and the defendant, 2 statements from Gavin Hoccom and a statement from John Downer. There were also written opening submission and some closing submissions in writing, the last dated 26 October 2022.

Background

3. The claim arises out of a contract for building works in connection with the conversion of commercial premises into 58 residential apartments at 256 Foleshill Rd, Coventry. The contract was a JCT Design and Build Contract 2016, with bespoke amendments, dated 1 August 2019.
4. The claimant, Ball, took possession of the site on 1 August 2019. The contract completion date was 31st August 2020. The initial contract value was £4,665,557 plus VAT. The defendant, St Phillips, has paid the claimant £4,327,217.74 of the contract sum, exclusive of VAT.
5. Ball did not complete the works due to its financial difficulties. On 23rd September 2020, it informed St Phillips that it would not complete the project and it ceased work that day. Ball's directors placed the company

into administration on 30th September 2020. St Phillips has since completed the works.

6. The stated purpose of the administration is the second statutory objective, namely, to achieve a better result for the creditors as a whole than would be likely if the company were wound up. The administrators are Michael Roome and Dean Nelson. Their reports of November 2021 and May 2022 indicate that the anticipated dividend to unsecured creditors will be 2 or 3 pence in the pound. They have yet to issue a notice of distribution which would trigger rule 14.24 of the Insolvency Rules, thereby imposing the equivalent of an insolvency set off. In such circumstances, the parties' entitlement to claims against each other would be converted to one claim for the positive balance arising from the mutual dealings between the parties.
7. The joint administrators are pursuing this claim through an agent, Pythagoras Capital Limited, which is acting under a Damages Based Funding Agreement ("DBA"). Pythagoras has instructed Circle Law LLP, solicitors, to act for the claimant. Those entities have a common shareholder in Gregory McMahon and a familial connection in that Mrs McMahon owns 50% of the shares in Circle Law LLP.
8. Ball served a Notice of Adjudication on 16 December 2021 and the adjudication referral on 19 December 2021. It claimed £221,790.36 plus a loss of profit for breach of contract or, alternatively, £439,556.09, exclusive of VAT, as the balance of the contract price in the event that there had been no breach. It also sought a valuation of the final position as between the claimant and the defendant under the contract. The defendant denied that any money was due, claiming that it was owed sums by the claimant. The adjudicator's award of £102,829.26 was expressed to be a balance of adjustment of the contract sum and allowance for the defendant's cross-claims.

The Defendant's Grounds

9. The Defendant resists enforcement by summary judgment on the following grounds:
    a. The decision of the adjudicator was reached in breach of the rules of natural justice in that his basis of decision was neither argued nor did the defendant have an opportunity to address it.
    b. The claimant is in insolvent administration with no intention or ability of trading its way back to health. In such circumstances, as a matter of principle or discretion it would be wrong to grant summary judgment. In the alternative, the enforcement of any judgment should be stayed pending the defendant litigating its cross-claim.
    c. The Damages Based Agreement between the claimant and Pythagoras is champertous and an abuse of process.

The court's approach to adjudication awards generally

10. The starting point is that a valid adjudication award will be enforced by an order for summary judgment save in limited circumstances. A recent expression of the court's approach is to be found in *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC) where O'Farrell J said:

> "The courts take a robust approach to adjudication enforcement, enforcing the decisions of adjudicators by summary judgement 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: *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 per Dyson J at [14]; *Carillion v Devonport Royal Dockyard* [2005] EWHC 788 (TCC) per Jackson J at [80]; *Carillion v Devonport Royal Dockyard* [2005] EWCA

1358 per Chadwick LJ at [85]-[87]; *J&B Hopkins Ltd v Trant Engineering Ltd* [2020] EWHC 1305 per Fraser J at [12]-[16]; *Bresco Electrical Services Ltd v Michael j Lonsdale (Electrical)* [2020] UKSC 25 per Lord Briggs at [17]-[26].”

11. This follows from the policy behind the adjudication provisions in the Housing Grants Construction and Regeneration Act 1996, encapsulated in the motto “pay now, argue later”: *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical)* [2020] UKSC 25 per Lord Briggs at [12]. As Dyson J explained in *Macob v Morrison* [1999] CLC 739 at pp. 743-744:

> “It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But 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.”

12. The current case is one in which St Phillips puts forward a cross-claim. In the ordinary course, a cross-claim which overtops the claim and has a realistic prospect of success would prevent the entry of summary judgment. That is not the case in the face of an adjudication award. The relevant principles were set out in *Squibb Group v Vertase FLI Ltd* [2012] EWHC 1958 (TCC) where, at [11], Coulson J, as he then was, said:

"In general, an unsuccessful party to an adjudication cannot seek to avoid the result of that adjudication by relying on the right to set-off any other claims… It has often been said that where there are subsequent cross claims, the right course is for the losing party to comply with the adjudicator's decision and not withhold payment on the ground of his anticipated recovery in a further claim…"

He later identified possible exceptions which are not argued in this case.

Ground (a) Breach of Natural Justice

The Law

13. It is common ground that adjudicators must follow the rules of natural justice. The relevant rule in this case is that *"the person affected has prior notice and an effective opportunity to make representations before a decision is made": AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1481 (TCC) per Dyson LJ at [14]. Natural justice challenges have to be examined critically, however, if the purpose of the 1996 Act scheme is not to be undermined; *Amec* per Dyson LJ at [22].
14. The relevant principles to apply are set out in *Cantillon v Limited Urvasco Limited* [2008] EWHC 282 by Akenhead J where he said at [57]:
    a. It must first be established that the Adjudicator failed to apply the rules of natural justice;
    b. Any breach of the rules must be more than peripheral; they must be material breaches;
    c. Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable

potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

d. Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

e. It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of **Balfour Beatty Construction Company Limited v The Camden *(sic-London)* Borough of Lambeth** was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

15. The line between breaching and honouring the rule is exemplified in two cases to which I was referred. In *Primus Build Ltd v Pompey Centre Ltd [2009]* EWHC 1487 (TCC) Coulson J was considering an award for loss of profit which the adjudicator calculated by reference to documents that the parties had said should be ignored. He held that the adjudicator's unheralded use of the documents vitiated the award and gave the following guidance at [40]:

> "As I have said, these things are always a matter of fact and degree. An adjudicator cannot, and is not required to, consult the parties on every element of his thinking leading up to a decision, even if some

elements of his reasoning may be derived from, rather than expressly set out in, the parties' submissions. But where, as here, and adjudicator considers that the referring party's claim as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim of some sort could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision. It seems to me that that principle must apply *a fortiori* in circumstances where the document from which the alternative approaches to be derived, is a document which the adjudicator was told by the parties to ignore. In those circumstances, common sense demands that, before reaching any conclusion, the adjudicator must ask the parties for their submissions on that alternative approach."

16. In *AECOM v Staptina* [2017] EWHC 723 (TCC) the reference to the adjudicator was expressed to be for the determination as to whether, as a matter of principle, AECOM was entitled to make deductions from Staptina's application. Her decision was that the deductions could be made and she went on to rule as to how the sums to be deducted were to be assessed, but these were limited by the sum it would have cost Staptina to carry out the work. AECOM challenged the decision on the basis that the adjudicator should have answered the question as to whether deductions could be made in principle either in the affirmative or negative and it was deprived of the opportunity to make representations on the assessment issue. Staptina argued that the question wasn't amenable to such a clear-cut answer. The decision as how the sums were to be assessed amounted to a qualified answer to the question posed, i.e. the sums could be deducted provided they were limited to the extent determined.

17. Fraser J held that the adjudicator was entitled to come to the decision she did without giving the parties a further opportunity to address her on the assessment issue. He relied upon the judgment given by Edwards-Stewart J in *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC) where he said at [24]:

> "…there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party had contended, provided the parties were aware of the relevant material and the issues to which it gave rise have been fairly canvassed before the adjudicator."

He said that this passage accurately summarised what had happened in AECOM. The point was one of contractual construction. The parties were aware of all the relevant materials. The issue was fully canvassed in that Staptina had argued that AECOM was not entitled to make deductions for defects and AECOM contended that there was such an entitlement, to be calculated by reference to the cost of employing others to remedy the defects. The issues had been fully canvassed and, as a result, the adjudicator was entitled to reach the decision which she did. He observed, at [45] that AECOM may have wished that they had made more comprehensive submissions on the deductions point, but that was different from a breach of natural justice.

18. Mr Stokell argues that what was said in *Roe Brickwork* and its application to the facts of *AECOM* are apposite in this case and should determine the outcome in the claimant's favour. Mr Chennells says that this case is

more like *Primus* in that what has happened is that the referring party could not make out its claims, as put, but the adjudicator has found an alternative path to their success. He says that I should adopt what is the *"acid test"*, as it was described in *Van Oord UK Ltd v Dragados UK Ltd [2022] CSOH 30* at [26], a decision of the Outer House of the Court of Session, where Lord Braid said:

> "Where an adjudicator has departed from the four corners of the submissions made by the parties, was it fair not to seek further submissions? If the issues have been fairly canvassed, or if the adjudicator has simply adopted an intermediate position, fairness will not require that the parties be given an opportunity to make further submissions. Conversely, if the adjudicator proposes a novel approach on a significant issue which has not been canvassed, fairness will point in the opposite direction."

Analysis

19. In order to understand the way in which the parties put their cases in the adjudication it is necessary to start with the provisions of the contract dealing with termination and payment. These are as follows:

"8.1 For the purposes of these conditions:

.1 a company becomes Insolvent

.1 when it enters into administration within the meaning of schedule B one of the Insolvency Act 1986…

Other rights, reinstatement

8.3

.1 The provisions of clauses 8.4 to 8.7 are without prejudice to any other rights and remedies of the Employer. The provisions in clause is 8.9 and 8.10, and (in the case of termination under either of those clauses) the provisions of clause 8.12, are without prejudice to any other rights and remedies of the Contractor.

.2 …

Termination by Employer

Insolvency of Contractor

8.5

.1 If the Contractor is insolvent, the employer may at any time by notice to the contractor terminate the Contractor's employment under this Contract.

.2 …

.3 As from the date the Contractor becomes Insolvent, whether or not the employer has given such notice of termination:

.1 Clauses 8.7.3 to 8.7.5 and (if relevant) clause 8.8 shall apply as if such notice had been given;

.2 The Contractor's obligations under Article 1 and these Conditions to carry out and complete the works shall be suspended; and

.3 The Employer may take reasonable measures to ensure that the site, the Works and Site Materials are adequately protected and that such Site Materials are retained on site; the Contractor shall allow and shall not hinder or delay the taking of those measures.

Consequence of termination under clauses 8.4 to 8.6

8.7 If the contract of employment is terminated under clauses 8.4, 8.5 or 8.6:

.1 the Employer may employ and pay other persons to carry out and complete the Works and to make good any defects of the kind referred to in clause 2.35, and he and they may enter upon and take possession of the site and the Works and (subject to obtaining any necessary third party consents) may use all temporary buildings, plant, tools, equipment and site materials for those purposes; …

.2…

.3 no further sum shall become due to the Contractor under this Contract other than any amount that may become due to him under clause 8.7.5 or 8.8.2 and the Employer need not pay any sum that has already become due either :

.1 insofar as the Employer has given or gives a Pay Less Notice under clause 4.9.5; or

.2 If the Contractor, after the last date upon which such notice could have been given by the Employer in respect of that sum, has become insolvent within the meaning of clauses 8.1.1…

.4 following the completion of the Works and the making good of defects in them (or of instructions otherwise, as referred to in clause 2.35), an account of the following shall within 3 months thereafter be set out in a statement prepared by the Employer:

.1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 8.7.1 and, where applicable, clause 8.5.3.3, and of any direct loss and/or damage caused to the Employer for which the Contractor is liable,

whether arising as a result of the termination or otherwise;

.2 the amount of payments made to the Contractor; and

.3 the total amount which would have been payable for the Works in accordance with this Contract;

.5 if the sum of the amounts stated under clauses 8.7.4.1 and 8.7.4.2 exceeds the amount stated under clause 8.7.4.3, the difference shall be a debt payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor."

There are two further provisions which have been referred to in connection with clause 8.7.4.

"1.1 Rectification Period: the period stated as such period in the Contract Particulars (against the reference to clause 2.35) in relation to the Works…"

The contract particulars provide for a rectification period of 24 months from practical completion.

"2.35 If any defects, shrinkages or other faults in the works or a section appear within the relevant Rectification Period due to any failure of the contractor to comply with his obligations under this contract:

.1 such defects, shrinkages or faults shall be specified by the Employer in a schedule … which he shall deliver to the Contractor as an instruction not later than 14 days after the expiry of the Rectification Period;

.2…within a reasonable time after the receipt of the schedule…, the defects, shrinkages and other faults shall at no cost to the Employer be made good by the Contractor…"

The parties' cases on the reference

20. A summary of the reference appears at paragraph 8 above. The basis of the case that there had been a repudiatory breach of contract on the part of St Phillips was that it had not served a notice to terminate the contract in accordance with clause 8.5.1, thus it was not entitled to employ others to complete the works as provided for under clause 8.7.1, and was thereby in breach of contract. Ball said that it had accepted the repudiatory breach by not returning to site to complete the works. The alternative claim was put on the basis that if St Phillips had not incurred completion costs, i.e. it had not employed someone else to complete the works, Ball was entitled to the balance of the contract price pursuant to clause 8.7.5.

21. The defendant's response to the reference was that:

    a. Ball was in repudiatory breach of contract in ceasing works, but that St Phillips had not accepted the breach as terminating the contract. The parties had agreed that other contractors would finish the works. Thus, the contract was not terminated though Ball's employment thereunder was. The result was that the contract, including the payment provisions, continued to govern the parties' relationship.

    b. There was no payment yet due for the works because:

        i. By clause 8.5.3, as from the date Ball became insolvent clauses 8.7.3 to 8.7.5 continued to apply whether or not a notice of termination had been given.

ii. By clause 8.7.4 the Employer is not required to produce the final account until 3 months following the completion of works and the making good of defects, which can be no earlier than 3 months from the end of the 2 year rectification period.

iii. Clause 8.7.5 provides for the sums stated under clause 8.7.4 to be stated but the time for stating them had not arrived by the time of the reference.

iv. There were, in any event, on-going defects of which the claimant had been informed which were yet to be rectified, which, in themselves, would defer the requirement to provide an account under 8.7.4.

On this case St Phillips sought dismissal of the claim on the basis that due to clause 8.7.4 no sums were due at this stage.

c. In the alternative, if there was a termination by breach, it was that of Ball. Aside from a jurisdiction point raised, but not relevant for present purposes, St Phillips argued that it was entitled to damages for Ball's breach. The sums claimed were those which would have been due to it under clause 8.7.4 and 8.7.5. This was made up by deducting from the balance due under the contract the defendant's costs to complete and liquidated damages and damages by way of interest on the development loan, which produced a balance payable by the claimant to the defendant of £475,881.58. The defendant observed that both parties agreed that the correct way to calculate the balance between the parties was to do so in accordance with clause 8.7.4.

22. Ball's Reply alleges that as St Phillips had admitted employing others to complete the works, it has been established that it was the party in

repudiatory breach, which was accepted by Ball, for the reasons given in the alternative claim in the reference. It said that St Phillips' argument that a final account was not due was incorrect because of the termination of the contract by breach. As a result, clause 8.7.4 did not apply and a final account was due. Clause 8.12 applied instead, as this makes provision in the event of termination by the contractor. Under that clause, Ball was entitled to payment for the works completed but for which it had not been paid, which was calculated as £221,790.36. In response to the damages claim by St Phillips it pointed to a lack of evidence to support the claim for remedial costs and the absence of an entitlement to completion costs, which it alleged were exaggerated, where the contractor terminated the contract.

23. In its Rejoinder, St Philips disputed certain factual assertions made by Ball to the effect that it did not know of the use of other contractors until shortly before it allegedly accepted such use as a repudiatory breach. At 2.4 of the Rejoinder St Philips said, in relation to the fact that Ball admitted that St Phillips had incurred considerable completion costs, "*The issue is whether the contract governs the calculation of those losses or whether the common law does."* It also responded to the following questions from the adjudicator, sent by email to the parties on 7 January 2022:

> "What is the effect of JCT 8.3.1 in the circumstances
>
> - of the building part completed in Sept 2020 and abandoned by the Contractor.
> - IF Employment of the contractor is not terminated under 8.7
> - IF Repudiatory breach of either party not accepted and therefore contract affirmed.

- The Employer employed and paid other persons to carry out and complete the works and make good any defects under JCT 2.35
- Referral para 9 alleges Philips not entitled to employ others.
- Effect of 8.3.1?"

24. St Philips' answers were to the effect that that as regards (a) and (e) the provision preserved the parties common law rights, including the defendant's right to complete the works, (b) clause 8.7 permits the employer to complete the works using others but it does not prevent it from doing so. If the contract was not terminated under clause 8.7 St Phillips were free to complete the works using Ball's management and sub-contractors, which is what they did, but terminating Ball's employment; they pointed out that clause 8.5.3 gives effect to clauses 8.7.3 to 8.7.5, a point repeated in response to question (c). As to (d), no further sums are due because clause 8.7.3 says so, and (f) the effect of 8.3.1 was that the contract was not terminated though Ball's employment was, but that had no effect on the calculation of sums under clause 8.7.4, under which no sums were yet due, and clauses 8.7.3-8.7 applies to govern the termination account.
25. Ball's answers to the questions were in more general terms. In an email dated 7 January 2022 it said that the position, presumably meaning the outcome of the reference, was dictated by either the common law or clause 8.12 of the contract. The effect of 8.3.1 was that Ball retained its common law right to terminate, regardless of clauses 8.4 to 8.7 "*as a result of JA Ball's (sic) repudiatory breach of contract.*"

<u>The adjudicator's decision</u>

26. Mr Bingham held that Ball's employment had not been terminated, either by a notice of termination under the JCT agreement or by mutual agreement. Neither did St Phillips accept Balls repudiatory breach of contract. On the contrary, it affirmed the contract and sought to apply the JCT terms. Whilst he accepted that St Phillips could only employ others to complete the contract if it terminated the employment of Ball, he held that Ball did not accept the claimed repudiatory breach by St Phillips as terminating the contract. Thus, by this point, he ruled out the claim for damages for breach of contract. He, however, proceeded to make an award for payment under the contract but not on the basis advanced by either party.
27. The adjudicator's explanation for the basis of his award appears in a list of issues which he had identified for decision. These were not taken from any list of issues provided by the parties.

He said:

"8.6 **ISSUE**

"Whether St Philips is correct to aver (at Response [para 1.7]) that the calculation of the final balance due is via JCT clause 8.7.4 and that is agreed by JA Ball?

ADJUDICATOR'S DECISION:

- **NO; clause 8.7.4 cannot apply to calculate the final balance;**
- **NO; Ball does not agree to clause 8.7.4 applying (at *Reply to Response***

[para 11])

ADJUDICATOR'S OBSERVATION: Clause 8.7.4 applies only when employment is terminated under JCT clause 8.4, 8.5 or 8.6. In particular clause 8.5 says clause 8.7.3 to 8.7.5 applies whether or not the Employer has given such Notice of Termination. But the calculation of the account has to be *"Pursuant to clause 8.7.1 (see 8.7.4.1)".* That requires 8.7.1 to be triggered. It is *not* triggered unless the contractor's employment is terminated. See headline of clause 8.7. And further, there is no evidence of mutual agreement to applying clause 8.7.4

And further, it cannot be said (at *Response* [para 1.8]) *"By clause 8.5.3, as from the date JA Ball became insolvent (30 September 2020) clause 8.7.3 to 8.7.5 apply whether or not a termination notice has been given under the contract".* The reason is that clause 8.7.4.1 only allows calculation incurred under clause 8.7.1. But, clause 8.7.1 was not triggered.

8.7 **ISSUE**

"Whether it can be said (at Response [para 1.8]):

"No further sum shall be due to the contractor under this contract other

than the any amount that may become due to him under clause 8.7.5 or 8.8.2"?

ADJUDICATOR'S DECISION: NO.

Clause 8.7.5 relies upon 8.7.4.1, but clause 8.7.4.1 relies upon a determination of the contractor's employment. That has not happened

(clause 8.8.2 does not apply).

8.8 **ISSUE**

"*Whether the calculation of the account/sums due machinery, clause 8 under the contract has fallen away?"*

ADJUDICATOR'S DECISION: YES.

However, the Contract survives.

8.9 **ISSUE**

"Whether the account can be calculated for the now completed Works (at Response [para 1.10] says completed Works)?"

ADJUDICATOR'S DECISION: YES.

Given the status of the Contract (it survives) and status of the parties the probable position is

(1) What is the prima facie value of work as at 23 September 2020?

(2) Of that work, what amount is to be abated for defective or incomplete Works;

(3) What balance/sums remain due."

The parties' contentions

28. Mr Chennells argues that whilst the material upon which the decision was based was before the court, namely the contract, the issue upon which the case was decided was not fairly canvassed in that no-one had previously suggested that payment for work could be made under the contract other than in accordance with its express payment provisions. Ball had said that the contract had been discharged by its acceptance of

St Philip's repudiatory breach. Because the adjudicator found against Ball on the repudiation point, it could not succeed on its case. What the adjudicator has done is to identify an alternative way for Ball to succeed which was not notified to the parties till the issue of the decision.

29. Neither can it be said that the approach taken by the adjudicator arose from the case being run by St Philips, which was to the effect that payments under the contract, following termination or insolvency of the contractor, were governed by clauses 8.7.4 and 8.7.5, the consequence of which was that the claim for payment was premature.

30. Mr Chennells further argues that albeit that the contract document was material before the parties and the adjudicator, the defendant cannot be expected to foresee every argument which may be based on the terms of that document. The issues of which each party had notice are those which are apparent from their respective arguments. These frame the scope of the issues for determination.

31. As to the materiality of the breach of natural justice, Mr Chennells says, it is clearly material as the decision to make an award under the contract other than under clause 8.7.5 was central to the decision and had this approach been canvassed, and the reliance upon termination as a trigger for clause 8.7.1 and the suggestion that clause 8 under the contract fell away, St Philips would have countered this by pointing to the provision in clause 8.5 as to the application of clauses 8.7.3 to 8.7.5, i.e. the payment provision, in the event of an insolvency whether or not notice of termination was served.

32. Mr Chennells says that he does not need to satisfy me that the defendant's case on this issue would succeed so as to render the breach material. He relies upon *Corebuild Limited v Mr Tom Cleaver and another* [2019] EWHC 2170 (TCC). In that case, Adam Constable KC, sitting as a judge of the High Court, held at [24] that there had been a

breach of justice where the adjudicator had determined the reference *"on the basis of a factual finding which had not been argued for, which there was no evidence or submission in support of, and upon which the Defendants had had no opportunity to comment or adduce evidence"* He went on to consider whether the breach was a material one. In that regard, he said, in reliance upon *ABB Limited v BAM Nuttall Limited [2013] EWHC 1984 (TCC)*:

> "There may be circumstances in which it is possible to demonstrate on summary judgment that the answer the adjudicator arrived at was so obviously correct, that the failure to have allowed the point to be properly ventilated is not material: permitting a party to make submissions could not have changed the outcome. However, generally, it is sufficient for a party to show that the substance of the point which they were deprived of the opportunity to engage with was properly arguable i.e. it had reasonable prospects of success. Beyond that, the Court should not determine the merits of the point itself on the summary judgment application."

On that basis, he found that the breach was material and held that the decision was unenforceable for a breach of natural justice.

33. Mr Stokell argues that the substance of the adjudication was about an assessment of the net balance between the Ball and St Philips. In that context the latter had a full opportunity to make submissions as to which contractual terms applied and why. He had received detailed submissions on clause 8.7.4 but nevertheless found that a balance was due. Clauses 8.4 to 8.7 of the contract are not straightforward and it would be a "high test and penalty", by which I took him to mean, too exacting a test, if an

adjudicator who made an error when construing these terms could be said to be in breach of natural justice.

34. He says that St Philips had notice of the approach the adjudicator may take by the questions about the effect of clause 8.3.1 sent to the parties on 7 January 2022. Thus, as the relevant material and issues to which they gave rise had been fairly canvassed before the adjudicator, there was no breach of natural justice; he relied upon that passage in *Roe Brickwork Ltd* at paragraph 17, above. He sought to distinguish *Corebuild* (above) as there the adjudicator had made a decision on a factual basis for which there was no evidence.

35. In the course of his oral reply to Mr Chennells' submissions, Mr Stokell took a materiality point. He argued that clause 8.7.4 of the contract does not provide that a final account cannot be taken till the end of the defects liability period, as it refers to St Philips preparing an account within 3 months "*following the completion of the Works and the making good of defects…)*. For these purposes the two year defect liability period is irrelevant. Accordingly, even if the adjudicator had invited submissions on the approach he ultimately took in making his award, it would have made no difference, as, under the contract, he could deal with the balance.

Discussion and conclusion

36. I accept Mr Chennells' observation that the issues which the parties can be expected to address are framed by those which they raise in the adjudication, albeit to that must be added any issues of which the adjudicator has given the parties notice.

37. In this case the issues identified by the parties were whether Ball was entitled to a payment of damages at common law due to St Philips' breach of contract, or, if there was no breach, payment under clause 8.7.5, following a determination under clause 8.7.4 (Ball's position), or whether

it was the defendant which was entitled to damages for Ball's repudiatory breach of contract, and that an account for the balance was premature as the period after which such an account could be taken was still current, that being the effect of clauses 8.5.3 and 8.7.4 (St Philips' position).

38. Mr Chennells also argues that from the time of Ball's reply, the issues were further narrowed as it elected to proceed on the basis that the claim was for damages for breach of contract in the light of the defence admission that other contractors had finished the works. Whilst the emphasis placed on repudiatory breach is mirrored in the extent of the evidence devoted to this subject before the adjudicator and the fact that 4 of the 8 issues he identified turned on this issue, I do not see evidence of an election to abandon the claim for payment under clause 8.7.5 of the contract. All that Ball was asserting was that its claim for repudiatory breach was the stronger limb of its claim.

39. The arguments I have outlined could not put St Philips on notice that in order to defend its position it needed to argue that there was no way that a payment was due under the contract other than in accordance with the clauses which both it and Ball referred to in their Reference. Whilst it did have the opportunity to identify the clauses giving a right to payment and to argue that the commencement of the machinery for so doing was premature, that was in a context in which the other party was claiming that payment under that machinery was now due, not that there was some other way in which payment under the contract became due, i.e. by clause 8 "falling away". As between the parties, the Reference clearly proceeded on the common assumption that Ball's claims to a payment were at common law, following termination of the contract by an accepted repudiatory breach by St Philips or under clause 8.7.5 of the contract.

40. The reliance upon the questions of 7 January 2022 as giving St Philips notice of the issue they needed to address is misplaced. It asks about the

effect of clause 8.3.1 in various circumstances. It does not seek comment about, or forewarn the parties as to, the Adjudicator's approach to the question as to whether clauses 8.7.3 to 8.7.5 apply or to there being circumstances in which clause 8 "fell away", leaving some other, unidentified or residual right to payment.

41. It follows that this is not a case in which the Adjudicator has taken some intermediate position as between the parties or based his decision on, not only material before him, but also issues arising therefrom that had been fairly canvassed between the parties. He decided the case on a novel basis of which neither party had notice and about which St Philips, in particular, should have been given an opportunity to respond. To reach a decision in this way on a determinative point is a breach of natural justice.

42. I do not accept that the breach was not material, it clearly was. Following *Corebuild,* and *ABB Limited* before it, a breach is material if the point which St Philips has not be able to argue has a reasonable prospect of success. It is not for the court to decide whether the point succeeds unless it is so obvious that it should. The rationale for such an approach is that the court should not second guess what the adjudicator would make of the point, for the decision is his, save where it is unarguable, in which event it could not be material.

43. Mr Stokell does not argue about the existence of the principle to be found in *Corebuild*. In essence he is saying it was applied in that case to more extreme facts. Nevertheless, he seeks to argue materiality on the basis that the defects liability period was irrelevant to the operation of clause 8.7.5. Thus, if the adjudicator had based his decision on what was argued before him, i.e. applied clauses 8.7.5, he would have been justified in making an award.

44. The first point in response to the argument is that the Adjudicator did not accept that payment was due to Ball under 8.7.5 as he held that clause 8 fell away. He did not decide the case on the period for producing the account point, nor does it seem to have been argued before him by Ball, or, indeed, until it was raised in response to the defendant's submissions in this case. The second is that St Philips' argument on this point has a realistic prospect of success. Clause 8.7.4 times the account to a date three months after the completion of works and the making good of defects. Clause 2.35 provides for the giving of instructions to cure defects during the Rectification Period, which is defined as period of 2 years from the Completion of the Works, the original contractual date for completion being 31 August 2020. It is arguable, with considerable force, that this must result in the time for an account provided for under the contract following the Rectification Period.

45. For completeness, though this was not disputed by Mr Stokell, St Philips have a reasonable prospect of succeeding in the argument that in the case of an insolvent contractor, the clause 8.7 machinery for payment applies, whether or not notice of termination is served, as clause 8.5.3 applies 8.7.3 to 8.7.5 as if a notice of termination had been served. Termination is not a prerequisite. Thus, the failure to alert St Phillips to the argument that clause 8.7 does not apply because clause 8 falls away was a material breach of natural justice.

46. In the light of my findings, the decision is unenforceable by reason of a material breach of the rules of natural justice.

47. In view of my conclusion as to the natural justice point it is not necessary to consider the impact of the claimant's administration and the champerty point. In case I am wrong as to natural justice, however, I will deal with these arguments.

The impact of Ball's administration.

The Law

48. The fact that a company has entered into an insolvency process can lead the court not to grant summary judgment. In *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] B.L.R. 522*, the Court of Appeal held that a company in insolvent liquidation which has obtained an adjudication decision in its favour will not generally obtain enforcement by summary judgment. The reason for such an approach was explained by Chadwick LJ at [35] where he said that:

> "Rule 24.2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and crossclaims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what r. 4.90 of the Insolvency Rules 1986 requires."

The effect of Rule 4.90 is that on liquidation all mutual debts and other mutual dealings between the company and its creditor are converted into a right to a balance of the account between them. The importance of the rule in the context of an adjudication where there is an adjudication award in favour of a party in liquidation is that where the other party had a valid

cross-claim, if it is obliged to pay the amount of the award to the liquidator, those monies will be available to the body of creditors as a whole, out of which that party will only received a dividend pro rata to its claim. It will have lost the benefit of treating the award under the adjudication as security for its own cross-claim; see per Chadwick LJ at [33].

49. More recently, in *Bresco Electrical Services Limited (in liquidation) v Michael Lonsdale (Electrical) Ltd [2022] UKSC 25*, the Supreme Court held that a company in liquidation has both a contractual and statutory right to pursue adjudication even though the dispute relates to a claim affected by insolvency set-off: see *Bresco* per Lord Briggs at [59] and *John Doyle Construction Ltd v Erith Contractors Ltd 2021 Civ EWCA 1452* per Coulson LJ at 86. Lord Briggs went on to make *obiter* observations on summary enforcement. He said:

> "64. The reasons why summary enforcement will frequently be unavailable are set out in detail in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All E.R. (Comm.) 1041; [2001] C.L.C. 927 at [29]–[35] per Chadwick LJ. As he says, the court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution…
>
> 65. Furthermore it will not be in every case that summary enforcement will be inappropriate. There may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour. Or the disputed

cross-claim may be found to be of no substance. Or, if the cross-claim can be determined by the adjudicator, because the claim and cross-claim form part of the same "dispute" under the contract, the adjudicator may be able to determine the net balance. If that is in favour of the company, there is again no reason arising merely from the existence of cross-claims why it should not be summarily enforced.

66…

67. The proper answer to all these issues about enforcement is that they can be dealt with, as Chadwick LJ suggested, at the enforcement stage, if there is one. In many cases the liquidator will not seek to enforce the adjudicator's decision summarily. In others the liquidator may offer appropriate undertakings, such as to ring-fence any enforcement proceeds: see the discussion of undertakings in the *Meadowside* case. Where there remains a real risk that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment."

50. These passages were considered by the Court of Appeal, and applied, in *Doyle* (above), with the caveat that Lord Briggs, by his third example as to where the enforcement of an award may be available, did not mean that a company in liquidation was entitled to a judgment on the basis of a provisional decision, which is the nature of an adjudication award; see

Coulson LJ at [90]-[91] and Lewison LJ at [143]-[145]. At [88] of *Doyle* Coulson LJ said:

> "Accordingly, it appears that, as to enforcement, Lord Briggs JSC's starting point was that summary judgment to enforce an adjudicator's decision will frequently be unavailable when the claimant is in liquidation, with the court either refusing it outright or granting it with an immediate stay of execution. He also noted that where the liquidator sought to enforce the adjudicator's decision summarily, there could be a real risk that it would deprive the respondent of its right to have recourse to the insolvent company's claim as security for its cross-claim, and that in such circumstances the court would again refuse summary judgment. It might be said with some force that those observations are directly applicable here."

51. In *Straw Realisations (No.1) Ltd v Shaftsbury House (Developments) Ltd [2010] EWHC 2597* Edwards-Stewart J was faced with a case in which the claimant had been put into administration following two adjudication awards. The administrators had yet to serve a notice under IR 14.29 of an intention to make a distribution or declare a dividend to creditors, which, by IR 14.24, would have invoked a statutory set-off, similar to that which applies where there is a liquidation under IR 14.25. It was argued by the claimant that nothing short of liquidation was sufficient to bring about automatic mutual set-off with the effect that enforcement of the adjudicator's decision should be refused. The judge held that one award was final and binding due to want of notice under paragraph 23(2)(a) of the Scheme for Construction Contracts, whereas the other was not. He gave summary judgment on the former, but stayed enforcement, and

refused judgment on the latter. As to the impact of an administration order in such a case Edwards-Stewart J said, at [87-88],

> "87. Once a company is put into administration no legal process may be instituted or continued against the company without the consent of the administrator or the permission of the court…
>
> 88. It is clear, therefore, that the making of an administration order has effects on the rights of the parties with the result that the principle of "*pay now, argue later*" may no longer be capable of achievement. The party who has paid money to the other pursuant to an adjudicator's award no longer has an unfettered right to have the issue decided by the adjudicator determined finally by a court or arbitrator."

52. Having reviewed a number of authorities, Edwards-Stewart J said, insofar as relevant to this case, at [89]:

> "Having regard to the decisions discussed and referred to in this judgment, I consider that the following principles are established or can be derived:
> (1) …
> (2) If, at the date of the hearing of the application to enforce an adjudicator's decision, the successful party is in liquidation, then the adjudicator's decision will not be enforced by way of summary judgment: see *Bouygues v Dahl Jensen* and *Melville Dundas*. The same result follows if a party is the subject of the appointment of administrative receivers: see *Melville Dundas*.

(3) For the same reasons, I consider that if a party is in administration and a notice of distribution has been given, an adjudicator's decision will not be enforced.

(4) If a party is in administration, but no notice of distribution has been given, an adjudicator's decision which has not become final will not be enforced by way of summary judgment. In my view, this follows from the decision in *Melville Dundas* as well as being consistent with the reasoning in *Integrated Building Services v PIHL*.

(5) If the circumstances are as in paragraph (4) above but the adjudicator's decision has, by agreement of the parties or operation of the contract, become final, the decision may be enforced by way of summary judgment (subject to the imposition of a stay). I reach this conclusion because I do not consider that the reasoning of the majority in *Melville Dundas* extends to this situation.

(6) There is no rule of English law that the fact that a party is on the verge of insolvency ("*vergens ad inopiam*") triggers the operation of bankruptcy set-off: see *Melville Dundas*, per Lord Hope at paragraph 33. However, the law in Scotland appears to be different on this point (perhaps because the Scottish courts do not enjoy the power to grant a stay in such circumstances).

(7) If a party is insolvent in a real sense, or its financial circumstances are such that if an adjudicator's decision is complied with the paying party is unlikely to recover its money, or at least a

substantial part of it, the court may grant summary judgment but stay the enforcement of that judgment.

53. *Straw* pre-dated *Bresco* and *Doyle*. I propose to adopt the principles set in *Straw* with the modifications that:

    a. It is clear from *Bresco* and *Doyle* that even in the case of a liquidation, refusal of summary judgment is not inevitable as there may be circumstances, such as those identified by Lord Briggs at [65]. Accordingly, the decision in such cases is fact specific.

    b. As the decision has to be fact specific, the same must be said of an award in favour of a company which subsequently goes into administration. There is no hard and fast rule that an award will not be enforced in favour of a company in administration. For example, if the evidence is that the administration will save the business such that it can trade out of insolvency or that the company has become insolvent due to the non-payment of the award, these may be powerful reasons for giving judgment without staying enforcement; as happened in the analogous case concerning the impact of a CVA, heard together with *Bresco* in the Court of Appeal, *Cannon Corporate Limited v Primus Build Limited [2019] EWCA Civ 27*. If, on the other hand, the defendant is disabled in pursuing its cross-claim by the administration, that would be a good reason for refusing judgment to allow the insolvency regime, which affects all creditors, to take primacy over that of adjudication, the affect of which is limited to the parties. Further, if the financial state of the claimant, which led to the insolvency would result in there being no prospect that it could repay the award if the cross-claim were successful, that would be a good

reason to stay enforcement, or where notice under IR 14.29 had been given, refuse judgment following *Bouygues, Bresco* and *Doyle.*

54. The factual background against which this application it to be determined shifted during the course of the hearing. Until the second day of hearing, the claimant's administrators would only consent to the issue of a cross-claim if the defendant paid £100,000 into court as security for costs and paid the award which was to be ringfenced for such time as a court may order to enable the defendant to pursue its claim. By a letter dated 7 October 2022, shortly before the adjourned hearing of the application, the administrators consented to permitting the defendant to issue a claim to "overturn the Adjudicator's Decision". The explanation for this limitation is that the balance of the defendant's claim over the award will have to be proved in the administration.

55. A further late development in the application concerned information as to the arrangements between the claimant and its funder, Pythagoras Capital Limited. In the face of an argument that the agreement between the administrators and Pythagoras was champertous, there was a further purported agreement between them produced, dated 10 October 2022, i.e. after the first hearing of the application, which is relied upon to rebut the allegation of champerty.

<u>The parties' contentions</u>

56. Mr Stokell says that the adjudicator took into account the cross-claim. It falls within the third example of cases involving liquidation given by Lord Briggs in *Bresco* where there should be enforcement. He argued that insofar as *Doyle* doubted what was said by Lord Briggs as to this point, it was wrong. That said, he suggested that the key question is whether there remains a real risk that the summary enforcement will deprive the

defendant of recourse to Ball's claim as security for its cross-claim. On this last point he relies upon the administrator's offer to ring-fence any enforcement proceeds and an offer from Pythagoras to guarantee all monies due from Ball to St. Philips in respect of adverse costs orders in these proceedings and any new proceedings issued within 6 months of the defendant paying the claimant the amount of the award to the extent that they are successful in overturning the adjudicator's decision. This is supported by a secondary guarantee from Aviva, set to expire in September 2024, under which it will guarantee £150,000 in excess of the first £150,000, provided Pythagoras has first paid the initial £150,000 to St Philips. He says that the guarantee on offer is sufficient to cover the defendant's reasonable costs as the defendant's costs estimate, which exceeds this sum, is unreasonable and disproportionate.

57. In support of the suggestion that St. Philips could be adequately secured by undertakings and the guarantee, Mr Stokell referred me to *Meadowside Building Developments Ltd (in liquidation) v 12-28 Street Management Company Ltd [2019] EWHC 2651* where Adam Constable QC, sitting as a Deputy High Court Judge, said that an award could be enforced in favour of a company in liquidation where the award determined the final net position between the parties and satisfactory security was provided to ensure that there was money to repay the award if the cross-claim is successful and to pay the defendant's costs of an unsuccessful enforcement application and the costs of overturning the adjudication decision by the cross-claim. The judge suggested that this could be achieved by the liquidator undertaking to ring-fence the sum enforced and a third party providing a guarantee or bond.

58. In *Meadowside* the court refused summary judgment on the grounds that the agreement between the liquidator and Pythagoras, which was the funder in that case as well, was champertous, but went on to say that he

would have refused judgment as he was not satisfied that there was a high level of certainty that Pythagoras would be good for the money. Further, as regards an offer to guarantee the repayment of the award, no bank guarantee or bond had been offered as replacement for the absolute security the debtor has in the cross-claim,

59. Mr Stokell referred me to what was said by Lord Briggs at [67] in *Bresco* about the use of *Meadowside* undertakings and referred me to *Styles & Wood (in administration) v CE GIF Trustees [2020] EWHC 2694 (TCC)*, not because it contains any new point of principle, but as an example of a case in which a claimant in administration obtained judgment without a stay of enforcement on the basis that there was an undertaking to ringfence and had offered a £200,000 ATE policy as security for the defendant's costs. The main point of contention in that application was whether the sum offered was adequate. Much of the judgment deals with the question as to whether the defendant's cost's estimate, which far exceeded that sum, was excessive. In the course of the judgment, having referred to *Bresco*, HH Judge Parfitt neatly summarised the focus of the court's concern. He said, at [8]:

> "It is worth emphasising that the key aspect in relation to whether or not to enforce is the protection of the right to set off. It is the prejudice to the payor created by a combination of insolvency and adjudication not being a determinative resolution of the parties' disputes from which protection is required."

60. Mr Chennells makes the following points in response:

    a. There is little distinction between the effect of the administration in this case and the position if Ball was in liquidation. It is massively

insolvent and sooner or later will be the subject of an insolvent liquidation, at which point insolvency set-off will apply. He points to evidence that Pythagoras has procured an undertaking from the administrators confirming they will not issue a notice of intended dividend during the ringfencing period and says that this is a device to avoid insolvency set-off

b. Until October 2022, i.e. after the first day of hearing, the administrators were trying to stymie St Philips in pursuing their cross-claim by imposing onerous conditions. At the 11th hour, the administrators have made an unexplained *volte face* on this issue, but are still not permitting St Philips a free run at its cross-claim as the consent to litigate is limited to proceedings to overturn the Adjudicator's Decision. Mr Stokell has argued that this is sufficient as the balance over the award will have to be proved in the administration, but, says Mr Chennells, St Philips cannot split up its claim just to balance the award. It will have, or would wish, to litigate its whole claim for the court to determine how much of it succeeds and, if there is success, as to the extent whereby it overtops the award. He further highlights the unreasonable stricture arising from the consent in that in any litigation by St Philips, Ball may, and probably will, wish to pursue those of the claims it made in the adjudication, but which failed, in addition to those which succeeded. Accordingly, the problem identified for a litigant facing a company in administration identified in *Straw* is present in this case as well.

c. The Pythagoras guarantee is inadequate for a number of reasons. First, the published accounts of that company for June 2020 show capital reserves of £98,730, well short of its potential liability under the guarantee. These were all that the claimant had provided

to the defendant up to 15 September 2022. On the day before the first hearing, a third statement from Mr McMahon was produced attaching management accounts showing capital reserves of £183,648, but these fluctuated between December 2021 and July 2022 between a minus figure of £32,000 and a positive balance of £242,000. He says that I should bear in mind that Mr McMahon's assertions that the company has cash of about £295,000 does not advance matters as any cash is taken into account in the management accounts. He also says that I should be unmoved by Mr McMahon's assertions that the shareholders of Pythagoras have cash and unencumbered properties and will stand by the company to ensure it always meets its obligations. Mr Chennells relies upon the late production of this information, despite the fact that for months before the hearing, certainly from July 2022, the defendants have been saying they would not accept a Pythagoras guarantee.

d. The second objection to the guarantee is that, apart from the costs of the enforcement proceedings, it is limited to new proceedings to overturn the adjudicator's decision, whereas such proceedings will be used to determine the whole final balance between the parties.

e. The assertion that the estimate of the defendant's costs for its new claim are disproportionate assumes that it is limited to the amount of the award. The costs, which are estimated at £336,175, are both reasonable and proportionate once one takes into account that St Philips are claiming at least £500,000 and Ball claimed £221,709 for loss of profit in the adjudication claim. Thus, a minimum of just over £700,000 is at stake. At a more granular level, the overall estimated costs of the expert phase of £35,170, trial preparation of £52,440 and trial costs of £32,220 are unexceptional for a case

proceeding in the London TCC. Whilst the defendant has produced a precedent H setting out its breakdown of costs, there is nothing similar from the clamant from which to make a comparison.

f. There is no justifiable purpose in ordering the payment of a sum which will be ring-fenced and remain of no use to Ball or St Philips until disposal of the latter's claim. He referred me, in this regard, to *Doyle*, where at [57]-[58] and [100] Coulson LJ expressed the view that ordering a payment into court or into an escrow account is the worst of all worlds. It deprives the defendant of the use of the cash, which is contrary to the ethos of adjudication to maintain construction industry cash flow and cannot be used by the liquidator. Mr Chennells says the same reasoning must apply to ring-fencing in this case. He accepts that it may be legitimate if there were doubts as to the defendant's solvency, but although Mr McMahon produced a statement to suggest that there were, these have been answered by Mr Downer and the issue was not pursued by Mr Stokell.

g. The funding agreement between Pythagoras and the administrators is champertous. A request for documentation about the arrangements between them was refused by Circle Law on 12 September 2022 who made the bald assertion that there was compliance with Damages-Based Agreement Regulations 2013 ("DBA Regulations") as Pythagoras was not entitled to more than 50% of any net proceeds recovered. The retainer letter, dated 29 April 2021 was not provided by Ball until 20 September 2022. Having had sight of the agreement, it is clear that, contrary to reg 4(3) of the DBA Regulations, Pythagoras will be entitled to receive more than 50% of the 'payment' recovered, as defined by the regulations. This is because the April 2021 agreement states that it

will keep 50% of recoveries after the issue of proceedings. 'Payment' while excluding expenses, is defined in reg 1(2), as including disbursements incurred by Pythagoras for counsel's fees. It is, therefore, inevitable that it must be keeping more than 50% of the sums recovered. Further, in breach of reg 3, the agreement does not specify the claim or proceedings or part of proceeding to which it relates and does not specify the reason for setting the amount of payment at the level agreed. The only reason given in the agreement for the 50%, being that it is for *"the significant risk we are taking"*, is insufficient for these purposes. The letter of 10 October 2022 setting out what Pythagoras intended by the April 2021 agreement and asserting that it would not work in such a way as to give it more than 50% of the payment, unsupported by any statement and written in the context of trying the argue that the agreement complies, is worthless, as is the letter from Circle Law with the explanation that they are paying for counsel before any realisations are split.

h. Whilst a champertous agreement does not, of itself result in the proceedings which they support be an abuse, they are in this case. In *Meadowside,* judgment was refused where the funding agreement was unenforceable for champerty as it did not comply with the DBA Regulations. The court refused summary judgment as, on the limited evidence, there was a realistic prospect of the defendant establishing that the agreement was an abuse of process. In this case, a similar conclusion should be reached as (a) Pythagoras has no interest in the underlying business of Ball, (b) its sole interest is in what it recovers from this dispute, (c) if Ball is successful is will recover a modest sum, something less than 50% of its claim, and (d) Pythagoras and Circle Law have a clear

interest in Ball winning for otherwise it gets nothing despite incurring expenditure. There is a lack of clarity as to the arrangements between Pythagoras and Circle Law as to who pays counsel. Bearing in mind that Pythagoras is 60% owned by Mr McMahon and Circle Law is owned in equal shares by Mr and Mrs McMahon, looked at realistically, the risk and reward in this action falls on Mr McMahon.

i. If this is an appropriate case for granting judgment, enforcement should be stayed in accordance with the principles summarised in *Wimbledon Construction 2000 Ltd v Vago [2005] EWHC 1086 (TCC).* In that case HH Judge Coulson QC, as he then was, after a review of the relevant authorities said at [26]:

> "…there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:
>
> a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
>
> c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court

must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see *AWG*).

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

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

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

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

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

Discussion and conclusion

61. On any view, Ball is highly insolvent. The administrators forecast that the unsecured creditors, who amount to just over £2m in value, can only expect 2 or 3 pence in the pound. It is clear beyond doubt that it could not

repay the award in circumstances where St Philips succeeds on its cross-claim. *Bouygues, Bresco and Doyle*, establish that the robust approach to the enforcement of adjudication awards must give way to the insolvency regimes when there is a tension between the two. They identify two ways in which this can arise. First, in the case where the parties' rights are converted by the insolvency regime into a statutory set off, there should be no enforcement unless, on the facts, it is clear that there is a positive balance owing to the claimant. Second, where the effect of insolvency is that enforcement of the award would lead to the payee losing its security for a cross-claim there should be no, or a stay on, enforcement, unless the court is satisfied that there is some worthwhile and suitable safeguard in place to ameliorate that hardship.

62. Mr Chennells is correct in his assertion that St Philips' claim will be for the whole of the sums it is owed, it will not be limited to claims just sufficient to match the award. It will need to deploy its whole claim as some parts may not succeed. Furthermore, faced with a claim for the full sum, it can be expected that Ball will wish to rely upon its full claim as it, too, is not bound to accept the adjudication award as final and may consider that it has a better chance of overtopping the St Philips claim if it also pursues those claims rejected by the adjudicator. Mr Stokell relied on a reference in *Meadowside* at [76] and [84] to the effect that the defendant will only be able to recover by litigation a sum enough to extinguish the award and will have to prove for the rest. That does not mean that the litigation must, or will, be limited as he suggests, it merely makes the practical point that after the court has determined the balance, the most St Philips can achieve is to reduce the balance to nil and it must look to proving in the administration insofar as the amount awarded exceeds the balancing figure.

63. The consequence of these conclusions is that the rules relating to insolvency do have an impact on this case which is in tension with the adjudication regime. As in *Straw*, the principle of *pay now and argue later* could not operate at the stage that the administrators were refusing permission for St Philip's claim. Although they have changed their mind after the first day of hearing, by giving permission to litigate, they have limited that to a claim to overturn the adjudicator's award. It is unclear whether that formulation is permission to the defendant to litigate its full claim, so as to have the maximum chance of overtopping the award or restricted to a claim for a balancing figure. Mr Stokell says that this is the correct form of permission based on his argument that any claim beyond that will have to be proved in the administration. Not only is he wrong, but it supports Mr Chennells' assertion that the limited permission is intended to restrict the defendant in proceeding with its full claim. For this reason alone I would have refused summary judgement.

64. Mr Stokell said that *Straw* was no longer good law in the light of *Bresco*. Subject to the modification I have outlined above, it is, as it is consistent with the underlying principle of preferring the insolvency regime to that of adjudication where justified on the facts.

65. Whilst I have not been given a hard example of the practical effect of such limitation, the courts have experience in such cases of a party arguing that since the best the other side can achieve is a reduction of the insolvent party's positive balance to nil, they should be restricted to a pared down number of issues on the grounds of proportionality, usually supported by an argument that if they think their claims are so strong, why should there be any complaint to this approach. It has the capacity to put the solvent party at a disadvantage.

66. The administration here will have the result that any money paid to Ball under the award will go in the expenses of the administration and any

dividend left to the creditors, thus if St Philips were required to pay they will lose the security of the award for its cross-claim. If that were the only impact of the administration it would be an argument for a stay of execution rather than refusing judgment.

67. It is difficult to find a clear guide from the cases as to the principles governing a refusal of judgment as opposed to stay, where the only harm to the defendant is the loss of the security for its cross-claim. In liquidation cases, it has been said that there should be no judgment due to the conversion of the parties' rights into the statutory set off, *Bouygues [35]* and *Doyle at [144]-[145]*, unless there is no realistic defence of set-off to the whole or part of the claim; *Bresco [65]*, but, as is clear from *Bresco* this approach is fact sensitive. There may be other reasons for refusing judgment, such as where it is realistically arguable that the nature of the funding agreement gives rise to an abuse of process, as in *Meadowside.*

68. If the only issue was the loss of security, subject to my conclusion as to the worth of the Pythagoras guarantee and the utility of ring-fencing, I would have given judgment on the award but imposed a stay for a limited period, say 6 months, subject to extension, to enable the defendant to bring its claim. This would recognise the purpose of the adjudication regime, at least in part, but put the onus on the defendant to argue later or, in default of argument, pay. To do otherwise would render the adjudication pointless as it would enable the defendant to walk away and trust that the administrators of this highly insolvent company would give up the chase. It would be wrong for insolvency law to encourage a result which may be to the prejudice of innocent creditors and could encourage debtors to delay payments if the creditor's insolvency was on the horizon, as was recognised by the court in *Swissport (UK) Ltd (in liq) v Aer Lingus Ltd [2009] BCC 113 at [33]*.

69. My reasons for imposing a stay would have been reached on the *Wimbledon v Vago* principles as all the factors favouring a stay exist in this case and those which do not are absent. The claimant cannot repay the award and its financial state has not been brought about by the defendant, nor is there evidence that it was in this state when the contract was made.

70. I next need to deal with the question as to whether a stay ought to be imposed in the face of the offer of ring-fencing and the guarantees. In a case such as this, the court is trying to balance the competing interests of the party with the award and the importance afforded to an effective adjudication regime against the risks to the defendant from the operation of that regime due to that governing insolvency.

71. I would not make an order for which there was not a good reason. If it were the case that there was a doubt as to the defendant's ability to meet the award at the conclusion of litigation, that would be a good reason to order a payment surrounded by the elaborate structure of ring-fencing and guarantees. That, however, is not this case. I do not see the purpose for ordering the defendant to pay money over, only for it to be held in a ring-fenced account. As was pointed out by Coulson LJ in *Doyle* at [58] and [100], the sterilisation of money in this way runs counter to the underlying philosophy of adjudication.

72. On a more general note, it is also undesirable that it becomes a feature of every adjudication enforcement in which there appears to be no risk to the claimant from a stay of enforcement that there has to be detailed evidence and argument as to the worth of a guarantor and guarantee, the level of the defendant's estimated costs, the form of the ring-fencing undertaking and arguments about champerty and abuse of process. What should be a streamlined and speedy procedure, in keeping with the ethos of adjudication, quickly becomes bogged down where there is a proliferation

of issues, as happened this case. It was listed for 2 hours but took one and a half days, stretched over several weeks, and involved two rounds of written submissions.

73. With that introduction, I look at these issues, as briefly as possible, given my decision as to the outcome of this application.

74. The guarantee is limited to the extent that the defendant's "proceedings are successful in overturning the Adjudicator's Decision." For that reason alone the guarantee is inadequate for the same reason that the administrator's limited permission to litigate is. It does not give full costs protection to the defendant to the extent of the action it proposes to bring to defeat the claim based on the award.

75. When looking at the worth of the guarantee, I first need to look at the extent of the potential liability. The defendant's costs budget for its claim includes, in round figures, £84,000 of incurred costs and £244,000 of estimated costs, a total of £329,255, to which is to be added the costs of the budget and budget process, a further £10,000. As I accept that the sums at stake in this ligation are likely to total £700,000, the figures alone are not disproportionate. Neither are they when the range of issues to be tried is taken into account. The precedent H does not include any sums which seem patently too high. Perhaps statements of case could be reduced and there would be a question mark over the incurred costs as the estimated costs appear to show that the defendants are starting from scratch, for example work has yet been done on witness statements. But even deducting 20% to allow for challenges to the budget and incurred cost, the amount of costs at stake are in the order of £270,000.

76. The Aviva guarantee, which also suffers from the same limitations as that of Pythagoras, only covers the second £150,000 of costs if Pythagoras pays the first £150,000. The question which arises is whether the latter is good for that figure. The latest filed accounts, those for June 2020, do not

support that it has an ability to pay this figure, given capital reserves of only £98,730. Set against that are the reserves shown in the capital account, but these fluctuate wildly, as to which there has been no explanation.

77. Mr McMahon, in his third statement, says that the shareholders of Pythagoras have unencumbered property and cash to support the company and stand behind the guarantee. It is said this will be enough to cover any costs claim, though no detail is provided. He claims that the business is on the point of expanding fourfold and that based on his experience, he forecasts that his company will collect £3m in fees in the next 12 to 18 months from the 186 debts it is pursuing for 30 construction companies. The company is retained on a contingent basis, thus its income is dependent upon success. He says that the cost base is fixed, by which I take him to mean that the additional work he expects will not affect cash flow. That does seem improbable where his company is funding litigation for which disbursements will be necessarily incurred; the issue fee alone can be £10,000 and even if litigation is not required, there are costs associated with adjudication. I would have expected to see a cash flow forecast if it is to be maintained that Pythagoras will be in a position to cover at least £150,000 of costs at the conclusion of the defendant's claim. Particularly where it is alleged that the business is due to expand to the extent suggested.

78. Mr Chennells posed the question, if Pythagoras is so financially sound, why does it not obtain a guarantee for all of the costs from an unimpeachable third party or ATE policy. That would have avoided a debate as to worth of the company. There is force in that point. Stepping back, on the selective evidence produced by Pythagoras and raw assertion by Mr McMahon, and taking into account the only published accounts, I am not satisfied that there is a high level of certainty, which was the test

applied in *Meadowside* at [136]-[137], that the company will be able to meet the first £150,000 of costs so as to trigger the Aviva guarantee.

79. Lastly, I come to the issue of champerty and abuse of process. The starting point is that a damages based funding agreement is champertous unless it complies with the DBA Regulations. Thus, the burden is on Pythagoras to show that it comes within the protection of the regulations.

80. As to the three factors which are said to amount to a lack of compliance, I have not been referred to any authority on what constitutes compliance in these regards. The main argument centred around the questions as to whether or not Pythagoras would take more than 50% of the payment as it would recover what it called, external costs, to include counsel fees in addition to 50% of the recovery. If one was to look at the terms of appointment agreed in April 2021, one would conclude that it would incur, and thereby recover, counsel's fees. Circle Law has filed a letter to say that this will not be the case as counsel will be paid before the spoils are divided between the funder and the administrators.

81. There is no witness statement explaining how counsel's fees are to be paid or who is responsible to fund counsel. This is against an evidential background in which Mr McMahon said, in his third statement, that Pythagoras paid £300,000 of counsels' fees in *Bresco* in the Supreme Court. It was on the winning side in that case, which gives rise to the question as to why they paid these fees if these are dealt with by the solicitor deducting the fees before the proceeds of the litigation are divided. The inference to be drawn from the fact that Pythagoras is funding the litigation and is the agent of the administrators to pursue the litigation is that it has agreed to be responsible to pay counsel's fees, as if it were the client, and any payment out of the proceeds to counsel represents a discharge of its liabilities and thus to be treated as a payment made by it. For that reason, without seeing the agreement governing the

payment of counsels' fees as between Pythagoras and Circle Law, I cannot be satisfied that the payment to counsel is not on Pythagoras's behalf and thus should be included within its 50% recovery. These two entities are entitled to withhold the agreement if they wish, but it comes at the cost that I cannot be satisfied that there has been compliance with the regulations in this regard.

82. As to the letter of 10 October 2022 setting out the Pythagoras's intention in realising the collected debt and including an agreement to reduce to 50% the sums ultimately recovered by it, in order to avoid a breach of the regulations, this seems to be a side agreement to delete terms from the April 2021 DBA if its provisions as to remuneration would breach the DBA and a fresh agreement to reduce the amount recoverable under the DBA to ensure that there is no breach. The letter of 10 October 2022 is not in the form of a DBA, nor does it comply with the regulations, The only DBA in this case is the April version. Mr Chennells argues, and I agree, that if the funder wishes to operate under a DBA in line with the October letter it will need an amended DBA or a new agreement, but that would commence from the date of amendment or replacement. Thus, the DBA as it stands remains non-compliant. That is sufficient to find that the damages based agreement was champertous.

83. The other objections are that the claim was not identified and the reason for setting the amount of the payment was not given. The former was not pursued in argument but the latter was. The question which arises is whether the obligation to provide the reason for setting the amount of the payment level agreed is satisfied by stating in bald terms that it is because of the risk. The requirement is stated as the obligation to specify "(c) the reason for setting the amount of the payment at the level agreed".

84. In the absence of authority, I cannot see that the reason given on the agreement can amount to compliance. It is the reason for the level agreed

which must be provided, that is what the regulation states, not merely the reason for taking any percentage of the recovery. It is axiomatic that in entering into a DBA the funder is taking a risk as recovery is contingent on success. The level of information required by regulation 3 must require that the funder explain why it is taking a particular percentage. Furthermore, if that was not explicit in the wording of regulation 3(c), it should be given a purposive construction. The regulations both protect the consumer by informing them and any authority with an interest in the matter, such as a professional regulator and the court, why the percentage recovery has been set at a particular rate. The reason, therefore, must answer that question. If it were otherwise the consumer and others would not know whether the percentage agreed was justifiable.

85. Finally, the question has to be asked as to whether it is realistically arguable that non-compliance amounts to an abuse of process. Mr Stokell dealt with Mr Chennells' arguments on this point in his final written submissions. He said there was not abuse for reasons he gave but which only went to the question of compliance. He did not seek to answer Mr Chennells' arguments on this point. This is an issue of some difficulty. I was not referred to any authority other than what was said in *Meadowside* where this aspect of the law was clearly dealt with in substantial detail. In that case the judge decided that the matter of abuse could not be dealt with, largely, if not wholly, as a result of Pythagoras's refusal to disclose the terms of the agreement.

86. In this case I have seen the agreement. Without lengthening the judgment, on what is not a determinative point by reciting the factors he took into account, from the authorities cited to him, they are set out at [123] *Meadowside,* and whilst I have some reservations arising from the fact that the funder is controlling the litigation due to its connection with Circle Law and its position as agent for the administrators, the DBA does

not amount to trafficking in litigation. It is important that administrators and liquidators have a source of funds to pursue the enforcement of claims and such support should not be confused with trafficked litigation even where, as here, the benefit to the funder is substantial when compared to that to individual creditors, to whom it is likely to be slight. The insolvent company has a real interest in recovering the sums due, so there is nothing improper in the purpose of this litigation. Whilst I do not know how much funding Pythagoras have provided to compare it to the gains it can make, which can be a relevant consideration, the fact is that, whatever the success, the gains will be modest. There is unlikely to be an unreasonable disparity. I am not persuaded that it is realistically arguable that the DBA and Pythagoras's part in this litigation may be an abuse of process. The arrangement here seems to be a justifiable one between insolvency practitioners lacking funds to pursue the insolvent's debt and a funder, save for the failure to comply with the DBA, which is not on its own an abuse.

Conclusion

87. The award will not be enforced as the adjudicator failed to comply with the rules of natural justice in coming to his award. Had this not been the case, I would have given judgment but stayed enforcement for 6 months, or until further order, to enable St Philips to bring its cross-claim. The application for summary judgment is dismissed.