Neutral Citation Number: [2022] EWHC 1443 (TCC)

CONSTRUCTION CONTRACT – ADJUDICATION ENFORCEMENT *– Application for summary enforcement of adjudication decision – Whether proceedings should be stayed for arbitration – Whether summary judgment should be granted – Stay refused – Summary judgment for claimant*

Case No: HT-2022-MAN-000013

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
TECHNOLOGY & CONSTRUCTION COURT (QBD)

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ

Hearing Dates (remotely by Teams): Monday 14 March & Wednesday 4 May 2022
Judgment Date: Monday, 20 June 2022

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

The Metropolitan Borough Council of Sefton

Claimant

- and -
Allenbuild Limited

Defendant

- -
- -

Mr Oliver McEntee (instructed by **Weightmans LLP**, Manchester) for the **Claimant**

Mr Gideon Shirazi (instructed by **Eversheds Sutherland (International) LLP**, Cardiff) for the **Defendant**

The following authorities are referred to in this judgment:

AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098, [2010] Lloyd's Rep I.R. 301
Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27, [2019] Bus LR 3051; [2020] UKSC 25, [2020] Bus LR 1140
Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd [2004] EWCA Civ 1757, [2005] BLR 64
Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)
Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, [2007] Bus LR 1719
Halki Shipping Corporation Ltd v Sopex Oils Ltd [1998] 1 WLR 726
John Doyle Construction Ltd v Erith Contractors Ltd [2021] EWCA Civ 1452
Lane End Developments Construction Ltd v Kingstone Civil Engineering Ltd [2020] EWHC 2338 (TCC)
Law Debenture Trust Corpn Plc v Elektrim Finance BV [2005] EWHC 1412 (Ch), [2005] 2 All ER (Comm) 476
Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93
MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd [2010] EWHC 2244 (TCC), [2010] BLR 561
Motacus Construction Ltd v Paolo Castelli SpA [2021] EWHC 356 (TCC), [2021] Bus LR 717, [2021] BLR 293
Prater Ltd v John Sisk & Son (Holdings) Ltd [2021] EWHC 1113 (TCC), (2021) 196 Con LR 207
Transport for Greater Manchester v Kier Construction [2021] EWHC 804 (TCC), [2021] BLR 431

Hearing dates: Monday 14 March & Wednesday 4 May 2022
Draft judgment circulated: Monday 13 June 2022
Judgment handed down: Monday 20 June 2022

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.

His Honour Judge Hodge QC

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This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives caselaw website. The date and time for hand-down is deemed to be 2:00 pm on Monday 20 June 2022.

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His Honour Judge Hodge QC:

I: Introduction

1. This is my considered judgment on cross-applications: (1) by the claimant employer, the Metropolitan Borough Council of Sefton, seeking summary judgment in a claim to enforce an adjudication award against the defendant contractor, Allenbuild Limited; and (2) by the defendant seeking a stay pursuant to s. 9 of the Arbitration Act 1996 ('**the Arbitration Act**'). The applications raise the question whether a paying party which seeks to avoid the summary enforcement of an unfavourable adjudicator's award is entitled to the stay of any action to enforce that decision for arbitration on the basis that there is a 'dispute' as to whether the sum claimed is due. The resolution of that question involves the consideration of two competing public interests: the 'pay now, argue later' policy which underlies the scheme for the speedy resolution of construction disputes by adjudication, and the respect to be accorded to the contractual autonomy of parties who have agreed that any dispute that may arise between them is to be referred to arbitration. In my judgment, the resolution of this potential tension lies in identifying the true scope of any reference to arbitration.

2. This judgment is divided into eight sections, as follows:

(1) Introduction paras 1 - 2

(2) Background paras 3 - 12

(3) The hearings paras 13 - 15

(4) The construction contract paras 16 - 25

(5) The notice of dissatisfaction paras 26 - 36

(6) The s. 9(4) application for a stay for arbitration paras 37 - 65

(7) The application for summary enforcement of the adjudication decision paras 66 - 87

(8) Conclusion paras 88 - 90

II: Background

3. By a Claim Form issued in Manchester under Part 7 of the Civil Procedure Rules on 9 February 2022 the claimant seeks an order that the defendant should pay the sum of £2,204,217.13 arising out of a decision dated 17 January 2022 (and corrected on 18 January 2022 and again on 21 January in response to minor errors pointed out by the solicitors for the claimant and the defendant respectively) of an adjudicator, Mr Christopher Ennis, nominated by the President of the Chartered Institute of Arbitrators pursuant to the Housing Grants, Construction and Regeneration Act 1996 ('**the Construction Act**') in respect of an adjudication concerning a construction contract and conducted under the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ('**the Scheme**'), plus

interest pursuant to the decision of £778.80 up to 9 February 2022 and £51.92 per day thereafter until payment.

4. By a deed dated 23 September 2005 the parties entered into a construction contract under which the defendant agreed to construct, complete, test, commission and maintain a combined leisure centre and water-based theme park for the claimant at the Esplanade, Southport, originally known as Southport Aquapark, and now called Dunes Splash World. Practical completion was certified on 22 June 2007. Following a number of standstill agreements to suspend time for limitation purposes, on 18 November 2021 the claimant served a notice of adjudication relating to defects; and this was duly referred to the adjudicator, who issued his original, reasoned decision on 17 January 2022. Paragraph 1.2.5 records that: *"There have been no challenges to my jurisdiction."* Both parties were represented in the adjudication process by firms of solicitors experienced in construction law. When the defendant failed to comply with the adjudication decision, the claimant issued its claim form; and on the same day it issued an application for summary judgment to enforce the adjudication decision. That application is supported by a witness statement from its solicitor, Mr Thomas Collins, a partner in the Liverpool office of Weightmans LLP, dated 9 February 2022, together with exhibit TC1. On the same day, HHJ Stephen Davies made a case management order giving procedural directions and abridging relevant time limits so as to lead to a hearing of the summary judgment application on the first available date after 11 March 2022, with an estimated length of hearing of 2 hours.

5. On 24 February 2022 the defendant issued a cross-application seeking an order for permission to stay the proceedings in accordance with s. 9(4) of the Arbitration Act and to adjourn the hearing of the claimant's summary judgment application, which had by then been listed for 14 March 2022 at 2.00pm, pending any resolution by the arbitrator. The defendant also sought a further 14 days following the lifting of the stay to file its evidence in response to the claimant's application for summary judgment. The defendant proposed that its stay application should be dealt with at the hearing that had been fixed for 14 March. The defendant's application was supported by a witness statement, dated 24 February 2022, from its solicitor, Ms Luisa Margaret Gibbons, a principal associate employed in the Cardiff office of Eversheds Sutherland (International) LLP, together with exhibit LG 1.

6. This cross-application was referred to HHJ Stephen Davies together with a letter to the court from the claimant's solicitors, dated 25 February 2022, contending that, and purporting to explain why, the defendant's s. 9 application for a stay was *"not meritorious"* and claiming that: *"What the Defendant is effectively proposing to do by seeking to have its Application listed on the date of the summary judgment application is to drive a coach and horses through the timetable already set by the Court and to interfere with the TCC's powers and procedures to deal with adjudication enforcement proceedings promptly. The Defendant is (on the Claimant's case) seeking to derail the Claimant's entitlement to a Summary Judgment hearing of the matter in a prompt manner."* In the circumstances, the claimant's solicitors invited the court to list the s. 9 application for an urgent hearing more than seven days before the date upon which the summary judgment application was due to be heard. Effectively, that would have meant a hearing during the week commencing Monday 28 February.

7. By an Order dated 28 February, HHJ Stephen Davies listed the defendant's application for a stay at the same time as the claimant's application for summary judgment. He directed that if the judge were to refuse the application for a stay, he should determine whether or not to proceed with the application for summary judgment forthwith or adjourn such application. Accordingly, the timetable in relation to the summary judgment application was directed to stand subject to the following variations, and the timetable in relation to the stay application was to be the same as the timetable in relation to the summary judgment application (as so varied): (1) The defendant was to serve any evidence it might wish to adduce in response to the summary judgment application, and the claimant was to serve any evidence it might wish to adduce in response to the stay application, by 5.00 pm on 3 March 2022. (2) Each party was to serve any evidence in reply by 5.00 pm on 7 March 2022. (3) The claimant was to produce a combined bundle for both applications, and the parties were likewise to produce skeletons and authorities for both applications. (4) Permission was given to either party to apply to the court by letter (to be copied to the other party and to HHJ Stephen Davies) to seek to set aside or vary these directions. Any such application was required to be made by 4.00 pm on the working day following receipt of the order. No such application was ever made.

8. In purported compliance with HHJ Stephen Davies's second order, on 3 March 2022 each party served a second witness statement from their respective solicitors. For the claimant, Mr Collins's second witness statement, which exhibits further documents as exhibit TC 2, responds to the defendant's s.9 stay application. Mr Collins addresses the background and the contractual position, commenting (at paragraph 10) that if a notice of dissatisfaction with the adjudication decision were to be served, then it was clear from clause 93.2 of the contract conditions that the jurisdiction of the arbitration tribunal was concerned *"… with the substantive merits of the adjudication decision alone. The forum for enforcement of the adjudication decision itself is the court. The tribunal has no jurisdiction to deal with enforcement of an adjudicator's award."* At paragraph 11, Mr Collins observes that the defendant's notice of dissatisfaction sets out a blanket expression of dissatisfaction with *"the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning and decisions"*. There is said to be nothing in the notice of dissatisfaction which even begins to explain why it is considered, for example, that the decision is not enforceable e.g. that the adjudicator did not have jurisdiction to hear the dispute; or that there was any alleged breach of natural justice. *"Therefore, whilst the arbitrator does not have jurisdiction on matters of enforcement in any event, there is clearly nothing in the Notice of Dissatisfaction which could be said to identify any issues relative to enforcement for the arbitrator to determine even if he/she in fact had jurisdiction to do so."* At paragraph 13, Mr Collins asserts that the claimant has not issued proceedings in respect of a matter which ought to have been referred to arbitration: *"There is no blanket arbitration clause ousting the jurisdiction of the courts generally. The Claimant has issued enforcement proceedings in relation to which the court has jurisdiction and to which, pursuant to the Contract, the arbitrator does not have jurisdiction to address. The court is the only forum with jurisdiction over the adjudication enforcement proceedings. On that basis, the Defendant is unable to rely on Section 9 of the Arbitration Act and the Defendant's application should be dismissed."* (I have corrected an obvious typographical error in the last sentence of this final citation.)

9. Ms Gibbons's second witness statement first addresses the contractual position and the notice of dissatisfaction before responding to the summary judgment application (at paragraphs 9 to 11). Having set out the legal test governing the grant of summary judgment, Ms Gibbons asserts *that "... until such time as an arbitration finally determines the issue of liability and if appropriate, the quantum attaching to any final liability so determined, it cannot be the case that the defendant has no real prospect of successfully defending the claim or issue, since the arbitrator has the power to review and revise the decision of the Adjudicator. Awarding summary judgment at this stage, when liability and quantum is subject to determination by arbitration, would be, adopting the common analogy, 'putting the cart before the horse'."* Furthermore, there is said to be a compelling case as to why the case should be disposed of at trial: *"The time until trial may be used by the parties to have liability and quantum determined at arbitration, and as stated in clause 93.2 of the Conditions: 'the tribunal settles the dispute referred to it.' An award in the favour of the Claimant, at this stage, could lead to the Defendant in due course having to apply to set aside the summary judgment in the event that the arbitration reviews and revises the conclusion of the Adjudicator. Furthermore, it could result in proceedings having to be issued by the Defendant to recover any sums paid pursuant to a summary judgment award. This will inevitably lead to costs being unnecessarily incurred by the parties, and further demands upon the courts resources and the public purse which funds the Claimant. There is therefore a compelling case as to why the Claimant's summary judgment application is premature, and that allowing the parties time to resolve the dispute through the means agreed by them, will advance the overriding objective."* At paragraph 12, Ms Gibbons concludes that: *"In the circumstances, it is the Defendant's position that the Claimant has failed to establish that the defendant has no real prospect of successfully defending the claim, given that the parties had agreed upon arbitration as a means of settling a dispute, in the event either party was dissatisfied with the Adjudicator's decision. Furthermore, there are compelling reasons why the case should not be disposed of summarily in the interests of saving costs, the court resources and advancing the overriding objective."*

10. The parties' third round of evidence was served on 7 March 2022. Mr Collins's third witness statement responds to Ms Gibbons's evidence in response to the claimant's application for summary judgment. Mr Collins points out that the defendant *"... has not in fact put forward any valid or proper grounds on which to resist the application for summary judgment separate or distinct from those advanced in its application for a stay in favour of arbitration"*. The defendant is said to have failed properly to have addressed the grounds on which it may dispute an application for summary judgment to enforce the decision of an adjudicator. *"On the basis that the Claimant's position is that the Defendant's Stay Application should fail, then the decision of the adjudicator should be enforced. The Defendant has failed to demonstrate or evidence that there is no such decision to enforce because, for example, (a) the Adjudicator did not have jurisdiction to make the Decision or (b) the Adjudicator breached the rules of natural justice. There is no such evidence from the Defendant. On that basis the Claimant's position is that (1) there is no real prospect of the Defendant successfully defending the claim; and (2) there is no other compelling reason why the case of* [surely: or] *issue should be disposed of at trial. Therefore, the Claimant's position is that the order for summary judgment should be made."*

11. In her third witness statement, Ms Gibbons contends that Mr Collins's second witness statement entirely misses the point. The defendant's position – as set out in its application for a stay under s. 9 of the Arbitration Act – is that the summary judgment application should be stayed for arbitration, in accordance with s. 9; and, in those circumstances, the defendant has not incurred the significant costs associated with the investigations and production of evidence in response to the summary judgment application, which should be resolved in an arbitration tribunal. Should the defendant's s. 9 application be dismissed, then directions should be set to a further hearing, including for evidence in response to the summary judgment application. *"By way of anticipation of the types of points that Allenbuild might include in its evidence (and to explain the costs which have not yet been incurred)"*, Ms Gibbons claims that *"… there are fact specific complexities to this dispute involving the manner in which this adjudication was brought (and, issues around the sale of the company, exercise of subrogation rights, etc.)."*

12. *"By way of background"*, Ms Gibbons explains that the dispute with the claimant is said to relate to a contract that was entered into between the parties in 2005. In 2014, the defendant was sold by its owners to a third party. Under the sale agreement, the seller agreed to indemnify the buyer on demand against liabilities, including the contract with the claimant. There was also a guarantee of the buyer's liabilities and obligations. Under the terms of the indemnity, the buyer agreed to allow the seller to take over the 'sole conduct' of any third party indemnity claim as the seller deemed appropriate; and the defendant was required to instruct such solicitors as were nominated by the seller to act on behalf of the defendant, acting in accordance with the seller's instructions, but having regard to the reasonable requests and commercial interests of the buyer and the defendant. Ms Gibbons asserts that this gives rise to complexities around the issue of authority and jurisdiction, scope of subrogation rights, assignability of adjudication, etc. that the defendant has not yet fully investigated, nor put into evidence at this stage, given that liability in this matter remains to be determined by arbitration. Service of the notice of dissatisfaction in a timely fashion put the wheels in motion for referring this matter to arbitration, but the contract allows time for such matters to be finessed. Ms Gibbons says that the defendant may also argue that clause 90.1 of the contract conditions complies with the Construction Act and/or that the contract sets out a contractual adjudication procedure and so no adjudication can be carried out under the Scheme. Ms Gibbons also speculates that there may be further arguments that the defendant would wish to raise based, e.g., on the date of the contract and the provisions of the unamended Construction Act. Ms Gibbons submits that, in the circumstances, the most appropriate course of action is to stay the enforcement proceedings pursuant to s. 9(4) of the Arbitration Act; but if the application is refused, she suggests that directions should be set for further evidence to be adduced.

III: The hearings

13. The initial hearing of these two applications was listed remotely by Teams at 2.00 pm on Monday 14 March 2022 with a two hour time estimate. The claimant was represented by Mr Oliver McEntee (of counsel) and the defendant was represented by Mr Gideon Shirazi (also of counsel). Both counsel had submitted helpful written skeleton arguments, respectively dated 10 and 9 March 2022, which I had had the opportunity of pre-reading. There was an electronic hearing bundle of 330 pages and a

joint authorities bundle extending to 800 pages. Unfortunately, the hearing had to be adjourned part heard at about 4.50 pm due to a lack of time and because a number of new points, involving allegations of waiver and the precise terms of the notice of dissatisfaction, had been raised, and a number of additional authorities (which had not been made available to either the court or opposing counsel), had been referred to during the course of oral submissions. In order to allow for sequential further written submissions, and to accommodate the busy diaries of both counsel and the court, it was not possible to reconvene the hearing until Wednesday 4 May; and even then the hearing had to be put back from its original listing to 1.00 pm to accommodate a prior professional engagement on the part of Mr McEntee.

14. Prior to the resumed hearing, the court received further written submissions from Mr Shirazi, dated 21 March, and from Mr McEntee, dated 28 March which the court was able to read in advance. There was a further joint authorities bundle, extending to 181 pages. At the start of the resumed hearing, the court indicated a provisional view that much might turn on the question whether, properly construed, the notice of dissatisfaction extended to the validity, as well as the merits, of the adjudicator's decision. Mr Shirazi addressed the court first, followed by Mr McEntee, with a brief response from Mr Shirazi. The resumed hearing lasted from 1.00 until about 2.20 pm, when the court reserved to consider its judgment.

15. In this judgment, I do not propose to recite all the submissions, or to refer to all the many authorities, that have been advanced and cited to me; but I make it clear that I have re-read all four of the written skeleton arguments and have also refreshed my memory from my written notes of the two hearings. I propose to consider, first, the provisions of the construction contract relating to adjudication and arbitration; second, the meaning and effect of the notice of dissatisfaction; third, the defendant's s. 9 application for a stay for arbitration; and, fourth, the claimant's application for summary enforcement of the adjudication decision before summarising my conclusions.

IV: The construction contract

16. The construction contract consists of a number of documents, including the second edition (1995) of the NEC Engineering and Construction Contract, Option C as amended, together with the completed Contract Data Parts One and Two. Clause 1.1 of Contract Data Part One provides that: *"The conditions of contract are the core clauses and the clauses for Options C, G, H, M, P, R, T, U and Z of the second edition (1995) of the NEC Engineering and Construction Contract"*. Clause 9 of the Contract Data Part One provides as follows:

> **9. Disputes and termination**
> 9.1 The person who will choose a new adjudicator if the Parties cannot agree a choice is the President for the time being of the Chartered Institute of Arbitrators.
> 9.2 The adjudication procedure is the model adjudication procedure, published by the Construction Industry Council, second edition dated November 1998 and any amendments or alterations thereto current at the date of the notice of dispute.
> 9.3 The *tribunal* is arbitration. The arbitration procedure is the Chartered Institute of Arbitrator's Arbitration Rules (2000 Edition) or any

> amendment or modification to it in force when the arbitrator is appointed.

The core clauses of the second edition of the NEC Engineering and Construction Contract, Option C, address the settlement of disputes and adjudication at clauses 90 to 93. Clause 90.1 provides that: *"Any dispute arising under or in connection with this contract is submitted to and settled by the Adjudicator …"* in accordance with a prescribed timetable for the reference of the dispute to adjudication. Clause 90.2 provides that:

> The *Adjudicator* settles the dispute by notifying the Parties and the *Project Manager* of his decision together with his reasons within the time allowed by this contract. Unless and until there is such a settlement, the Parties and the *Project Manager* proceed as if the action, inaction or other matter disputed were not disputed. The decision is final and binding unless and until revised by the *tribunal.*

The *"Project Manager"* is identified in clause 1.4 of the Contract Data Part One as a named employee of the claimant. Clauses 91 and 92 deal with the adjudication and the adjudicator respectively. Clause 93, entitled *"Review by the tribunal"*, provides as follows:

> 93.1 If after the *Adjudicator*
> • notifies his decision or
> • fails to do so
> within the time provided by this contract a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the *tribunal*. It is not referable to the *tribunal* unless the dissatisfied Party notifies his intention within four weeks of
> • notification of the *Adjudicator's* decision or
> • the time provided by this contract for this notification if the *Adjudicator* fails to notify his decision within that time
> whichever is the earlier. The *tribunal* proceedings are not started before Completion of the whole of the *works* or earlier termination.
> 93.2 The *tribunal* settles the dispute referred to it. Its powers include the power to review and revise any decision of the *Adjudicator* and any action or inaction of the *Project Manager* or the *Supervisor* related to the dispute. A Party is not limited in the *tribunal* proceedings to the information, evidence or arguments put to the *Adjudicator*.

17. The model adjudication procedure, published by the Construction Industry Council, current at the date of the dispute, provides (so far as material) as follows:

> 4. The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties agree to arbitration) or by agreement.

> 5. The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration.
>
> …
>
> 7. If a conflict arises between this procedure and the Contract, unless the Contract provides otherwise, this procedure shall prevail.
>
> 8. Either Party may give notice at any time of its intention to refer a dispute arising under the Contract to adjudication by giving a written Notice to the other Party. The Notice shall include a brief statement of the issue or issues which it is desired to refer and the redress sought …
>
> …
>
> 31. The Parties shall be entitled to the redress set out in the decision and to seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration. No issue decided by the Adjudicator may subsequently be referred for decision by another adjudicator unless so agreed by the Parties.
>
> 32. In the event that the dispute is referred to legal proceedings or arbitration, the Adjudicator's decision shall not inhibit the right of the court or arbitrator determine the Parties' rights or obligations as if no adjudication had taken place.
>
> …
>
> 'Contract' means the contract between the Parties which contains the provision for adjudication.

The CIC model adjudication procedure complies with the requirements of the Construction Act.

18. The construction contract was required to comply with the Construction Act as it was in force at the time the contract was entered into. This means that the contract was required to include provision enabling a party to give notice *'at any time'* of his intention to refer any dispute to adjudication, with any resulting adjudication decision being temporarily binding between the parties until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement: see s. 108(2)(a) and (3) of the Construction Act. If the contract does not comply with these requirements, by s. 108 (5) the adjudication provisions of the Scheme apply. By paragraph 23 (2) of the Scheme, corresponding to paragraph 4 of the CIC model adjudication procedure, *''the decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties''*.

19. Because clause 90.1 of the core clauses sets out prescribed time limits as to when a dispute may be submitted to adjudication, it is common ground that that sub-clause does not comply with s. 108(2)(a) of the Construction Act, which provides that a construction contract must *"enable a party to give notice at any time of his intention to refer a dispute to adjudication"*. However, the parties differ as to the consequences of this.

20. For the claimant, Mr McEntee submits that by s. 108(5) of the Construction Act, the adjudication provisions of the Scheme apply. For the defendant, Mr Shirazi submits that it is the CIC model adjudication procedure (which is expressly incorporated into the contract by clause 9.2 of the Contract Data Part One) which applies. He points out that at the time of contracting, core clause 90.1 was known to be inconsistent with the Construction Act because it fettered the parties' right to refer matters to adjudication *"at any time"*. The parties were professionally advised and should be taken to have been aware of this. They therefore expressly agreed, by clause 9.2 of the Contract Data Part One, that a different adjudication procedure should apply, namely the CIC model adjudication procedure. That adjudication procedure is inherently inconsistent with the NEC2 adjudication procedure, but it complies with the Construction Act. The better interpretation of the contract is one which upholds the parties' bargain – as recorded in clause 9.2 – and not one which strikes down the parties' contract and replaces it with something else, in the form of the Scheme, as laid down by the Construction Act.

21. On this issue, I prefer Mr Shirazi's submissions and I reject the competing submission of Mr McEntee. In my judgment, clause 7 of the CIC model adjudication procedure (cited above) displaces the adjudication procedure provided for by core clauses 90 to 92, replacing it with the provisions of the CIC model procedure. Clause 7 provides, in terms, that if any conflict arises between the model adjudication procedure and the contract, the former is to prevail. This reflects the position under the general law of contract, as noted at section 4 of chapter 7 of *Lewison: The Interpretation of Contracts*: *"Where the contract is a standard form of contract to which the parties have added special conditions, then unless the contract otherwise provides greater weight must be given to the special conditions, and in case of conflict between the general conditions and the special conditions, the latter will prevail."*

22. In my judgment, this displacement extends to the whole of core clauses 90 to 92, including clause 90.2. Mr Shirazi submits that clause 90.2 survives because the special conditions incorporating the model adjudication procedure do not take precedence over clauses which are already consistent with the special conditions, or which add additional obligations, such as clause 90.2. However, it does not seem to me that it is possible to 'cherry-pick' between different elements of the two adjudication procedures, with some elements of one co-existing with elements of the other. In my judgment, the parties contracted to follow the model adjudication procedure, nothing more and nothing less.

23. If I am wrong about the application of the CIC model adjudication procedure, then I would hold that the effect of s. 108(5) of the Construction Act was to displace the provisions of clauses 90 to 92 (including clause 90.2) in favour of the Scheme. Whichever route is followed, I hold that there was no requirement on the Adjudicator to notify the Project Manager, as well as the parties, of his decision. However, if I am wrong about that, then I would have held that the Adjudicator's apparent failure to

notify the Project Manager of his decision does not affect the validity, or the binding character, of the Adjudicator's decision as between the parties to the contract.

24. It follows that the adjudication should have been conducted in accordance with the CIC model procedure rather than (as was the case) the Scheme. However, this was not a point raised at any time by the expert construction solicitors (Pinsent Masons LLP) who had been retained for the purposes of the adjudication on behalf of the defendant. By failing to raise any objection to the adjudicator's decision at the start of the process, or expressly to reserve the right to do so in the future, I consider that the defendant waived any right to object to the adjudicator's jurisdiction thereafter. The applicable principles on waiver and general reservations in the adjudication context were summarised by Coulson LJ (with the agreement of Sir Andrew McFarlane P and King LJ) in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27 at [92], [2019] Bus LR 3051: *"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"*. Mr Shirazi relies on Coulson LJ's later observation (at 92(iv)] that: *"A general reservation of position on jurisdiction is undesirable but may be effective"*. However, there is not a shred of evidence that the defendant ever reserved its position on jurisdiction (a point I will develop further when addressing the summary judgment application).

25. I also note that by email to the Adjudicator, dated 21 January 2022 at 15.08, Pinsent Masons LLP wrote as follows:

> Thank you for your decision of 17 January 2022 which was subsequently updated on the 18 January 2022.
>
> Having reviewed the terms of the award, we note an error at paragraph 7.3.9 d (ii) which deals with Mott McDonald's expert fees where the total deductions are said to be £28,303.05.
>
> According to our calculations the deducted sums add up to £28,883.05 and therefore the sum awarded should be £64,894.35 rather than £65,474.35. This in turn will have an impact on the total sum of Additional Costs of Investigation at paragraph 11.1.4 and interest applied against the total sum at paragraph 11.1.5.
>
> We raise this for your consideration and trust this could be amended under the slip rule.

This led to the second correction of the Adjudicator's decision, on 21 January 2022. Had it been necessary to do so, I would have held that this invitation to the Adjudicator to amend his decision, made without any reservation, amounted to an acceptance of the Adjudicator's jurisdiction even if (contrary to my view) it was still open to the defendant to object to his jurisdiction.

V: The notice of dissatisfaction

26. It is common ground that the substitution, for clauses 90 to 93 of the core clauses, of alternative adjudication provisions, whether under the Scheme or the CIC model

procedure, does not supplant the provisions for arbitration at clause 93 of the core conditions. The defendant gave notice of its dissatisfaction with the adjudicator's decision in accordance with clause 93 by letter dated 7 February 2022. Having referred to the decision, and the terms of clause 93.1, the letter continued as follows:

> We hereby give notice under clause 93.1 of Allenbuild's dissatisfaction with the Adjudicator's Decision.
>
> This Notice of Dissatisfaction relates to the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning, and decisions.
>
> As a consequence of this Notice of Dissatisfaction, the Adjudicator's Decision shall not become final and binding.
>
> Allenbuild reserves all of its rights in relation to this matter including the right to refer the dispute which is the subject of the Adjudicator's Decision to the tribunal for final determination under clause 93.
>
> Please acknowledge safe receipt of this notice.

27. For the defendant, Mr Shirazi emphasises that the notice of dissatisfaction served by the defendant states that it "*relates to the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning and decisions.*". He submits that a notice relating to the "*entirety*" of an adjudicator's decision has the effect of preventing that decision from becoming final and binding and leaves open any challenges on any basis whatsoever (whether as to enforceability or final determination). He relies on two authorities.

28. The first is the recent decision of O'Farrell J in *Transport for Greater Manchester v Kier Construction Ltd* [2021] EWHC 804 (TCC), [2021] BLR 431. There the parties had contracted on the NEC3 form (the successor form to the NEC2 form used in this contract). The NEC3 form provided for a similar tiered dispute resolution clause as in the present contract. The successful party to an adjudication (Kier) argued that a notice of dissatisfaction served by TfGM was invalid because (amongst other reasons) it did not set out enough detail. The court held at [43]:

> The Contract did not stipulate the form of words that had to be used, or the level of detail that was required in any notice of dissatisfaction. The purpose of the notice was to inform the other party within a specified, limited period of time that the adjudication decision was not accepted as final and binding. A valid notice would have to be clear and unambiguous so as to put the other party on notice that the decision was disputed but did not have to condescend to detail to explain or set out the grounds on which it was disputed.

29. The second is the even more recent decision of Ms Veronique Buehrlen QC in *Prater Ltd v John Sisk & Son (Holdings) Ltd* [2021] EWHC 1113 (TCC), (2021) 196 Con LR 207 which also concerned the NEC3 contract. At [23] the Deputy Judge said this:

> [Counsel] also argued that what clauses W2.3(11) and W2.4(2) of the Subcontract contemplate is a rehearing of the underlying merits of the dispute not a challenge to the jurisdiction of the adjudicator. However, there is no such carve out in the relevant contractual provisions. Clause W2.4(2) is concerned with circumstances in which a party is dissatisfied with the decision regardless of the grounds for that dissatisfaction. Further, the parties have agreed that the decision will be binding unless and until revised by the Tribunal. 'Revised' must include a declaration that the decision is not enforceable or otherwise binding for jurisdictional reasons. Moreover, the provisions cannot be limited to a dispute as to the underlying merits of the decision because clause W2.3(11) provides that in the absence of a notice of dissatisfaction being served within four weeks of the notification of the Adjudicator's decision, the decision becomes final. Accordingly, if the dissatisfied party wants to challenge the decision for want of jurisdiction, he must serve a notice stating his intention to refer the matter to the tribunal.

Mr Shirazi submits – in my view correctly - that this passage establishes that for the purposes of the NEC dispute resolution clauses, there is no distinction between a challenge to an adjudicator's decision on the underlying merits of the dispute or as to the adjudicator's jurisdiction: both forms of dispute may be referred to the *"tribunal"*. However, he also seeks to rely upon this passage for the further submission that the requirements for a notice of dissatisfaction are the same regardless of whether the serving party wishes *"to dispute enforceability or seek a final determination"*, by which I understand Mr Shirazi to mean whether the dissatisfied party wishes to challenge the underlying merits of the decision or the adjudicator's jurisdiction.

30. Mr Shirazi invites the court to note three points from these two authorities:

(1) First, the purpose of the notice of dissatisfaction is to prevent an adjudicator's decision from becoming *"final and binding"*.

(2) Secondly, for a notice of dissatisfaction to be valid it need only set out that the decision is disputed. Such a notice does *"not have to condescend to detail to explain or set out the grounds on which it was disputed"*.

(3) Thirdly, for similar reasons, the requirements are the same regardless of whether a party disputes the enforceability of a decision, the substance of a decision, or both.

31. For the claimant, Mr McEntee submits that whilst a notice of dissatisfaction need not descend into the details of the substantive challenge, the issue of the validity of an adjudication decision is of a fundamentally different character from its merits; and, on the true construction of core clause 93.1, that was a matter that needed to be spelt out if it was to be referred to the tribunal. He accepts that the sufficiency, or otherwise, of the detail with which the substantive grounds of challenge are set out in a notice of dissatisfaction is unlikely to bear upon its validity as an adequate notice. It is entirely right that there is no need for any particulars of the substantive dispute to be spelt out at that stage: there will be a notice of arbitration, and ultimately detailed statements of case in due course. But whether or not the decision is valid is a matter of an entirely different character, particularly under a contract such as the NEC2 Contract, where

the existence of a valid adjudication decision is the first step in the resolution of any dispute, and a precondition to the bringing of an arbitration. If the decision is not accepted as such, the party receiving the notice of dissatisfaction will, among other things, need to consider whether to bring a second adjudication. If the decision appears to be accepted as a valid, but wrong, decision, the claimant (on its construction of the contract) can commence enforcement proceedings. A challenge to the *"entirety"* of a decision presupposes that the purported decision is, as a matter of fact, a *"decision"*. The defendant's notice of dissatisfaction is a challenge to the substance of the adjudicator's decision. The *"matter which [the defendant] disputes"*, for the purposes of clause 93.1, is what the adjudicator decided, not the fairness of the procedure or the jurisdiction of the adjudicator to make the decision. The defendant has simply not indicated an intention to refer any enforcement challenge to arbitration and so the application for a stay falls away in any event.

32. Mr McEntee submits that *TfGM v Kier* is not determinative of the issue. The case was concerned solely with the degree of particularity with which a **substantive** challenge to the merits of an adjudicator's decision was formulated in a notice of dissatisfaction. The decision does not bear upon the specific question as to whether a challenge to the validity of an adjudicator's decision is a *"matter"* different from the substantive merits of that decision.

33. Mr McEntee further submits that *Prater v John Sisk* is no support for the proposition that there is no need to specify the existence of a jurisdictional challenge in a notice of dissatisfaction provided there is a general objection to the adjudicator's decision. That case was all about serial adjudications. For present purposes, the material issue was whether the findings in a prior adjudication (Adjudication 2) were binding upon the adjudicator in a subsequent adjudication (Adjudication 4) in circumstances where there had been a notice of dissatisfaction in relation to, but no arbitration to challenge the validity of, the earlier decision: see [20]-[22]. No point was taken in that case as to the sufficiency of the notice of dissatisfaction, and the judgment does not record the terms of that notice. Rather, the claimant (who was seeking enforcement) contended that the defendant could not challenge the provisional validity of the findings in Adjudication 2 because, although a notice of dissatisfaction had been served, arbitral proceedings had not been commenced. The defendant (who was resisting enforcement) contended that jurisdictional objections to the validity of the adjudication decision could not be put in issue before the tribunal, so that the defendant could not be precluded from denying the provisionally binding effect of the decision in Adjudication 4. Paragraph 23 of the judgment simply records the argument that was advanced, and the judge's dismissal of it. Mr McEntee contends that nothing in that paragraph supports the proposition advanced by Mr Shirazi that if the basis on which the relevant party is dissatisfied with an adjudicator's decision is a want of jurisdiction, as distinct from the merits of the decision, the fact that the challenge made is jurisdictional does not need to be distinctly specified in the notice of dissatisfaction.

34. I accept Mr McEntee's submissions, and his analysis of the authorities, and I reject those of Mr Shirazi. As Mr McEntee submits, the issue in *TfGM v Kier* was whether the adjudicator had erred in law and in his interpretation, and application, of the express terms of the construction contract. As O'Farrell J explained at [44]:

> The letter of 29 November 2019 was a valid notice of dissatisfaction for the purposes of clauses W2.3(11) and W2.4. The words: 'it is clear that he has erred in law and in his interpretation and application of the express terms of contract between the parties in a number of fundamental respects' were sufficient to make clear that TfGM did not accept, and was dissatisfied with, the Adjudicator's decision. The words: 'TfGM's … intention to seek formal resolution to reverse the outcome of the Decision' were sufficient to inform Kier that it intended to refer the disputed adjudication decision to the Court.

The case is no authority for the discrete proposition that there is no need for a party who wishes to make a challenge to the **validity** of an adjudicator's decision, as distinct from its substantive merits, to make that clear in any notice of dissatisfaction. *Prater v John Sisk* establishes that a notice of dissatisfaction may relate to the validity of an adjudicator's decision, instead of, or in addition to, its substantive merits; but it affords no support for the proposition that there is no need to specify the existence of a jurisdictional challenge in such a notice so long as it raises a general objection to the adjudicator's decision.

35. I hold that whilst a notice of dissatisfaction need not descend into the details of any substantive challenge to an adjudicator's decision, the issue of the validity of such a decision is of a fundamentally different character from its substantive merits; and a notice of dissatisfaction needs to make it clear whether a challenge is being made to the **validity** of an adjudicator's decision on jurisdictional grounds, instead of, or in addition to, a challenge to its substantive merits. In my judgment, the notice of dissatisfaction, issued on 7 February 2022, relating to *"the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning, and decisions"*, on its true construction, did **not** make it clear that a challenge was being made to the **validity** of the adjudicator's decision, on jurisdictional grounds, in addition to a challenge to its substantive merits.

36. However, for the reasons set out in the next section of this judgment, in my judgment it makes no difference to the outcome of this case if I am wrong and the notice of dissatisfaction issued on 7 February 2022 did purport to challenge the **validity** of the adjudicator's decision, on jurisdictional grounds, in addition to its substantive merits.

VI: The s. 9(4) application for a stay for arbitration

37. Section 9 of the Arbitration 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.

The expressions *"null and void"*, *"inoperative"*, and *"incapable of being performed"* introduce tests that go to the validity of the arbitration clause generally.

38. Mr Shirazi emphasises that there is no discretion in relation to an application under s. 9. The mandatory nature of a stay for arbitration is clearly recognised in the authorities. Thus in *Halki Shipping Corporation Ltd v Sopex Oils Ltd* [1998] 1 WLR 726 a majority of the Court of Appeal (Henry and Swinton Thomas LJJ, Hirst LJ dissenting) concluded that even where there was no arguable defence to a dispute, the court was obliged by s. 9 of the Arbitration Act to stay proceedings in respect of a matter referred to arbitration unless it was satisfied that the action was not brought in respect of that matter or that the arbitration agreement was null and void, inoperative or incapable of being performed. In *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, [2005] BLR 64 the Court of Appeal held that the 'pay now, argue later' requirements of the payment provisions of the Construction Act do not trump the mandatory requirement to stay a dispute for arbitration, and the court was therefore bound by s. 9 of the Arbitration Act to grant such a stay. However, that was a claim to enforce payment of sums due under interim and final certificates where, although no notice of intention to withhold payment had been given by the employer, the contractor had not pursued its claims to an adjudication decision. Indeed, at [24]-[26] Clarke LJ (delivering the leading judgment) appears to have contemplated that if any dispute under the construction contract had been referred to adjudication, the court would have had the necessary jurisdiction to enforce any order made by the adjudicator, notwithstanding the existence of the arbitration provisions in the contract.

39. Mr Shirazi refers to the summary of the approach demanded of a court under s. 9(4) which is to be found in the 6th edition of *Merkin & Flannery on The Arbitration Act 1996* at paragraph 9.17, as follows:

> Once the court is, at least preliminarily speaking, satisfied that:
>
> (i) an arbitration agreement exists (meaning that it has been 'constituted' and that it still subsists);
>
> (ii) the parties to it and to the proceedings are the same;
>
> (iii) the arbitration agreement covers the matter in question; and
>
> (iv) the defendant has taken no step in the action to answer the merits of the claim;
>
> a stay is automatic and mandatory, unless any one or more of the conditions in section 9(4) are met, i.e. the claimant (respondent to the

> stay application) 'satisfies' the court that the arbitration agreement is defective in one of the ways listed.

When considering whether an arbitration agreement covers the 'matter in question', there is a strong presumption that parties intend to have all their disputes resolved in a single forum: *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2007] Bus LR 1719, at [13].

40. Mr Shirazi submits that juridically, an adjudication enforcement action is a breach of contract claim. In principle, there is no reason why the position should be any different for adjudication enforcement claims: where there is an arbitration clause covering claims under the contract, a stay should be granted.

41. There are said to be only two decisions which directly consider whether adjudication enforcement proceedings should be stayed under s. 9 of the Arbitration Act. The first is the decision of Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93. There the unsuccessful party to an adjudication had referred seven disputes relating to it to arbitration, including the question as to whether the adjudicator's decision was of any force and effect; and it sought a stay of adjudication enforcement proceedings under s. 9. Mr Shirazi analyses Dyson J's decision as holding that:

(1) The validity of an adjudication decision can be resolved by arbitration: there can be no objection in principle to the parties to a construction contract giving an arbitrator the power to decide questions as to the lawfulness of an adjudicator's decision: see page 99 col 1;

(2) A clause stating that an arbitrator can *"revise"* a decision means that the adjudicator has jurisdiction to determine disputes relating to the validity of the decision: see page 99 col 1.

(3) But, on the facts of that case, the unsuccessful party had waived its right to make an application under s. 9: see page 99 col 2.

Mr Shirazi submits that this final point does not reflect the modern state of the law; but he says that *Macob* is distinguishable from the present case because the waiver in *Macob* arose from the unsuccessful party starting an arbitration about the decision which has not happened here. In my judgment, it is clear from the extracts from his judgment cited below that Dyson J was applying the doctrine of waiver by election, also known as the doctrine of approbation or reprobation (or blowing hot and cold). As will appear later in this judgment, I do not accept that this aspect of Dyson J's decision fails to reflect the present state of the law; or that *Macob* can be distinguished from the present case: although the defendant may not have commenced arbitration proceedings, it has served a notice of dissatisfaction relating *"to the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning, and decisions"*.

42. The second of the decisions on applications under s. 9 of the Arbitration Act for a stay for arbitration in the context of adjudication enforcement is that of HHJ Peter Langan QC in *MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] EWHC 2244 (TCC), [2010] BLR 561. In that case, the unsuccessful party sought a

stay of adjudication enforcement proceedings under s. 9. HHJ Langan QC refused a stay. Mr Shirazi submits that the judge took a drastically different approach to Dyson J, holding, at [31], that the Scheme and the 'pay now, argue later' policy of the Construction Act were inherently irreconcilable with arbitration and so adjudication enforcement must lie outside the scope of the arbitration clause. As will appear later in this judgment, I do not consider that HHJ Langan took any different approach to Dyson J.

43. Mr Shirazi submits that the reaction to ***MBE*** calls its analysis seriously into question:

(1) The editors of the Building Law Reports – the only report of the case – are said to be deeply critical of the decision, noting that: *"Analysis of what the arbitration clause encompasses leads potentially to directly the opposite result to that achieved in the judgment …"*; and that its relatively low value meant that an appeal was unlikely. The same legal conclusion is said to have been reached in Julian Bailey's *Construction Law*, volume III para 24.123.

(2) The successful counsel in ***MBE*** wrote an article for the TECBAR Review commenting that the result in that case was inconsistent with the law generally. Mr Shirazi observes that it is a truly exceptional case where counsel feels compelled to pen an article condemning a case that they successfully argued.

(3) The Joint Contracts Tribunal (which drafted the JCT suite of contracts) expressly carved out adjudication enforcement matters from their arbitration clauses (in article 8 of the JCT Standard Building Contract). Mr Shirazi submits that that would hardly have been necessary if ***MBE*** were viewed as correctly reflecting the law.

(4) ***MBE*** is said to fly in the face of the general approach adopted in the law of arbitration (such as the primacy of the respect to be accorded to the parties' autonomy in choosing their dispute resolution forum, the ***Fiona Trust*** approach to interpreting arbitration clauses, and so forth); and the decision is said to be contrary to the conclusion reached by Dyson J in ***Macob*** that *"there can be no objection in principle to the parties to a construction contract giving an arbitrator the power to decide such questions"*.

(5) The only subsequent case in which ***MBE*** has been considered is my own decision in ***Motacus Construction Ltd v Paolo Castelli SpA*** [2021] EWHC 356 (TCC), [2021] Bus LR 717, [2021] BLR 293. In that case, the court was asked to stay adjudication enforcement proceedings under the 2005 Hague Convention because of an exclusive foreign court jurisdiction clause. Mr Shirazi submits that *"the court effectively declined to follow MBE, deciding that a stay could not be refused on the grounds of manifest injustice or public policy but that it could be refused on the basis that adjudication enforcement was an interim measure (effectively accepting the fallback argument in MBE)"*.

44. Mr Shirazi submits that the better approach is that set out by Dyson J in ***Macob***, namely that there is nothing irreconcilable between adjudication enforcement and arbitration. In any event, ***MBE*** is said to be distinguishable because the contract in that case incorporated the Scheme whilst the present contract did not. This contract has a tiered dispute resolution procedure, with similar wording to that considered by Dyson J in ***Macob***. He is said to have concluded that that similar wording covered an

adjudication enforcement claim, although, on the facts of that case, there had been a waiver of the right to a stay. No such waiver is said to exist in the present case. Mr Shirazi invites this court to follow the judgment of Dyson J on similar wording in *Macob* and to grant the defendant's application for a mandatory stay for arbitration.

45. Mr Shirazi submits that:

(1) There is an arbitration agreement between the parties;

(2) The arbitration agreement has the same parties as the parties to these proceedings;

(3) The arbitration agreement covers the matters in these proceedings (i.e. the enforceability of the adjudicator's decision); and

(4) Prior to making the application for a stay, the defendant has taken no step in these proceedings to answer the substantive claim.

In those circumstances, Mr Shirazi submits that the court must stay the proceedings for arbitration.

46. This approach is also said to fit the 'one-stop shop' presumption. Otherwise, all of the objections raised in case after case would arise here. The court is invited to imagine a situation where the parties are arguing about whether an adjudicator's decision is binding, and also about whether it has become final; or a situation where an adjudicator's decision determines part of a dispute and a party wishes to have the remainder of the dispute resolved. The parties must surely have intended that all of those disputes would be resolved in the same contractual dispute resolution forum, i.e. by arbitration.

47. For the claimant, Mr McEntee accepts that there is an arbitration clause in this construction contract. The dispute between the parties is as to the true scope of that clause. He submits that a stay will not be granted under s. 9 of the Arbitration Act if the dispute in question does not fall within the scope of the relevant provision, even if there is a valid arbitration agreement between the parties: see *Russell on Arbitration* (24th edn) at para. 7-020. This is a matter that is for the court to decide. As Mann J held in *Law Debenture Trust Corpn Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch), [2005] 2 All ER (Comm) 476 at [35]:

> If a claimant is saying, on good grounds, that he never agreed to arbitrators deciding a particular dispute, then it seems to be rather unfair that he should be compelled to have that very dispute decided by the arbitrators whose very authority he is disputing.

The fundamental issue for the court therefore is ultimately one of construction.

48. Mr McEntee submits that the suggestion that clause 93 of the core conditions affords jurisdiction to the arbitral tribunal to adjudicate upon the enforceability of an adjudication award, as distinct from its substantive correctness, is totally unsustainable and should be dismissed. As a matter of the plain language of the construction contract, the enforcement of an adjudication award (including any dispute as to whether it should be enforced) is not a matter that falls within the

jurisdiction of the arbitral tribunal. It is common ground between the parties that there is a tiered dispute resolution procedure that requires any dispute to be referred to adjudication in the first instance. The fundamental fallacy in the defendant's s. 9 application is the proposition that the parties agreed that disputes *"in relation to the adjudication decision"* should be determined by arbitration, rather than by the court. The parties did not agree to this; rather they agreed that any particular matter in dispute might be the subject-matter of a reference to arbitration for a different final decision on the substantive effect of the agreement.

49. Mr McEntee submits that the tribunal is simply not invested with any power to make an award setting aside an adjudication decision. Core clause 93.2 requires the tribunal to *"settle the dispute referred to it"*. The role assigned to the tribunal is to resolve, finally, whatever substantive aspect of the dispute the relevant party refers to it pursuant to clause 93.1. What is contemplated is a *"review"* or a *"revision"* of the decision, in which the arbitrator will be entitled to consider a wider range of material than that which was before the adjudicator. In an adjudication enforcement hearing, the court does not settle any dispute: if a decision is not enforced, it is only because either the adjudicator had no jurisdiction to decide the relevant matter or because some breach of natural justice renders it improper, as a matter of public policy, for the adjudication decision to be enforced. Absent very clear wording, to construe core clause 93 as empowering the tribunal to decide disputes as to the provisional enforceability of an adjudication award would not give due weight to paragraph 23(2) of the Scheme (or clause 4 of the CIC model adjudication procedure) and the agreement of the parties that the adjudicator's decision is to be complied with immediately, as was held by HHJ Peter Langan QC in ***MBE*** at [30]. That decision is said to have been cited with approval (obiter) in my own decision in ***Motacus*** at [27]. Mr McEntee submits that there is no reason to depart from that general interpretive approach here.

50. Mr McEntee further submits that absurdities would result if the position were as the defendant contends:

(1) Clause 93.2 expressly provides that *"the tribunal proceedings are not started before Completion of the whole of the works or earlier termination"*; and nothing in that sub-clause requires a dissatisfied party to refer a dispute to adjudication within any particular timeframe. More fundamentally, a notice of dissatisfaction is a notice of *"intention"* to refer the matter to arbitration. The timely service of such a notice is merely a pre-condition to the right of a disappointed party to refer the matter to arbitration.

(2) There is said to be nothing on the face of clause 93.2 which would entitle the successful party to commence an arbitration: the initiative to do so is reserved to the disappointed party. If the defendant's contentions were right, after an early adjudication, the disappointed party could simply serve a notice of dissatisfaction and then preclude enforcement indefinitely by contending that there was an issue as to the enforceability of the adjudication decision.

(3) Even if it were to be said that either party could refer the matter to arbitration after a notice of dissatisfaction, the earliest point in time at which any arbitration could take place under clause 93.2 is after completion of the whole of the works or earlier termination. It would make a nonsense of the adjudication process if there were to be

an adjudication at an early stage of the works in relation to a payment dispute, and the successful party then had to wait months, or even years, just for a tribunal to be constituted (with the attendant costs and expenses once that point in time finally arrived).

(4) It is said to be clear that if no notice of dissatisfaction is served in time by the unsuccessful party, the only forum in which the adjudication award could be enforced by the victor, in the event of non-payment, would be the court. The successful party in the adjudication could not invoke clause 93.1 because it would, ex hypothesi, not be *"dissatisfied"* with the decision reached by the adjudicator, and there would therefore be nothing to refer to the tribunal.

(5) The defendant's contentions require one to accept the proposition that an adjudicator could make a decision requiring immediate payment and, following the making of a summary judgment application to enforce that decision seven days thereafter, and the issue of directions in the enforcement proceedings, the loser could (without a murmur of objection beforehand) issue a notice of dissatisfaction on the 28th day following the decision and apply for a stay whilst requiring the challenge to enforcement to be heard by an arbitral tribunal. Mr McEntee protests that that simply cannot be right: It offends the common sense intuition that parties *"as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal"*: see Fiona Trust v Privalov at [13] per Lord Hoffmann.

51. Whilst I would not necessarily agree with all of his arguments, in my judgment Mr McEntee is correct in his submission that a stay will not be granted under s. 9 of the Arbitration Act if the dispute in question does not fall within the scope of the relevant arbitration provision, so the fundamental issue for this court is ultimately one of construction. Indeed, in his oral submissions in support of a stay, Mr Shirazi submitted that the question here is not abstract but is very focussed: whether the particular contract contains an arbitration provision which covers adjudication enforcement. S. 9(1) is only engaged where 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"*. It is therefore necessary to determine what matters are *"to be referred to arbitration"* under the relevant construction contract.

52. In my judgment, on their true construction, the relevant provisions of both the model adjudication procedure and the Scheme expressly exclude from the range of matters which may be referred to arbitration any challenge to the decision of an adjudicator. That is the clear effect of: (1) paragraphs 4, 5 and 31 of the model adjudication procedure, and (2) paragraph 23 (2) of the Scheme (all cited above), all of which are intended to give effect to the mandatory requirement in s. 108 (3) of the Construction Act that an adjudication decision "*is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement"*. In my judgment, these provisions all make it abundantly clear that the decision of an adjudicator is to be binding upon the parties, and is to be provisionally enforceable, until the substantive dispute is finally determined by litigation, by arbitration (if there is an arbitration provision in the construction contract) or by agreement, and notwithstanding the existence of any pending reference to arbitration. In this regard, the provisions of paragraphs 5 and 31 of the model adjudication procedure (on which Mr Shirazi relies)

are even clearer than the Scheme provisions. The court does not refuse a stay of any arbitration under s. 9 because of the 'pay now, argue later' policy of the Construction Act. Rather the court refuses a stay because the parties have agreed in their construction contract (consistently with that Act) that to give effect to that policy, the arbitration provisions of their contract do not extend to any challenge to an adjudication decision. The philosophy which underlies s. 9 of the Arbitration Act is the contractual autonomy of the parties; and the court is merely giving effect to that philosophy when it refuses a stay for arbitration where the dispute falls outwith the ambit of an arbitration clause.

53. In summary, I consider that both the CIC model adjudication procedure and the Scheme expressly exclude any challenge to the decision of an adjudicator from the range of matters which may be referred to arbitration so the court will always have jurisdiction to enforce an adjudicator's decision and will never grant a stay for arbitration under s. 9 of the Arbitration Act. In my judgment, that conclusion, which seems to me to be correct in principle, is entirely consistent both with the authorities in this area of the law and also the views expressed in the leading practitioners' work on construction adjudication. Any academic or professional criticism of that approach seems to me, with respect, to be misguided.

54. *Macob v Morrison* was the first occasion that the court had had to consider the adjudication provisions of the Construction Act. So far as material, the head-note in the Building Law Reports reads as follows:

> (1) An adjudicator's decision which appears on its face to have been properly issued will be binding and enforceable in the Courts whether or not the merits or the validity of the decision are challenged.
>
> Per Mr Justice Dyson at p 99: *1 would hold, therefore. that a decision whose validity is challenged is nevertheless a decision within the meaning of the Act. the Scheme and clause 27 of the contract.*
>
> (2) Clause 27 of the contract gave the arbitrator power to consider disputes as to the adjudicator's jurisdiction.
>
> (3) It was not open for the defendant to elect to treat the adjudicator's decision as a decision capable of being referred to arbitration and thereafter to assert that it was not a decision for the purposes of being binding and enforceable pending any revision by the arbitrator.

55. At first sight, there may appear to be some difficulty in following the reasoning of Dyson J at page 99, col 2 (as reflected in holding (3) of the head-note); but it has to be approached against the background of the judge's earlier holding (as reflected in holding (2)) that there can be no objection **in principle** to the parties to a construction contract giving an arbitrator the power to decide questions as to the lawfulness of an adjudicator's decision. Dyson J proceeds to reject a submission that if a dispute as to the validity of an adjudicator's decision is referred to arbitration, any enforcement proceedings must be stayed pending the final resolution of that dispute by arbitration. He does so on the following basis:

> 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. For the reason stated earlier in this judgment, this second course would have availed the defendant.
>
> 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 … 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.

56. The resolution of this apparent contradiction – that a dispute as to validity can properly be referred to arbitration but the reference will not lead to a stay of any enforcement proceedings - seems to me to lie in the fact that Dyson J has already held that even if there is a challenge to the validity of an adjudication decision, it is nevertheless a *'decision'* within the meaning of the Construction Act, the Scheme and the adjudication provisions of the contract, meaning that, in accordance with s. 108(3) of the Construction Act, it "*is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement"*. The fact that the validity, as well as the merits, of the adjudication decision may be referred for determination by an arbitrator, rather than the court, does not affect the fact that the Construction Act (and the Scheme and any other relevant contractual provisions which comply with the Construction Act) all provide for the decision to be provisionally enforceable pending the determination of the arbitrator (or the court). Effectively, what Dyson J decided in *Macob* - in my judgment entirely consistently with the wording of s. 9 and its underlying philosophy of according primacy to the contractual autonomy of the parties - is that the **enforceability** of an adjudication decision is not a matter which is to be referred to arbitration under a construction contract, and so is not covered by the arbitration agreement (so that the third of the requirements identified in *Merkin & Flannery* is not satisfied).

57. I consider this to be entirely consistent with the approach of HHJ Langan QC, refusing an application for a stay for arbitration, in *MBE v Honeywell*. The judge began his judgment (at [1]-[2]) by explaining that the claimant (MBE) had applied for summary judgment in an action brought to enforce an award made in an adjudication under the Construction Act. The agreement between MBE and the defendant (Honeywell) contained an arbitration clause. Honeywell had applied for a stay of the enforcement proceedings pursuant to s. 9 of the Arbitration Act. In essence, Honeywell wanted to have certain matters which it had raised in answer to the application for enforcement of the adjudicator's decision determined by arbitration. The position of MBE was that the arbitration clause did not bite on the enforcement

proceedings. HHJ Langan QC explained that *"... the application was argued elaborately on both sides, with extensive citation of authority, and on a scale which, I have to say, was out of proportion to the amount involved and to the temporary quality of an adjudicator's award. If one stands back from the detail of the case, the answer to the question which I have to decide appears to be quite simple: and I do not think that the appearance is deceptive."* The judge began by clarifying *"a few preliminary points"*:

> 21. First, it will be recalled that Honeywell maintains that the whole of the agreement between the parties was not in writing, with the consequences that the contract did not fall within the Construction Act, and that the adjudicator lacked jurisdiction. This point will be open to Honeywell if I refuse a stay and proceed to hear MBE's application for summary judgment. However, in dealing with the application for a stay, it seems to me that I have to assume in favour of MBE that the contract was one to which the Scheme applied.
>
> 22.[1] Secondly, it is common ground that at least ultimately what I would characterise as the merits of the dispute between the parties must, if either so elects, be resolved by arbitration. The object of the stay which is sought by Honeywell is that at this stage what may loosely be regarded as questions of jurisdiction should go to arbitration. I have used the word 'loosely' because, while the contract in writing question is undoubtedly a jurisdictional one, there may be room for argument (the point has not yet been debated) on whether the clause 17 or time-bar issue is a jurisdictional or merits question. In any event, Honeywell's position is that these two matters should now be determined by arbitration, with the enforcement proceedings being stayed in the meantime.
>
> 23. Thirdly, it is accepted by MBE that, if clause 30.3 entitles Honeywell to require arbitration on a jurisdictional question at this stage, the court must grant a stay in accordance with the decision of the Court of Appeal in *Halki Shipping Corporation v Sopex Oils Ltd*. It is not suggested that there is any special reason which would justify refusal of a stay.
>
> 24. Fourthly, it was suggested on behalf of Honeywell that this is a case with important implications for international construction contracts. I emphatically disagree. This case is about the scope of an arbitration clause which is found in the context of a wholly domestic English agreement, which incorporates provisions, namely the Scheme, which are peculiar to English law.

58. At [25] HHJ Langan QC explained that the essence of the submissions made by the solicitor advocate representing Honeywell (Mr Choat) was simple: The right to a stay of proceedings under s. 9(1) of the Arbitration Act arises where a claim is brought *"in respect of a matter which under the agreement is to be referred to arbitration"*. Clause 30.3 of Honeywell's standard terms and conditions, which were printed on a

[1] At this point, until paragraph 32, the paragraph numbering in the Building Law Reports goes awry, shifting from paragraph 21 to 23. I have adopted the correct, sequential paragraph numbering.

purchase order which was one of the contractual documents, provided that *"any dispute arising out of or relating to this Purchase Order including the breach, termination or validity thereof, will be finally resolved by a panel of three arbitrators"*. MBE's claim in the action arose out of, or related to, the purchase order, so it fell within clause 30.3 and was subject to arbitration; and accordingly the right of Honeywell to apply for a stay under s. 9(1) had been triggered. Several answers to this *"apparently neat and tidy analysis"* were provided by counsel on behalf of MBE (Mr Bowling), some of which were said by the judge to be *"less impressive than others"*. Having dismissed two of these arguments, HHJ Langan QC continued (at [29]-[31]) as follows:

> 29. MBE stands, as I see the matter, on much stronger ground when it attempts a reconciliation of clause 30.3 on the one hand and the Scheme on the other hand. On behalf of Honeywell, Mr Choat said that MBE was making the 'extraordinary suggestion' that 's. 9 of the Arbitration Act is in some way trumped by the Construction Act'. That is not, in my judgment, a fair representation of the way in which MBE's case was put by Mr Bowling. He started from the premise that the parties had made a contract which, by an express provision, contained an arbitration clause, and, by the statutory implication of terms, incorporated the Scheme. The relationship between arbitration and adjudication is dealt with in paragraphs 21 and 23(2) of the Scheme. These provide, respectively, that the decision of the adjudicator is to be complied with immediately, and that the decision is binding and is to be complied with 'until the dispute is finally determined by legal proceedings, by arbitration or by agreement'.
>
> 30. One has in the last-mentioned provisions what appears to me to be a clear articulation of the 'pay now, argue later' policy which underlies Part II of the Construction Act and the Scheme itself. That policy would be stultified if a reference to arbitration under clause 30.3 were to put a brake, whether permanently or otherwise, on the carrying through of the adjudication process to enforcement. Honeywell is free to take any points which are open to it in the arbitration, but this does not entitle it to set on one side the Scheme which is part and parcel of the agreement into which it entered. Objections as to the adjudicator's jurisdiction, if they are to bar enforcement of his award, will have to be made in the enforcement proceedings. Questions which relate to the merits of the dispute must be left to the arbitration. In that way, proper weight is given both to the arbitration clause and to the importation of the Scheme into the contract.
>
> 31. On this basis, in my judgment, one has the simple and correct answer to the question raised by the application for a stay which must, in consequence, fail.

59. HHJ Langan QC dealt with the case law at [32]-[37], as follows:

> 32. The decision of Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* appears to be clearly against the

availability of a stay for arbitration in cases of this kind. In *Macob* the plaintiff brought enforcement proceedings following an adjudication. The contract contained an arbitration clause. The defendant asserted that the decision of the adjudicator was invalid as he had been in breach of the rules of natural justice, and sought a stay so that the question whether there was indeed a decision could be referred to arbitration. Dyson J refused the stay. Two courses were open to the defendant: to accept that there was a valid decision and to refer it to arbitration on the merits, or to contend by way of defence to the enforcement proceedings that there was no valid decision. The defendant could not 'approbate and reprobate' by asserting both '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'. Once a party had 'elected to treat a decision as one capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable until revised by the arbitrator' and could not have the enforcement proceedings stayed.

33. There is also a decision of HHJ Wilcox in a case of *Absolute Rentals Ltd v Gencor Enterprises Ltd*, which was cited by Mr Bowling. This was another case in which a defendant failed to obtain a stay on enforcement proceedings pending arbitration. (It appears that the arbitration would deal solely with the merits of the dispute, an objection as to jurisdiction not having been pursued before the judge.) Judge Wilcox said:

> The purpose of the Scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and by requiring decisions of Adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact, if within the terms of the reference. It is a robust and summary procedure and there may be casualties although the determinations are provisional and not final.

34. These judgments were delivered in 1999 (*Macob*) and 2000 (*Absolute Rentals*) and were the subject of lengthy and critical analysis by Mr Dominic Helps and Mr Peter Sheridan in an article in the *Construction Law Journal* in 2002. I have to say that I find the assault on the reasoning of Dyson J and the attempt which the writers make to confine these decisions within narrow limits unconvincing. The decisions have stood for a decade and have not been overruled. More recently, Sir Peter Coulson, writing extra-judicially (*Construction Adjudication* (2007), paragraph 3.88), has said that it 'would make a nonsense of the adjudication process if the losing party could avoid the consequences of an adjudicator's decision by claiming that he disputed the decision and that that dispute should be referred to arbitration'. I respectfully agree.

35. Mr Choat submitted that the decision of the Court of Appeal in *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd*

somehow opens the door to a disputed claim to enforce an adjudicator's decision being amenable to reference to arbitration. I do not agree. First, there was in *Collins* no criticism of the decision in *Macob*. Secondly, as Sir Peter Coulson has pointed out, the claim which was stayed in *Collins* was an ordinary civil action for sums due under the contractors' final account. For some unexplained reason the contractors had not pursued their claim to adjudication. If they had done so and obtained an award, they could 'have commenced proceedings in the TCC, which could not have been defeated by an application for a stay' (*Construction Adjudication*, paragraphs 2.151, 3.88).

36. A further point taken by Mr Choat was that it is open to parties to a construction contract which contains an arbitration clause expressly to exclude the right to go to arbitration once an adjudicator had made an award, as had been done in *Ferson Contractors Ltd v Levolux Ltd* [2003] EWCA Civ 11. The point being made was, I think, that MBE and Honeywell could have, but did not, adopt that course. That would not, in my judgment, assist Honeywell, for the simple reason that the Scheme expressly requires compliance with an adjudicator's decision pending the outcome of litigation or arbitration.

37. Mr Choat also relied on a passage from the speech of Lord Hoffmann in *Premium Nafta Products Ltd v Fili Shipping Company Ltd*[2], in which, dealing with the construction of an arbitration clause, Lord Hoffmann said:

> If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance by another, one would need to find very clear language before deciding that they must have had such an intention.

I cannot see how this passage is of value to Honeywell in this case. First, this is not a 'no rational basis' case: there is rationality in committing the provisional process of adjudication and enforcement to the adjudicator and the court and the definitive process of arbitration to the tribunal of three arbitrators. Secondly, there is 'very clear language' in the Scheme which is prescriptive of this division of functions.

60. I have dwelt at some length upon HHJ Peter Langan QC's decision in *MBE* because I am in complete agreement with his reasoning. I would also endorse the judge's preliminary observation (at [2]) that: "*If one stands back from the detail of the case, the answer to the question which I have to decide appears to be quite simple: and I do not think that the appearance is deceptive."* For the reasons I have given, I do not accept Mr Shirazi's submission that *MBE* flies in the face of the general approach adopted in the law of arbitration (such as the primacy of the respect to be accorded to the parties' autonomy in choosing their dispute resolution forum, the *Fiona Trust*

[2] Also cited as *Fiona Trust & Holding Corporation v Privalov*.

approach to interpreting arbitration clauses, and so forth). Nor do I agree that the decision in *MBE* is contrary to the conclusion reached by Dyson J in *Macob* that *"... there can be no objection in principle to the parties to a construction contract giving an arbitrator the power to decide such questions"* so long as that observation is properly understood in the context in which it was made.

61. I referred to the decision in *MBE* during the course of my judgment in *Motacus* when addressing the submission of counsel that it would be manifestly contrary to the public policy enshrined in the Construction Act to refuse to enforce an otherwise enforceable adjudicator's decision in reliance on an exclusive jurisdiction clause in the construction contract (in that case in favour of the courts of Paris). Counsel had drawn a parallel with the position under construction contracts containing arbitration clauses. At [27] I cited *MBE* as *"... authority for the proposition that where a contract contains an arbitration clause, the 'pay now, argue later' policy of the 1996 Act requires enforcement by the courts of the interim adjudicator's award before final determination by the chosen forum (in that case, arbitration): see [30] - [32]"*. I continued:

> The whole purpose of the 1996 Act is to ensure that the adjudicator's decision is binding until it is successfully challenged by arbitration or in court. Thus, in the ordinary case, the sum awarded by an adjudicator must be paid, and the paying party cannot seek to avoid payment by staying the enforcement proceedings for arbitration. *Coulson* endorses that analysis at para. 3.47; and Ms Jones submits that it is an analysis that also assists when considering the operation of art. 7 of the 2005 Hague Convention.

It came as a surprise that Mr Shirazi should submit that I had *"effectively declined to follow MBE, deciding that a stay could not be refused on the grounds of manifest injustice or public policy but that it could be refused on the basis that adjudication enforcement was an interim measure (effectively accepting the fallback argument in MBE)"*. The correctness of the decision in *MBE* was not directly in issue in *Motacus*, and Mr McEntee is correct to characterise my observations in that case as *"obiter"*; but nothing that I said in *Motacus* was intended to cast any doubt upon the correctness of HHJ Peter Langan QC's decision, which seems to me to be correct in principle.

62. The 4th (2018) edition of *Coulson on Construction Adjudication* addresses the subject of stays for arbitration at paragraphs 3.43 to 3.47. The book may not be a *"work of authority"* in the sense that we still continue to benefit greatly from the views of its author, both judicially and extra-judicially; but those opinions must nevertheless command great respect in view of the writer's great knowledge and experience of this field of law, as a practitioner, a judge and a commentator. The section begins:

> It is sometimes argued by the payer seeking to avoid the consequences of an unfavourable adjudicator's decision that the action to enforce that decision should be stayed for arbitration because there is a dispute as to whether the sum claimed is due. In the ordinary case, such an argument could not succeed. The whole purpose of the Act is to ensure that the decision is binding until it is challenged in arbitration or in court. Accordingly, in the ordinary case, the sum awarded by an adjudicator must be paid by the paying

> party and he cannot seek to avoid that result by staying the enforcement proceedings for arbitration.

Sir Peter Coulson then considers the Court of Appeal's decision in *Collins v Baltic Quay*. He comments:

> Of course, what went wrong in *Collins* was that the contractors failed to pursue their claims in adjudication. On the facts of the case, it would appear that the employers had no defence to the claim based on certificate 5 and that therefore the adjudicator would have been bound to award the contractors the sum due on that certificate in any event. If the employers still failed to pay, the contractors could then have commenced enforcement proceedings in the TCC, which could not have been defeated by an application for a stay.

63. I merely add that in *Collins*, Clarke LJ, who delivered the leading judgment, expressly recognised (at [25]) *"… that the court has jurisdiction to enforce an order made by an adjudicator; see Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] 1 BLR 93. It is no doubt in the light of those provisions that clause 4.2 excludes the enforcement of any decision of an adjudicator from the arbitration provisions of the contract"*; and Neuberger LJ (who agreed) observed (at [70]) that *"… 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)."* Sir Peter than refers to MBE; and he suggests:

> … that this was a correct application of the policy behind the 1996 Act. What makes this case additionally noteworthy is that the commentators in the Building Law Reports appeared to regard the decision as overly robust, and that the judge had failed to have regard to the precise words used in the arbitration clause. That may indicate the sort of overly technical approach to arbitration clauses which Lord Hoffmann was so anxious to depart from in *Fiona Trust & Holdings Corporation v Privalov*. In addition, it must be questionable whether reasonable businessmen contemplated that the same dispute would be referred, first to an adjudicator, and then to an arbitrator, without payment of what the adjudicator decided was due. Accordingly, it is suggested that the decision in *MBE Electrical Contractors* is in accordance with the general approach the courts to this problem.

I merely add that the decision in *MBE* would seem to me to accord with the policies underlying both the Construction and the Arbitration Acts. It is also consistent with the understanding of Lord Briggs JSC (with whom Lord Reed PSC, Lord Kitchin, Lord Hamblen and Lord Leggatt JJSC all agreed) in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, [2020] Bus LR 1140 at [12] that the objective of improving cash flow to fund ongoing works on construction projects *"… is achieved by rigorous time limits for the conduct of the adjudication, the provisionally binding nature of the adjudicator's decision and the readiness of the courts (and in*

particular the TCC) to grant speedy summary judgment by way of enforcement, leaving any continuing disagreement about the merits of the underlying dispute to be resolved at a later date, by arbitration, litigation or settlement agreement". (This authority was only cited to me for the observations of Coulson LJ in the Court of Appeal on waiver and general reservations in the adjudication context. I have referred to the decision of the Supreme Court (reversing the Court of Appeal's decision on grounds not material hereto) during the course of preparing this judgment in order to see whether it had any bearing on my decision; but I find it unnecessary for me to call for further submissions on that decision because Lord Briggs's observations merely support the conclusion at which I had already arrived on the defendant's stay application.)

64. The commentary upon ***MBE*** in the Building Law Reports expressly accepts (at page 563, col 2) *"that in each case the breadth of the arbitration clause is relevant"*. Earlier on page 563, the commentator acknowledges that in *Collins*, *"no less a body than JCT drafting committee had specifically excluded from the arbitration clause in question in the JCT Minor Works form, the reference to arbitration of enforcement of any decision of an adjudicator. In other words, the parties themselves accepted in their own arbitration clause that such disputes would not be determined in any arbitration between them. This point was referred to in passing by Clarke LJ in paragraph 25 …"*. Thus the commentator recognises the right of the parties to a construction contract to exclude adjudication enforcement from the scope of an arbitration clause. I do not discern any criticism of the decision in ***MBE*** in Julian Bayley's work on *Construction Law*; and (at paragraph 24.123) he expressly recognises that it is *"… open to contracting parties to carve out an exception to an arbitration clause, so as to permit the summary enforcement through the courts of an adjudicator's decision"*. In his article in the TECBAR Review for Winter 2011, James Bowling does no more than claim that *"… there is a respectable case to be made that adjudication enforcement should, just like any other dispute arising under a contract, be caught by a suitably worded arbitration clause; at very least, the position is not free from doubt"*; although he also acknowledges that *"… the current state of the law seems to the writer at least to be clear in its outcome, but difficult and uncertain in its reasoning"*. The fact that the JCT have expressly carved out adjudication enforcement matters from their arbitration clauses would not seem to me to cast any doubt upon their views about the correctness of the decision in ***MBE***; rather I consider it to be the foundation of the decision in that case, as correctly understood. Moreover, as prudent drafters, one would expect the JCT to wish to make the true position pellucidly clear.

65. Therefore, for all these reasons, I conclude that I should refuse the application for a stay under s. 9 of the Arbitration Act since the enforcement of the adjudicator's decision does not fall within the scope of the applicable arbitration provision. Further, or alternatively, as previously explained, in my view, the notice of dissatisfaction issued on 7 February 2022, on its true construction, did not purport to challenge the validity of the adjudicator's decision, on jurisdictional grounds as opposed to its substantive merits.

VII: The application for summary enforcement of the adjudication decision

66. It is common ground between the parties that the claimant's application to enforce the adjudicator's decision summarily falls to be determined in accordance with the principles identified by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC

339 (Ch) at [15] (as approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep I.R. 301 at [24]) and set out at paragraph 24.2.3 of the current (2022) edition of Volume 1 of *Civil Procedure*:

> (1) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success …
>
> (2) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable …
>
> (3) In reaching its conclusion the court must not conduct a 'mini-trial' …
>
> (4) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents …
>
> (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial …
>
> (6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case …
>
> (7) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction …

67. Mr Shirazi submits that since, logically, the s.9 application for a stay for arbitration must be decided before the claimant's application for summary judgment, the defendant had no need to carry out any expensive investigations unless and until it had lost on its stay application. The defendant explains in its evidence that it has not carried out any investigations, and that it may wish to raise further points as to the validity of the adjudicator's decision. The defendant anticipates that in any resolution of the adjudication enforcement proceedings, it may wish to advance the following arguments:

(1) That the claimant purported to start an adjudication under the Scheme when the contract required adjudication under the CIC model adjudication procedure.

(2) That the adjudicator failed to send the decision to the *"Project Manager"* within the time limit (as required by clause 90.2 of the core conditions) and so did not deliver an enforceable decision.

(3) That there are issues associated with the manner in which the adjudication was carried out, and the authority to conduct the adjudication proceedings, including issues as to subrogation, arising out of the sale of the defendant in 2016.

He submits that if the court is against the defendant on the stay application, it should set directions up to the hearing of the summary judgment application.

68. Mr Shirazi submits that it is highly unsatisfactory that the claimant should have raised new allegations of waiver for the first time in oral submissions, and without reference to the relevant authorities. The suggestion made at the first hearing that the claimant was *"ambushed"* by Mr Shirazi's skeleton was both inappropriate and wrong. The grounds of challenge are said to appear in the evidence; but, in any event, they are legal points based on the documents in the hearing bundle. Even if the claimant had missed that evidence, that would not justify the claimant in ambushing the defendant and the court with a new factual argument at the hearing when it was too late for further evidence to be advanced by the defendant. Had the claimant wished to advance any waiver argument, it should have been advanced properly, with evidence, before the hearing.

69. The requirements for a summary judgment application to succeed are set out in CPR 24.2. They require that (1) the defendant should have no real prospect of defending the claim, and (2) there should be no other compelling reason why the case should go further. Mr Shirazi submits that neither head is met. He refers to the summary of the principles governing applications for summary judgment formulated by Lewison J in *Easyair*. The key points for present purposes are said to be:

(1) The test is *"reality"*. The application must be dismissed unless the court is persuaded that the defendant's arguments are fanciful or lack reality.

(2) In deciding this, the court must take into account not only the evidence that is currently before the court but also the evidence that might reasonably be expected to be before a court at trial.

(3) The burden lies on the applicant – the claimant – to show that there is no real prospect of success. While the court can take into account an absence of evidence

from the defendant in reaching its conclusions, it can only do so where the court is persuaded that there is no real prospect of such evidence being advanced at trial.

70. This last point is said to be important in the context of the claimant's new waiver arguments. The defendant cannot fairly be expected to have put in evidence dealing with arguments that had not been raised, nor can it be required to prove a negative. This is particularly true where the primary application is for a stay under the Arbitration Act and the court set directions that that application should be heard first.

71. Mr Shirazi submits that this point goes further. Waiver arguments in adjudication enforcement proceedings are normally included in the particulars of claim and the evidence served with the summary judgment application (so that they can be answered by the defendant in its responsive evidence). Had the claimant wished to advance a waiver argument, it could, and should, have pleaded and evidenced it in the normal way. The fact that, contrary to the normal practice, the claimant (which is represented by specialist construction solicitors) did not advance any evidence that there had been a waiver should weigh heavily in assessing the reality of the allegation.

72. Mr Shirazi refers the court to Coulson LJ's summary of the law on waiver and general reservations in the adjudication context in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27, [2019] Bus LR 3051 at [92]. He submits that: (1) a party does not waive its right to object to the initial jurisdiction of an adjudicator by participating in the adjudication if it either raises a positive jurisdiction objection or adequately reserves its position: see sub-paragraph (i); and (2) a general reservation as to jurisdiction can be effective: see sub-paragraph (iv).

73. On an application for summary judgment, Mr Shirazi submits that the question for the court is whether there is a real prospect that the defendant either raised a jurisdiction objection in the adjudication or adequately reserved its position. There is said to be a real prospect that the defendant adequately reserved its position. Because this point was not raised until the claimant's oral submissions, the court does not have any of the documents in the bundle necessary to decide this question. That, Mr Shirazi submits, should be sufficient to dismiss the application. However, the evidence in the bundle suggests that the defendant may well have adequately reserved its position:

(1) First, the claimant did not plead or advance any waiver allegations in its evidence. Given that it was represented by specialist construction solicitors, and the normal practice is to plead and advance such allegations in evidence if they are made, the court can draw an inference from the absence of such evidence that the defendant may have adequately reserved its position.

(2) Second, the only document in the bundle emanating from the defendant – the notice of dissatisfaction – contains an express reservation of rights. It is reasonable to infer that the drafters of the adjudication documents might have included similar reservations.

(3) Third, while the adjudicator's decision records that the defendant did not raise any jurisdiction objection, it says nothing about whether the defendant reserved its position. Mr Shirazi suggests that it would not be typical for an adjudicator to record whether there was a reservation of position and this is unlikely to take matters much further.

Even if the court is against the defendant on waiver, Mr Shirazi submits that this only goes to the jurisdiction objection that the Scheme did not apply (because the other jurisdiction objections could not be waived in this way).

74. Mr McEntee submits that the defendant has had every opportunity to put its case and that nothing in the evidence it has submitted discloses any sensible or meaningful basis for resisting the claimant's application for summary judgment. In the absence of any ground for refusing enforcement, the adjudicator's decision should be enforced.

75. Mr McEntee points out that the grounds on which the enforcement of an adjudicator's decision may be resisted are confined to want of jurisdiction and breach of natural justice and that the scope for such a challenge is very limited. In its evidence, the defendant has not identified, with any conviction whatsoever, any arguable ground for resisting the enforcement of the adjudicator's decision. Instead of putting in proper evidence in response to the claimant's application, the defendant submits, through the vehicle of Ms Gibbons's third witness statement, that directions should be given for further evidence and that the summary judgment application should be adjourned. Mr McEntee counsels against that course of action, submitting that, like the s. 9 application itself, it is a transparent attempt to delay the enforcement of a substantial adjudication decision.

76. On 28 February 2022, HHJ Stephen Davies had listed both applications to be heard together and he had directed that the defendant was to serve any evidence in response to the summary judgment application by 3 March 2022 (with the claimant serving any evidence in response to the s. 9 stay application at the same time). Instead of articulating its case properly, the defendant merely provided (and then only in Ms Gibbons's third witness statement of 7 March 2022) a brief outline of *"the types of points that Allenbuild might include in its evidence"*. This followed a letter from the claimant to the court, dated 25 February, indicating its concerns that if the s. 9 application were to be listed together with the summary judgment application, the defendant might contend *"... that the whole point of a section 9 application is to prevent a party who is entitled to insist on arbitration as the forum for dispute resolution from being vexed with litigation in the ordinary courts. The Defendant, therefore, is likely to say that they cannot be required to prepare for the summary judgment application because, if their application is meritorious, they should never have been required to do any work for it or incur the costs of the same."* Put bluntly, the claimant was concerned that the defendant might use its own, unmeritorious s. 9 application as a pretext for seeking an opportunity to put in further evidence. Mr McEntee submits that by making the order he did, HHJ Stephen Davies must have intended that the defendant should put the whole of its case in response to the summary judgment application. In any event, his order says what it says; and there is no reason to afford the defendant *"a second bite at the cherry"*, particularly when the grounds advanced are shadowy and devoid of any conviction.

77. Mr McEntee submits that the matters raised by Ms Gibbons in her second witness statement are manifestly irrelevant and misconceived. The fact that the tribunal might ultimately reach a different, final decision is no reason for refusing to enforce an adjudication decision. Ms Gibbons raises further matters in her third witness statement, which ought properly to have been raised in her second witness statement. These matters are also said to be irrelevant: First, as for paragraphs 8 and 9, the defendant was represented by a substantial law firm (Pinsent Masons LLP) in the

adjudication. The terms of any agreement regarding the conduct of any third party indemnity claim are irrelevant to the summary judgment application. Any adjudication was properly brought in the name of the defendant. Paragraph 10 raises a point of law going to the effect of core clause 90.1 which is plainly wrong and which requires no further evidence. Paragraph 11 does not even begin to identify any intelligible potential ground for resisting enforcement of the adjudication decision.

78. In his submissions in rejoinder, Mr McEntee maintains that the defendant raised no challenge to the adjudicator's jurisdiction. The claimant's pleaded case (at paragraph 17 of the particulars of claim) is that the defendant *"participated in the adjudication process without raising any jurisdictional or procedural objections"*. The claimant also pleaded the basis on which the Scheme was said to apply (at paragraph 8). Nowhere in the correspondence between the parties prior to the hearing of the summary judgment application was it suggested that any jurisdictional point was open to, or being taken by, the defendant. Indeed, on 22 February 2022, the claimant's solicitors made the point that no jurisdictional challenge had been raised; and nothing in the response suggested that the defendant would pursue any such point. The claimant had set out its stall by its pleading. The defendant advances no authority for the proposition that the claimant was also required to marshal, at the outset of the proceedings, evidence to establish that no jurisdictional or procedural objections could properly be raised in circumstances where there had never been any suggestion that such a point would be advanced and the parties had already put on record the gist of their respective positions. In any event, such a submission is not reasonably reconcilable with the recent guidance given by the Court of Appeal in *John Doyle Construction Ltd v Erith Contractors Ltd* [2021] EWCA Civ 1452, where (at [28]) Coulson LJ held that:

> Any application summarily to enforce the decision of an adjudicator in the TCC is subject to a bespoke and streamlined service. The claim form should be in simple terms, identifying the adjudicator's decision which is the basis of the claim. The application for summary judgment will be supported by a short witness statement, attaching the agreement to adjudicate and the decision. If it is clear from the pre-action correspondence that a particular point is being taken by the defendant in answer to the application, it is usually no bad thing for that issue to be addressed upfront in the witness statement. Time for acknowledgment of service is usually abridged, and the Court will make directions leading to a hearing of the summary judgment application within 28 days of the commencement of the proceedings.

It would also be surprising if a claimant were required to do so in circumstances where it would, in effect, be required to gather documents to prove a negative. If the defendant had any valid jurisdictional challenge to the adjudicator's decision, it was plainly incumbent on it to raise that in its responsive evidence. There was no suggestion in the evidence in response to the summary judgment application that any jurisdictional point was being taken.

79. As to the evidence in reply on the s. 9 application, there is a reference at paragraph 9 to a potential jurisdictional challenge based upon want of authority in relation to which no waiver objection could have succeeded. Paragraph 10 states in the most general of terms that the defendant *"... may also argue that clause 90.1 of the*

Conditions is compliant with the Act, and/or the contract sets out a contractual adjudication procedure and so no adjudication can be carried out under the Scheme". No indication is given as to what the argument might be, much less the specific point about the applicability of the CIC model adjudication procedure. Nor is there any reason why that point could not have been ventilated earlier. It is a point of contractual interpretation, and no further investigations into the facts would have been necessary to establish its existence or otherwise. There is no sensible basis for insisting that any further opportunity for investigation or reflection would be required before the defendant could put in evidence in response. There was no provision for the claimant to file any further evidence in response to Ms Gibbons's third witness statement; and the defendant was not entitled to slip in oblique references to clause 90.1 and the Scheme in evidence to which the claimant had no right of reply.

80. The suggestion that there is any prospect of there being any evidence available to found a jurisdictional challenge or reservation which has not yet been identified is obviously untenable in any event. The full text of the passage at paragraph 92(iv) of the *Bresco* decision records that:

> 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; (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.

81. HHJ Halliwell summarised the effect of the *Bresco* decision in *Lane End Developments Construction Ltd v Kingstone Civil Engineering Ltd* [2020] EWHC 2338 (TCC) at [57] as follows:

> On this basis, a party will generally be taken to have waived any jurisdictional objection and thus lose its right of election if it participates in the adjudication without reserving its position in clear and appropriate terms. To do so effectively, it will generally be expected to reserve its rights in terms tailored, no doubt, to the jurisdictional challenge. In the absence of good reason, a general reservation will be ineffective if the nature of the jurisdictional challenge is not identified.

The contention that a different adjudication procedure applied, namely the CIC model adjudication procedure, would (or ought to) have been known to the defendant at the time the claimant purported to commence the adjudication; and the right to raise such a challenge plainly could not be preserved by a general reservation: First, it is a point that, on the defendant's own case, would have arisen on the face of the NEC2 Contract and is not one that depended on the investigation of background facts that would not have been known to the defendant at the time. Secondly, upon referring the matter to the adjudicator, the claimant averred that the Scheme overrode the contractual provisions in the contract. The minds of the defendant and its legal representatives must (or ought to) have been directed to the question whether that position was correct.

82. I accept Mr McEntee's submissions on the summary judgment application and I reject the submissions advanced by Mr Shirazi. I am satisfied that the defendant has no real prospect of successfully defending this adjudication enforcement claim, and that there is no other reason (still less any compelling reason) why this case should be disposed of at a trial. The defendant does not seek to challenge the adjudicator's decision on the grounds of breach of natural justice. That effectively limits any challenge to a want of jurisdiction on the part of the adjudicator.

83. I agree with Mr McEntee that the matters advanced by way of response to the summary judgment application in Ms Gibbons's second witness statement are manifestly irrelevant and misconceived. For the reason I have already given, the fact that the tribunal might ultimately reach a different final decision from the adjudicator does not affect the provisional binding character of his decision in the meantime, or its amenability to summary enforcement. The fallacy underlying the defendant's position is the misconception that *"... the parties had agreed upon arbitration as a means of settling a dispute, in the event either party was dissatisfied with the Adjudicator's decision"*. In my judgment, they have not done so.

84. Strictly it is not open to the defendant to rely upon Ms Gibbons's third witness statement by way of response to the summary judgment application. HHJ Stephen Davies's order of 28 February was clear: by paragraph 4, *"the defendant shall serve any evidence it may wish to adduce in response to the summary judgment application ... by 5pm on 3 March 2022"*. This is not merely a procedural point because, by paragraph 5 of that order, the claimant was to serve *"any evidence in reply by 5pm on 7 March 2022"*. By serving evidence in response to the summary judgment application in Ms Gibbons's third witness statement, the defendant was subverting the careful timetable laid down by the judge, and preventing the claimant from responding to that evidence. That is contrary to the overriding objective in that it fails to ensure that the claimant is on an equal footing with the defendant and can fully participate in the hearing of its summary judgment application. However, I would not grant summary judgment on this ground alone. I am satisfied that there is no merit in any of the points raised in Ms Gibbons's third witness statement.

85. The matters raised in paragraphs 8 and 9 of the third witness statement are irrelevant to the position as between the claimant and the defendant resulting from the provisionally binding nature of the adjudicator's decision. The defendant was represented in the adjudication by experienced and competent construction solicitors in the form of Pinsent Masons LLP. There is no evidence that they raised any challenge to the adjudicator's jurisdiction. Paragraph 1.2.5 of the adjudicator's decision records that: *"There have been no challenges to my jurisdiction."* Had the defendant expressly reserved its position as to jurisdiction, I would have expected the adjudicator to have recorded this fact in his decision. He did not do so. In any event, Pinsent Masons LLP would know whether they had reserved the defendant's position as to the adjudicator's jurisdiction; and, as their former client, the defendant would have access to any evidence of this and could, and should, have produced such evidence in response to the summary judgment application. Paragraph 17 of the particulars of claim expressly pleads that: *"The Defendant participated in the adjudication process without raising any jurisdictional or procedural objections."* I agree with Mr McEntee's submission that the claimant *"had set out its stall by its pleading"*. I reject Mr Shirazi's submission that the claimant should have done any

more by way of its statement of case. If the defendant wished to challenge this plea, it was incumbent upon it to do so by way of evidence in response to the summary judgment application. It has not done so. The claimant was not required to anticipate, or to address, the unforeshadowed contention that the adjudicator acted without jurisdiction.

86. The suggestion in paragraph 10 of the third witness statement that the defendant might argue that clause 90.1 of the core conditions complies with the Construction Act is the precise opposite of the argument that Mr Shirazi actually advanced at the summary judgment hearing. Mr Shirazi did successfully advance the alternative argument that *"the contract sets out a contractual adjudication procedure and so no adjudication can be carried out under the Scheme"*; but, for the reasons I have given, and accepting the submissions of Mr McEntee, I find that the defendant has waived any right to object to the jurisdiction of the adjudicator by participating in the adjudication without any reservations of rights (and later by inviting him to correct his decision for manifest error). At the hearing of the summary judgment application, it was open to Mr Shirazi to raise any *"further arguments"* that the defendant *"would wish to raise based, for example, on the date of the contract and the provisions of the unamended Housing Grant, Construction and Regeneration Act"* (as foreshadowed by paragraph 11 of the third witness statement). He elected not to do so. I have already held that there is no reality in the argument that the adjudicator should have sent his decision to the "Project Manager" within the time limit required by clause 90.2 of the core conditions, and so did not deliver an enforceable decision, because that sub-clause was displaced together with the other adjudication elements of the core clauses.

87. I fully accept that in reaching its conclusion on an application for summary judgment, particularly if combined with a cross-application for a stay for arbitration, the court must take into account not only the evidence actually placed before it on those applications, but also the evidence that can reasonably be expected to be available at trial. However, a defendant must lay a sufficient evidential foundation for any submission that more evidence can reasonably be expected to be available at trial. A defendant should identify the nature of such evidence, and explain why it is not presently available to be placed before the court. It is just not good enough for a defendant to express the unparticularised hope (like Mr Micawber in ***David Copperfield***) that something may *"turn up"*. The fifth of the principles expounded by Lewison J in ***Easyair*** should not be seen as an endorsement of such Micawberism. In the present case, the defendant has laid no such evidential foundation. Nor has the defendant persuaded me that there is any need, or any proper basis, for adjourning the summary judgment application. Contrary to HHJ Stephen Davies's directions, the defendant has already enjoyed two bites of the cherry represented by the summary judgment application; and it has produced no reasoned or satisfactory justification for needing any further time to respond to it. By way of example, the defendant has pointed to no difficulties in adducing any evidence from the solicitors who represented it in the adjudication proceedings. Pursuant to the overriding objective, and in the interests of proportionality, and the saving of the time and costs of a further hearing, involving further recourse to the court's scarce resources, justice to both parties dictates that I should finally determine the summary judgment application at this hearing. I do so in the claimant's favour.

VIII: Conclusion

88. For the reasons I have set out above, I dismiss the defendant's application for a stay for arbitration; and I grant the claimant's application for summary judgment for enforcement of the adjudicator's decision. There will be an order for the payment to the claimant of the sum of £2,204,217.13, plus interest, pursuant to paragraph 11.1.6 of the Decision, in the sum of £51.92 per day from 24 January 2022 to the date of payment. I would invite the parties to agree a form of order to give effect to this decision.

89. In the interests of proportionality, and the saving of the time and costs of a further hearing, involving further recourse to the court's scarce resources, my provisional view is that costs should follow the event in the usual way, and that the defendant should pay the claimant's costs of both applications and of the claim as a whole. If the parties cannot agree on the amount of any payment on account of costs, they should submit brief written representations on this issue when they submit the draft order for my approval. My provisional view is that I should refuse any application by the defendant for permission to appeal. For the reasons I have given in this written judgment, I consider that my decision is both correct in principle and supported by my analysis of the authorities. It also reflects the conclusion consistently expressed in the leading practitioner's work on the subject of contract adjudication. Even Mr Bowling, in his critical article for the TECBAR Review (cited by Mr Shirazi), was constrained to acknowledge that *"… given the first instance decisions on the point, all pointing in the same direction, it seems unlikely that a first instance judge, presented today with unexceptionally worded arbitration and adjudication clauses will be persuaded to depart from [my] approach"*. I therefore consider that any appeal would have no real prospect of success; and there is no other reason (still less any compelling reason) for an appeal to be heard.

90. Give that practical completion of this construction project was certified almost 15 years ago, I recognise that the 'pay now, argue later' policy that underlies the adjudication provisions of the Construction Act has something of a hollow ring in the present case. However, in this court, hard cases do not make bad law.