Neutral Citation Number: [2025] EWHC 942 (TCC)

Case No: HT-2024-000423

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 16 April 2025

Before:

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

JAEVEE HOMES LIMITED

Claimant

- and –

MR STEVE FINCHAM
(trading as FINCHAM DEMOLITION)

Defendant

Ronan Hanna (Acting under Direct Access) for the **Claimant**
James Frampton (instructed by **Archor LLP**) for the **Defendant**

Hearing date: 19 March 2025

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JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 16 April 2025 at 10.30am.

Mr Roger ter Haar KC :

1. There is before the Court the Claimant's Part 8 Claim seeking declarations as follows:

> (1) That Jaevee engaged Mr Fincham to carry out works at the former Mercy nightclub ("the Demolition Works") pursuant to the terms of a written sub-contract agreement in accordance with the standard terms of business of Jaevee; or, alternatively
>
> (2) Jaevee engaged Mr Fincham to carry out the Demolition Works subject to a basic contract formed by the exchange of written communications by email and whatsapp text messages between April 2023 and in or around 23 May 2023 which included a requirement that Mr Fincham issue applications for payment on a monthly basis.
>
> (3) In any event, regardless of which declaration is made as to the contractual terms of engagement between Jaevee and Mr Fincham, the invoices issued with the reference INV 1078, INV 1079, INV 1081 and INV 1083 did not constitute valid "applications for payment" and/or "default payment notices" within the meanings ascribed by the Housing Grants, Construction and Regeneration Act 1996 (as amended) and/or the Scheme for Construction Contracts Regulations 1998 (as amended).

2. This claim arises out of an adjudication brought by the Defendant contractor against the Claimant developer. The adjudication was brought on the basis that four invoices issued by Defendant were payable because no payless notices had been served. It was common ground that no payless notices had been served. The main issue in the adjudication was whether the invoices were valid payment applications.

3. By a decision dated 11 September 2024, the adjudicator decided that the Claimant must pay the sum of £145,896.31, together with additional sums in

respect of interest and the adjudicator's fees. The Claimant has not yet paid those sums.

4. By the present Part 8 claim, the Claimant seeks to establish that, contrary to the adjudicator's decision, it was not liable to pay the invoices. As set out above, it seeks declarations as to the terms of the Parties' agreement and a declaration that the invoices were not valid payment applications.

PROCEDURAL HISTORY

5. Prior to the adjudication, the Defendant issued a statutory demand against the Claimant, (in reliance on the outstanding balance of the invoices) and intimated that he would seek a winding up petition. On 12 July 2024, the Claimant obtained an Order restraining the Defendant from presenting a winding up petition. That Order required the Defendant to pay the Claimant's costs, in the amount of £18,000. The Defendant failed to pay the costs.

6. The Defendant then referred the dispute to adjudication on 30 July 2024 and a decision was made on 11 September 2024.

7. The Claimant having failed to comply with that decision, on 20 September 2024 the Defendant commenced proceedings to enforce the decision, which culminated in a hearing in the TCC on 9 December 2024, heard by District Judge Baldwin.

8. The Claimant's position at that hearing was that execution should be stayed on account of the Defendant's impecuniosity and/or that it should be entitled to set-off the unsatisfied costs order made in the Claimant's favour.

9. The outcome of the hearing was that the Court enforced the adjudicator's decision, but ordered that the Claimant was entitled to set-off the £18,000 of costs due to it, with only the balance payable. The balance payable was £137,472.12 In addition, the Claimant was ordered to pay the Defendant's costs, in the amount of £22,971.20.

10. On 16 December 2024, the Claimant issued the present Part 8 claim.

11. The Claimant having failed to pay the sums pursuant to the Order of 9 December 2024, the Defendant subsequently applied for an obtained an interim third party debt order in respect of the Claimant's bank, which was made on 21 February 2025. The return date for a hearing on the final third party debt order is 22 April 2025.

RELEVANT FACTUAL BACKGROUND

12. The Parties have agreed a Statement of Facts, which provides a chronological summary of the key facts / documents, with bundle references.

13. The Claimant is a property developer and the Defendant trades as a demolition contractor. The dispute arises out of demolition works at a site that the Claimant was developing in Norwich (and which is known as the old Mercy nightclub).

14. In early 2023, the Claimant approached the Defendant to perform demolition works at the site. The Defendant attended site on 28 April 2023 to discuss the works. Thereafter, on 2 and 3 May 2023, the Claimant emailed the Defendant with further details of the work scope and asking the Defendant for a price.

15. The Defendant provided a written quotation on 11 May 2023. This stated as follows:

"QUOTATION.

Demolition Works @Mercy Night Club.

Section 1

To supply all scaffolding to the ceiling & the 3 staircases to take out wooden ceiling and remove from site, to break out 3 concrete staircases and remove all rubble & concrete material in skips.

For The Fixed Price Of £78,500.00. + VAT.

Section 2

To supply scaffolding to the high rise wall, to take it down & remove the material from site in skips.

To take down steel staircase using cutting equipment & removed from site.

For The Fixed Price Of £23,250.00. + VAT.

Section 3

To take down the wall, roof, & concrete staircase from the back carpark using small excavator & small equipment to remove the rubble material & place into skips on the road with road permits supplied for the skips.

For The Fixed Price Of £61,250.00. + VAT.

Section 4

To supply equipment to breakout 3 station bases, 2 concrete floor bases, wall & foundation near drain pipe, walls above the basement & the steels out of the wall to remove all material from site into skips.

For The Fixed Price Of £93,000.00. + VAT.

All labour, equipment, machinery, skips, scaffolding & permits for the skips will be provided.

For The Fixed Price Of £256,000.00 + VAT.

Yours Sincerely"

16. The sum of £256,000 stated at the end of the quotation was the cumulative sum of the figures given for each of the four sections of work.

17. On 12 May 2023, the Defendant exchanged emails with Mr Ben James, CEO of the Claimant. Mr James was using an email address for a different business, Estateducation Ltd (as demonstrated by the email address and the footer to his email). Mr James asked whether the works could be done in 8 weeks. The Defendant replied that, *"It will take 12 weeks at least"*.

18. On 12 May 2023 and by WhatsApp, the Defendant reached out to Ben James, regarding the quotation. The Parties haggled on price, but no landing was reached.

19. On 13-16 May 2023 and by WhatsApp, general discussions continued on whether the Defendant would be awarded the job. The Defendant proposed a reduced price of £248,000. Mr James indicated that he was waiting on one other tender.

20. On 16 May 2023, Ben James (from his Estateducation email account) emailed the Defendant, discussing the sequence of works.

21. On 17 May 2023, the Defendant and Ben James had another written exchange by WhatsApp. In full, the conversation that day was as follows:

"[17/05/2023, 16:34:43] Steve Fincham: Hi Ben How did you get on mate is the job mine mate

[17/05/2023, 16:38:32] Ben James: Can you start on Monday?

> [17/05/2023, 16:55:06] Steve Fincham: I can start with getting the scaffolding sorted and stuff on Monday mate but men will start the following Monday Tom needs to get the scaffolders there on Monday too mate to alter the scaffolding with ladder beams above the door way and make gates into the hoarding to get the equipment in He will know what we are talking about mate Appreciate this work I really do Ben
>
> [17/05/2023, 17:43:15] Steve Fincham: Ben Are we saying it's my job mate so I can start getting organised mate
>
> [17/05/2023, 20:06:42] Ben James: Yes
>
> [17/05/2023, 20:06:51] Ben James: Monthly applications
>
> [17/05/2023, 20:11:50] Steve Fincham: Are you saying every 28 or 30 days from invoice that's a yes not on draw downs then good d) call you at 8.30 mate Thanks mate appreciated Ben
>
> [17/05/2023, 20:12:12] Ben James: Ok
>
> [17/05/2023, 20:12:16] Ben James: Chat in the am
>
> [17/05/2023, 20:17:49] Steve Fincham: Thanks Ben"

22. At this time, scaffolders were already on site, working for the Claimant. The Defendant maintains that, on or around 24 May 2023, the same scaffolders starting performing work for him (in the form of scaffold alterations to accommodate the demolition works).

23. On 26 May 2023, the Claimant (Mr Gokool, senior quantity surveyor) emailed the Defendant as follows, attaching a zip file of documents:

> "Good Afternoon Steve,
>
> Please see attached (Zip File) Contract for the Demolition Works at Mercy. If you have any issues or queries please address them to the following people:-
>
> @Mike Ball will be dealing with your Monthly Payments,
>
> @Tom Gillard is the contract Manager,
>
> @rory.armitage@jaevee-homes.co.uk is the Project Manager.

Kind Regards" [1]

24. The zip file attached to the email included: (i) a purchase order; (ii) a Short Form Subcontract and (iii) a marked-up ground floor plan of the works.

25. The purchase order was issued in the name of the Claimant and stated that the *"Purchase Order Date"* was *"26 May 2023*" and went on as follows:

Description	Quantity	Unit Price	VAT	Amount GBP
As per attached agreement Demolition Work	1.00	248,000.00	5%	248,000.00
			Subtotal	248,000.00
			TOTAL VAT 5%	12,400.00
			TOTAL GBP	**260,400.00**

26. The Short Form Subcontract (**"the Subcontract"**[2]) appended to the email on 26 May 2023, was dated 22 May 2023 and named the contracting parties as the Claimant and Fincham Demolition (being the Defendant's trading name). The Subcontract stated that the contract sum was £248,000 plus VAT. Its terms provided for *inter alia* extensions of time, variations, retention, insurances, a defects rectification period and liquidated damages for delay. In the Claimant's submission, of particular significance to the present case are the following clauses concerning payment:

> "Payment and adjustment of Subcontract Sum
>
> 19. The Subcontractor shall be entitled to receive monthly interim payments. The Subcontractor shall submit its first

[1] Mr Ball, Mr Gillard and Mr Armitage (who were all referenced in the body of the email) were copied on the email.

[2] This recital of facts is substantially taken from the Claimant's Skeleton Argument. The Claimant refers to this document as "the Subcontract". I have adopted that reference for convenience, but in doing so am not accepting that the contract between the Parties was on the basis of that document – to the contrary, as will be seen below, I have rejected the Claimant's case to that effect.

> application for interim payment on the Interim Valuation Date ("IVD") and shall submit each subsequent application for monthly interim payment on the same date of the month as the IVD or the nearest business date should the IVD in any given month fall on a weekend. Any application for interim payment received after the IVD will be processed by the Contractor in the next monthly payment cycle. The Subcontractor will only submit all its interim payment applications via email to *applications@jaevee-homes.co.uk*.
>
> ["Interim Valuation Date" was defined in Clause as "30 days after the Commencement Date`]
>
> 20. The Subcontractor's payment application must specify the amount which the Subcontractor considers is due at the Due Date for Payment, the basis on which that sum has been calculated and shall be accompanied by contemporaneous documentation which substantiates the amount which the Subcontractor considers is due.
>
> 21. The Due Date for Payment is 7 (seven) days after the IVD.
>
> [Clause 22 concerned the Claimant provided notice of the Notified Sum]
>
> 23. The Final Date for Payment is 28 days after the Due Date for Payment.
>
> [Clause 24 concerned the service of payless notices]
>
> 25. Payment of the Notified Sum or such lesser sum due under any Pay Less Notice is conditional upon the Subcontractor raising a VAT invoice for the Notified Sum, or such lesser sum due under any Pay Less Notice, addressed to the Contractor at its registered office address not later than 7 (seven) days after the Final Date for Payment. Payment of any invoice will be made by the Contractor 28 days after the date of invoice. Any invoice raised by the Subcontractor which is received more than 7 (seven) days after the Final Date for payment will not be paid until 56 days after the date of invoice."

27. It is common ground that the Defendant commenced demolition works on 30 May 2023 (save that the Defendant claims that a scaffolding subcontractor had carried out works on his behalf on 24 May 2023).

28. On 9 June 2023 and by email, the Defendant issued Invoice 1078 in the sum of £48,000 plus VAT. The email was sent to ben.james@estateducaction.co.uk. The contents of the invoice are discussed more fully below.

29. On 16 June 2023, the Claimant made a payment of £10,000 to the Defendant.

30. By an email sent on 23 June 2023 at 00:48, the Defendant issued Invoice 1079, in the sum of £100,000 plus VAT. This was 14 days after the first invoice.

31. As with the previous invoice, Invoice 1079 was emailed to ben.james@estateducation.co.uk. The Claimant relies upon the fact that later that day, Mr James forwarded the Defendant's email and invoice to his colleague at the Claimant, Mr Wymer, commenting that, *"He's now raised this as his second application which isn't inline with his subcontract* [sic]. *He's been there max 4 weeks and has raised 2 applications already"*.

32. Later that same day, 23 June 2023, the Claimant (Mr Ball, quantity surveyor) emailed the Defendant. The subject of the email was "*Application 1*". The email stated as follows:

> "Dear Steve
>
> Pleasure to introduce myself on the phone yesterday. Please see the below table which schedules out your payment terms that reflect your subcontract.
>
> Please can you send your application 1 to applications@jaevee-homes.co.uk and copy in myself. The first application needs to be received by the 29th June, we will then agree the correct figure before payment on the 3rd August.

Start Date 30-May-2023	App No.	Plus 30 days for Interim Valuation Date	Plus 7 days for Due Date for Payment	Plus 28 days for Final Date for Payment
	1	29-Jun-2023	6-Jul-2023	3-Aug-2023
	2	29-Jul-2023	5-Aug-2023	2-Sep-2023
	3	28-Aug-2023	4-Sep-2023	2-Oct-2023
	4	27-Sep-2023	4-Oct-2023	1-Nov-2023
	5	27-Oct-2023	3-Nov-2023	1-Dec-2023
	6	26-Nov-2023	3-Dec-2023	31-Dec-2023
	7	26-Dec-2023	2-Jan-2024	30-Jan-2024
	8			

Any questions please do not hesitate to call."

33. In a WhatsApp exchange on 24 June 2023, Mr James and the Defendant said *inter alia* as follows:

> "[24/06/2023, 12:59:07] Ben James: Why did you submit application no. 2? You're not sticking to the subcontract that's in place
>
> [24/06/2023, 13:06:18] Steve Fincham: Well I know I have to wait 30 days now mate or what ever it is and I've finished all inside sections and Wednesday we need to get in the back carpark mate So will you please pay me something mate
>
> [24/06/2023, 13:09:14] Ben James: This is the payment application and payment due dates to work from
>
> [24/06/2023, 14:03:52] Steve Fincham: Will you just answer your phone mate
>
> [24/06/2023, 14:46:26] Steve Fincham: Can you put 5,000 or 10,000 across to help me mate
>
> [24/06/2023, 16:38:08] Steve Fincham: Ben I keep saying I started on the Tuesday 16th
>
> [24/06/2023, 18:04:11] Steve Fincham: Ben I do apologies mate now gone through all my dates and yes Ben I did start on the 30th so sorry But can you please pay me some money mate Steve
>
> [25/06/2023, 11:19:09] Steve Fincham: Ben Can you pay me something today now mate please
>
> [26/06/2023, 06:37:42] Ben James: Will call in an hour

> [26/06/2023, 11:19:27] Steve Fincham: Ben Come on push the button mate can't organise anything till you push the button
>
> [26/06/2023, 15:11:38] Ben James: Remember I'm doing you a favour"

34. On 26 June 2023, the Claimant made a further payment, in the sum of £10,000.

35. On 14 July 2023, the Defendant submitted Invoice 1081, in the sum of £38,750 plus VAT. The invoice was delivered by hand. This was the third invoice within the space of 35 days.

36. On 27 July 2023, the Defendant submitted a further invoice, Invoice 1083, in the sum of £9,107.50 plus VAT**.** This was delivered by hand.

37. Subsequently, the Claimant made three further payments, as follows:

    (1) £10,000, paid on 21 August 2023;

    (2) £10,000, paid on 29 September 2023;

    (3) £40,000, paid on 27 October 2023.

38. Counsel for the Defendant relies upon evidence from the Defendant that on 1 September 2023, Mike Ball (referred to at paragraph 32 above) produced a valuation (and told the Defendant by email dated that day that he had left it on Mr Smith's desk) which appeared to value the Defendant's works in the full sum of £195,857.50 claimed.

39. On 8 December 2023, the Claimant issued a final account stating the total value of the Defendant's works was £107,125 excluding VAT (£112,481.25 inclusive of VAT) before deduction of amounts already paid.

40. No further sum has been paid to the Defendant.

41. The Claimant says that the Parties fell into dispute regarding the amount of work that had been executed by the Defendant and the sums due. By letters on 30 November 2023 and 19 December 2024, the Claimant purported to terminated the Defendant's contract.

42. The total sum invoiced by the Defendant was £195,857.50 plus VAT. The total sum paid by the Claimant was £80,000.

Statutory demand

43. On 26 March 2024, the Defendant served a statutory demand in respect of the sums owed to it.

44. On 16 April 2024, the Claimant applied for an injunction restraining the presentation of a winding up petition by the Defendant.

45. At a hearing on 11 July 2024, the Claimant was successful and obtained the injunction. The Defendant was ordered to pay the Claimant's costs of £18,000.

46. On 31 July 2024, the Defendant applied to stay the costs order. A hearing was listed for 31 January 2025.

The Adjudication

47. In July 2024, the Defendant started an adjudication seeking the outstanding sum of £125,650.38 as a notified sum.

48. Mr Siamak Soudagar was appointed as the "Adjudicator".

49. In the Adjudication, the Claimant argued (among other things) that the Contract comprised the documents it sent on 26 May 2023 which were accepted by the Defendant commencing the works on 30 May 2023: see the Response at paragraph 4.18.

50. The Claimant's alternative position was that if the Contract was agreed by WhatsApp messages on 17 May 2023 then the agreement was one application to be issued each month.

51. The Defendant's position was that the Contract was agreed by an exchange of WhatsApp messages on 17 May 2023. and that the agreement was that it would be paid 28-30 days after issue of an invoice.

52. The Adjudicator issued his decision on 11 September 2024 ("the Decision"). The Adjudicator decided that the Defendant was entitled to the outstanding sum of £125,650.38 plus interest of £19,875.93 and late payment fixed compensation of £370 (totalling £145,896.31).

53. The Adjudicator dealt with the contract formation argument at paragraphs 28 to 98. He concluded:

> "93. It is my finding that the WhatsApp messages concluded the Contract. They cannot in my view be interpretated as pre-contract discussions.
>
> 94. I am not convinced by Jaevee's interpretation of the contract formation and conclude that Short Form of Subcontract is not applicable. The WhatsApp messages evidence the fact that the contract was formed on 17 May 2023 as a result of the agreement between Mr Fincham and Mr James.
>
> 95. The WhatsApp messages confirm that an agreed sum for the Contract was £248,000. That was based on Fincham's quotation dated 11 May 2024, in the sum of £256,000.00 + VAT which had then been lowered to £248,000.00 + VAT.

> 96. The WhatsApp messages also confirm that the parties agreed that invoices to be paid within 28 or 30 days. Therefore, the submission of invoices was the agreed process with the final date for payment being 28 or 30 days.
>
> 97. Having found that the Contract was formed by Fincham's quotation and the subsequent agreement by WhatsApp messages between Mr James of Jaevee and Mr Fincham on 17 May 2023, the documents whether sent or not by Jaevee on 26 May 2023 by email, and whether received or not by Fincham are not relevant to the formation of the Contract. It is my finding that the contract between the parties had already been made on 17 May 2023.
>
> 98. Furthermore, as to whether the date the works commenced was 24 May 2023 or 30 May 2023, it is not relevant as I have decided that the Contract was already formed on 17 May 2023."

54. The Adjudicator also rejected the Claimant's alternative argument at paragraphs 171 and 172:

> "171. I do not accept Jaevee's statement that if the WhatsApp messages evidence the contract, the parties have agreed that payment applications are submitted monthly. That is not in my view what the parties agreed. The parties agreed that invoices would be submitted and that the final date for payment would be 28 or 30 days of the receipt of any invoice. The submission of invoices was the agreed process.
>
> 172. Except for the fact that the final date for payment would be within 28 or 30 days of the receipt of any invoice, the Contract has no provisions in respect of Payment Notices and Pay Less Notices, therefore the relevant payment provisions of the Scheme apply to fill in any payment terms not forming part of the Contract."

55. The Adjudicator also decided that the Claimant should pay his fees of £6,404 in full.

Adjudication enforcement proceedings

56. The Claimant failed to pay any of the sums which the Adjudicator had decided were due.

57. On 20 September 2024, the Defendant issued proceedings in the TCC to enforce the Decision.

58. The Claimant filed a defence disputing the claim.

59. In a skeleton argument filed on Sunday 8 December 2024, the day before the hearing, the Claimant accepted that the sum was due but sought a stay of execution and, in the alternative, to set off the Costs Order.

60. At the hearing on 9 December 2024 (see the order of District Judge Baldwin):

    (1) The Defendant admitted the Claimant's right to set off the Costs Order.

    (2) The Court granted summary judgment enforcing the Decision.

    (3) The Court refused the Claimant's application for a stay of execution.

    (4) The Court ordered the Claimant to pay the net sum of £137,472.12 to the Defendant.

    (5) The Court ordered the Claimant to pay the Defendant's costs of £22,871.20.

61. In breach of the enforcement order, the Claimant has not paid any part of the sums it was ordered to pay to the Defendant.

These Part 8 proceedings

62. On 16 December 2024, the Claimant issued these Part 8 proceedings and served its evidence in Smith 1.

63. On 8 January 2025, the Defendant served its evidence in response, i.e. Fincham 1.

64. On 24 January 2025, the Claimant then, unusually, made an application for a stay of its own proceedings "*on a general basis*", with no right to apply to lift the stay until at least 3 months had passed. The grounds on which the Claimant applied for a stay were as follows: Smith 2, paragraphs 10-11:

> "10. Firstly, Jaevee has entered into a settlement agreement with a third party assignee of any debts alleged to be owed to Mr Fincham under the Contract.
>
> 11. Secondly, and in any event, following receipt of the responsive evidence of Mr Fincham filed on 9 January 2025, it is apparent that there is potentially a single dispute of fact between the parties in relation to the date on which Fincham Demolition commenced the Demolition Works that could have a significant impact upon these proceedings, including whether they can continue in the Part 8 process."

65. On 28 January 2025, the Defendant served a second witness statement, Fincham 2, responding to the application for a stay.

66. By an order dated 5 February 2025, Waksman J dismissed the Claimant's application for a stay and gave directions to this hearing. At paragraph 6, the Court ordered that the costs of and incidental to the directions, including the application, were reserved to this hearing. Waksman J's reasons were as follows:

> "8. There is no need for a stay here. Despite the matters raised by Mr Smith's witness statement dated 28 January 2025 (and it is noted that he has provided no evidence of the Claimant's payments to the alleged assignee, whereas Mr Fincham has offered disclosure of his bank statements) the core question remains that of contract formation on the basis of the documents referred to by the Adjudicator.
>
> 9. Nor does the question of the actual start date appear to affect that core question.
>
> 10. In a situation where the Defendant presently has an enforceable judgment against the Claimant made by DJ Baldwin on9 December 2024, and where the Claimant now seeks to

> demonstrate that the Adjudicator's decision is wrong, albeit that there is no stay of DJ Baldwin's judgment, it is essential that these matters are determined as soon as possible. As it happens, because of when the Court is able to accommodate this matter, the Claimant will have a month since it made its application for a stay to file any further evidence.
>
> 11. If, despite all the above, the Judge at the hearing takes the view that the matters cannot be resolved by the Part 8 Claim and a Part 7 claim is more appropriate, he can order to that effect at that time."

67. The suggestion that there had been a settlement agreement with a third party assignee of any debts alleged to be owed to Mr Fincham under the Contract was not pursued before me.

The Suitability of Part 8 Proceedings

68. The suggestion that this matter is not suitable for Part 8 Proceedings was not pursued before me. For the avoidance of doubt, in my judgment this matter is suitable for determination under Part 8 as there was no substantial dispute of fact before me.

The Hearing before me

69. This matter was listed before me for a half day hearing, which took place on 19 March 2025. In the event, through no fault of counsel, submissions were not concluded that day. At my suggestion, a suggestion with which both counsel agreed, submissions were completed by a further round of written submissions in addition to the skeleton arguments provided in the usual way in advance of the hearing.

The Starting Point for Considering the Application of the 1996 Act and the Scheme

70. In Mr Hanna's submissions, he started by taking me through the relevant provisions of the Housing Grants, Construction and Regeneration Act 1996 (as amended) and the Statutory Scheme. In doing so, he was in effect concentrating at the first stage of his submissions upon the third of the declarations sought in the Claim Form (see paragraph 1 above).

71. For his part, Mr Frampton started by making his submissions upon the terms of the contract between the Parties.

72. As he explained, he did so because the role of the 1996 Act and the Scheme is to fill in gaps in the Parties' Contract.

73. I accept that that is the proper approach.

74. In *CIMC MBS Ltd v Bennett (Construction) Ltd* [2019] EWCA Civ 1515; [2019] 4 WLR 155 Coulson L.J. said:

> *(a) Wholesale or Partial Incorporation?*
>
> [50]. The Scheme is divided into two parts: Part I (which is otherwise immaterial for the purposes of this appeal) deals with the adjudication provisions to be incorporated if the contract did not contain a proper adjudication clause. Part II sets out the more complex provisions which apply if the parties failed to agree compliant payment conditions. Although there has been a certain amount of confusion in the authorities as to whether, in cases of non-compliance, these Parts are to be incorporated wholesale or only where necessary, I consider that the position is now clear.
>
> [51]. Part I of the Scheme, dealing with adjudication provisions, is a series of "all or nothing" provisions. If the contract does not contain proper adjudication provisions, then Part I of the scheme applies "lock, stock and barrel": see Edwards-Stuart J in *Yuanda (UK) Co Limited v WW Gear Construction Limited* [2010] BLR 435 at [61]. That is because of s.108 of the Act and the straightforward provision in s.108(5) that, if the contract did not comply with the Act, "the adjudication provisions of the Scheme for Construction Contracts apply". There is nothing to say that such incorporation would only be to the extent necessary.

[52]. But Part II of the Scheme is different. The payment provisions there are incorporated where the contractual provisions are non-compliant, but s.110(3) makes plain that that is only "if or to the extent that" the contract does not contain the relevant provisions. As I pointed out in *Banner Holdings Limited v Colchester Borough Council* [2010] EWHC 139 (TCC); [2010] 131 Con LR 77, the words "to the extent that" are missing from s.108. That indicates that piecemeal incorporation is permitted in respect of the payment provisions in Part II of the Scheme in a way that is not permitted in respect of Part I.

[53]. That was always the approach in Scotland: see *Hills Electrical & Mechanical plc v Dawn Construction Limited* [2004] SLT 477. In that case Lord Clarke found that some of the payment provisions did not comply with the Act and that therefore Part II of the Scheme had to apply, but only to the extent that the express terms of the contract omitted particular requirements of the Act. That approach has been followed in England in a number of more recent cases. I note in particular that in *Grove Developments v Balfour Beatty Regional Construction Ltd* [2016] EWHC 168 (TCC); 165 Con LR 153, Stuart-Smith J said, at paras 28-29:

> "28. In *Yuanda (UK) Co Ltd v WW Gear Construction* [2010] BLR 435 at [55]ff Edwards-Stuart J contrasted the words of s. 108 of the Act (which incorporates the Adjudication provisions of the Scheme) with those of ss. 109, 110 and 113 (which incorporate the Payment provisions of the Scheme). He concluded at [62] that, where s. 108 of the Act applies to bring the Scheme's provisions concerning adjudication into play, it implements all of those provisions of the Scheme. At [63]-[64] he contrasted the position pursuant to s. 108 relating to Adjudication provisions with the position pursuant to ss. 109 and 110 relating to the Payment provisions of the scheme and expressed his agreement with the reasoning of the Outer House in the Scottish Case of *Hills Electrical & Mechanical v Dawn Construction Ltd* [2004] SLT 477. In *Hills*, Lord Clarke decided on the basis of the wording used in sections 109 and 110 that the approach of the legislature when dealing with the Payment provisions of the Scheme was not Judgment Approved by the court for handing down. automatically to incorporate all of the Payment provisions but was to import the appropriate provision or provisions of the Scheme in order to make up for their omission or inadequacy in the Construction contract.
>
> "29. I also respectfully agree with the reasoning and decision in the *Hills* case. It follows that where section 109 or section 110 is engaged, the provisions of the Scheme as to payment will only be imported and apply so as to govern the legal

> relations of the parties to the extent that they have not already concluded binding contractual arrangements that can remain operative. They will not automatically or necessarily be imported in their entirety. It is of course possible that the existing arrangements under a given contract are not capable of forming part of a payment scheme when read with the relevant provisions of the Scheme. If that were the case it may be necessary to import the Scheme's payment provisions as a whole. But that is not a necessary or correct outcome if the existing contractual arrangements are capable of co-existing with some of the Payment provisions of the Scheme to form a coherent whole."

The decision was upheld by the Court of Appeal ([2016] EWCA Civ 990; [2017] 1 WLR 1893).

[54]. Accordingly, I regard it as settled law that, where payment provisions do not comply with sections 109 or 110 of the Act, Part II of the Scheme applies, but only to the extent that such implication is necessary to achieve what is required by the Act.

(b) The correct approach to Part II

[55]. There is very little authority as to how the court should go about the task required by Part II. In *Alstom v Jarvis*, Judge Lloyd made a number of references to the tortuous nature of the drafting, and the "maze-like" exercise required to arrive at the answer. In the *Banner* case I complained that it should not really be the court's job to have to piece together one set of compliant provisions from two different sources. Judge Waksman made a similar complaint in the current case.

[56]. The few authorities dealing with the approach to be applied to payment provisions which do not contain an adequate mechanism required by section 110 are concerned with the particular provisions relating to final payments. So, other than those cases previously noted, leading counsel were unable to find any authority dealing with the interplay between an inadequate mechanism for periodic or interim payments, and paragraphs 1-7 of Part II of the Scheme.

75. In *Rochford Construction Ltd v Kilhan Construction Ltd* [2020] EWHC 941 (TCC), Cockerill J. cited and applied the above dicta of Coulson LJ and also cited and applied further dicta of Coulson L.J. in a slightly later decision:

> [19]. Rochford also cited the very recent Court of Appeal judgment in *C Spencer Limited v MW High Tech Projects UK Limited* [2020] EWCA Civ 331 where Coulson LJ decided the

> issue of whether in the case of hybrid contracts providing for both construction operations and non-construction operations excluded from the Act, a valid payment was required to identify separately the sum due in respect of construction operations. In finding that it did not, he emphasised the primacy of the contract:
>
> > "38. Mr Nissen argued that the sub-contract terms were of limited importance because what mattered was the Act. He also said that, since the whole basis of the Act was contrary to the general principle of freedom of contract, it was inappropriate to start any analysis by reference to the terms of the sub-contract. I disagree with those submissions.
> >
> > 39. What the Act does is to identify certain minimum provisions, as to payment and as to dispute resolution by way of adjudication, which every construction contract must contain. Thus, any analysis must start with the contract terms, in order to see if they comply with the Act. The Act itself envisages that the parties will contract on terms which they agree between themselves. If the agreed terms comply with the Act, then the conventional view is that the Act is no longer of any direct relevance to the rights and obligations of the parties."

76. Here, the starting point is to decide between the competing cases as to when and how the contract was concluded between the Parties, and the terms of that contract.

77. That done, the next step is to decide the extent to which the contract concluded complies with the statutory requirements and, accordingly, what provisions are required by Statute to be read into the contract.

The Terms of the Parties' Contract

78. It is the Defendant's case that the contract between the Parties was concluded by the exchange of WhatsApp messages exchanged on 17 May 2023.

79. The Claimant's case is set out at paragraphs 94 to 101 of Mr Hanna's skeleton argument:

(3) Was a contract formed on 17 May 2023?

94. The Whatsapp messages from Mr James on 17 May 2023 confirmed that the Defendant had won the tender (on the basis of a price of £248,000), but other terms essential for a construction contract had not yet been agreed:

94.1 It was unclear who the employing party was. The Defendant had primarily been negotiating with Mr James, who had been emailing from an email address associated with another business called Estateducation, as well as corresponding by email with persons using emails associated with the Claimant. It is difficult to see how the Defendant can maintain, as it does, that it is clear that a contract formed by Whatsapp on 17 May 2023 was with the Claimant (as opposed to Estateducation). The WhatsApp messages show that the Defendant had worked for and been paid by Estateducation on other projects in 2022 / early 2023.[3]

94.2 There was no agreement on the duration of the works. By emails on 12-13 May 2023, the Claimant proposed 8 weeks and the Defendant suggested 12 weeks, but no consensus was reached (and nor is there any evidence that the matter was discussed again prior to 17 May 2023).

94.3 It is unclear whether a start date had been agreed. On 17 May 2023, Mr James asked whether work could start *"on Monday"*. The Defendant responded that scaffold could start that day, but that *"men will start the following Monday"*. There was no direct response to that from Mr James and hence it is unclear where matters were left.

94.4 Payment terms were not agreed. Mr James proposed monthly applications. The Defendant replied, *"Are you saying every 28 or 30 days from invoice that's a yes not on draw downs then good [thumbs up emoji] call you at 8:30 mate Thanks mate appreciated Ben"*. To which Mr James immediate response was *"Ok"* and (4 seconds later) *"Chat in the am"*. The conclusion to be drawn from that exchange, it is submitted, is that the Parties were talking past one another on payment terms. There is no evidence that any call took place the next morning (and the Defendant's evidence says he does not recall any such call[4]). The next Whatsapp between Mr James and the Defendant was not until 2 weeks later, on 31 May 2023 (by which time works had already begun).

[3] See **[Main / 27]**: Whatsapp messages at 15:29 and 15:35.

[4] **[Main / 997-998]**

95. In the Claimant's submission, an informed, objective observer would not infer that the Parties both have intended to form legal relations and a binding contract through the exchange of Whatsapp messages on 17 May 2023. The following matters in particular would affect this conclusion:

95.1 This was work amounting to approximately one-quarter of a million pounds. For a job of that scale and value, participants in the construction industry would typically expect the agreement to be formalised in a written agreement.

95.2 It was only on this date that Mr James confirmed, for the first time, that the job would be given to the Defendant. In the context of normal practice in the construction industry, this was a confirmation of a successful tender (on the basis of a £248,000 price); it was a staging point in the Parties' negotiations rather than a complete and concluded agreement.

95.3 That is reinforced by the fact that the Parties had not yet reached a landing (and in some cases had not yet even discussed) certain essential terms by 17 May 2023. Whilst some of those terms could be supplied by law (eg payment terms via the Scheme), others could not (such as identity of the employer). Moreover, the fact that key terms such as duration and payment terms had not yet been concluded tends to suggest that the Parties regarded the negotiations as ongoing. Whilst the law can imply a term that the works are performed within a reasonable, it would be unusual for experienced parties in the construction industry to knowingly commit to a legally binding agreement without first reaching an agreement on duration.

(4) Was a contract made on the terms of the written Subcontract?

96. The written Subcontract was emailed to the Defendant on 26 May 2023. Although is witness evidence at one point sought to suggest that the email was never received, the Defendant has indicated that the Court should decide this case on the basis that it *was* received. The Defendant never acknowledged or replied to the email, either agreeing or rejecting the Subcontract terms.

97. The Claimant's case is that the agreement was not formed on 17 May 2023 (for the reasons given above) and that the Subcontract terms provided on 26 May 2023 apply, on the basis of the "last shot" doctrine. (In the present case, since these were the only formal written terms exchanged between the Parties, "only shot" might be the more apt description).

98. As at 26 May 2023, when the Subcontract and Purchase Order were sent, the scaffolding subcontractor had begun some

scaffold modifications on behalf of the Defendant, but (it is common ground) the Defendant had not yet mobilised to site and started his demolition works (which would not occur until 30 May 2023). The Purchase Order and Subcontract were the first time that it was made clear that the contracting party would be the Claimant. The Subcontract also filled in *inter alia* the remaining essential terms that had been left unagreed or undiscussed as at 17 May.

99. The acceptance of the Subcontract terms by the Defendant was by conduct, in the form of mobilising to site on 30 May 2023 to commence its demolition works. (For the reasons given in the legal section above, the fact that some preparatory scaffold work had been done on the Defendant's behalf prior to 30 May is not decisive. What instead matters is that the Defendant mobilised itself and began work without demur from the Subcontract).

100. That the Subcontract was intended to apply (and was understood to have applied) is supported by the Parties' subsequent conduct. In particular:

100.1 On 23 June 2023, Mr Ball of the Claimant emailed the Defendant (Subject line: "*Application 1*") referred to *"the below table which schedules out your payment terms that reflect your subcontract"* and included a table with Interim Valuation Dates (which was the language of the Subcontract). The full text of the email is in the chronology section of these submissions.

100.2 The Defendant did not reply to that email asking what was meant by a Subcontract, or denying that the Subcontract formed the terms of their agreement.

100.3 On 24 June 2023 (which was the day after the Defendant had submitted its second invoice in a three week span), Mr James sent a Whatsapp message to the Defendant at 12:59 saying, *"Why did you submit application no.2? You're not sticking to the subcontract that's in place"* [Main / 42]. The Defendant's reply was *"Well I know I have to wait 30 days now or what ever it is and I've finished all inside sections… So will you please pay me something mate"*. Again, the Defendant did not respond by denying that the Subcontract was in place, or indicating that he was unaware of a Subcontract. His reaction, if anything, indicates that the true position was that he was unbothered by any formal terms of the agreement (*"or what ever it is"*) and that his approach instead was that payments should be made on demand as and when he finished parts of the works.

101. For those reasons above, it is submitted that the agreement was made on the terms of the written Subcontract sent on 26 May

> 2023. If that is accepted by the Court, then it is common ground that the invoices are invalid for failing to comply with the Subcontract terms.

80. I do not accept the Claimant's analysis.

81. In my judgment, the exchange of WhatsApp messages, whilst informal, evidenced and constituted a concluded contract.

82. The Claimant's argument to the contrary contends that essential terms were not agreed, thus indicating that there was no concluded agreement on 17 May 2023.

83. Firstly, the Claimant contends that there was no agreement as to the party with whom the Defendant was contracting, pointing to the involvement of a company other than the Claimant, namely Estateducation.

84. The Defendant draws attention to the fact that this is a new point. It was not raised in the Adjudication and, indeed, is contrary to the Claimant's pleaded case brought in the name of the Claimant.

85. In my judgment, the answer to the Claimant's submission is that when a quotation was sought this was done by one email dated 2 May 2023 from Paul Wymer sent from an email address of paul.wymer@jaevee-homes.co.uk and describing himself as being "Property Development Director JaeVee" and two emails dated 3 May 2023 sent by Mr Rory Armitage with an email address of rory.armitage@jaevee-homes.co.uk and describing himself as being "Site Project Manager JaeVee"; and that the Defendant addressed his quotation to "Jaevee Ltd."

86. Viewed objectively, the Parties intended the contract to be between the Defendant and the Jaevee company carrying out the identified project. There is no dispute that this was the Claimant.

87. Secondly, the Claimant contends that there was no agreement as to the duration of the works. Agreement as to duration of contract works is not an essential element of a construction contract: absent express agreement, there is an implied term that the contractor will complete within a reasonable period.

88. Thirdly, the Claimant contends that it is unclear whether a start date had been agreed. In my judgment it had been agreed that the first part of the works (namely erection of scaffolding) would start on the following Monday, but even if that had not been agreed, agreement as to a precise start date was not an essential term of the contract.

89. Fourthly, and finally, the Claimant contends that payment terms had not been agreed. I consider below what had been agreed as to payment, but the absence of payment terms is not antithetical to the existence of a concluded contract – an important target of the 1996 Act is to fill the gap if a contract does not contain appropriate payment terms.

90. Accordingly, none of the four matters raised by the Claimant taken on its own requires the conclusion that no contract was concluded on 17 May 2023. However, that conclusion on its own is not sufficient – whilst the absence of an essential element of the contract might drive the conclusion that there was no concluded contract, even where that situation did not arise it is still important to step back and ask whether all the facts indicate that the Parties did not intend to

conclude, and did not conclude, an agreement that day: this point was reiterated in paragraph 9 of the Claimant's Post-Hearing Submissions.

91. In my judgment:

(1) The Parties intended that the works should be started as soon as possible, and had agreed when the Defendant would come to site;

(2) The scope of the works had been agreed;

(3) A price had been agreed;

(4) There was no express indication that the final terms of the agreement between the Parties depended upon agreement as to any other matter such as incorporation of the Claimant's standard terms of contract;

(5) The following exchange is redolent of a concluded agreement:

> [17/05/2023, 17:43:15] Steve Fincham: Ben Are we saying it's my job mate so I can start getting organised mate
>
> [17/05/2023, 20:06:42] Ben James: Yes

92. To the above list of factors, I would add that in my judgment terms of payment had been agreed.

93. The exchange of WhatsApp messages on 17 May concluded:

> [17/05/2023, 20:06:51] Ben James: Monthly applications
>
> [17/05/2023, 20:11:50] Steve Fincham: Are you saying every 28 or 30 days from invoice that's a yes not on draw downs then good … call you at 8.30 mate Thanks mate appreciated Ben
>
> [17/05/2023, 20:12:12] Ben James: Ok
>
> [17/05/2023, 20:12:16] Ben James: Chat in the am

[17/05/2023, 20:17:49] Steve Fincham: Thanks Ben"

94. The evidence before me showed that the background to this exchange was that in respect of a previous contract the Claimant had held back monies until it had received monies from its customer. This exchange made it clear that the Defendant would be paid at latest 30 days after delivery of an invoice – there is a separate issue as to whether the Defendant was at liberty to deliver more than one invoice in any one monthly period.

95. The conclusion that there was an agreement as to timing of payment is also indicative of a concluded agreement.

96. In arguing against the proposition that there was a concluded agreement on 17 May 2023, the Claimant referred to well known authorities as to contract formation, often referred to as "the battle of the forms" in respect of which the leading modern statement of the law is to be found in the judgment of Dyson L.J. (as he then was) in *Tekdata Interconnections Ltd. V Amphenol Ltd* [2009] EWCA Civ 1209; [2010] 1 Lloyd's Rep. 357.

97. In paragraph [25] of that judgment, Dyson LJ said:

> …. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the 'traditional offer and acceptance analysis', i.e. that there is a contract on B's conditions ….

98. In my judgment, the position here is even simpler than the example there given, because on 16 and 17 May 2023 there was simply no discussion of any conditions. In the WhatsApp exchanges on 16 May 2023, Mr Smith asked Mr Fincham to come up with a reduced price. Mr Fincham did so, putting forward

a figure of £248,000. Mr Smith's response on 16 May was to say that he would confirm on the following day whether Mr Fincham had a deal. On the next day the following exchange confirmed that Mr Fincham had his deal:

> "[17/05/2023, 16:34:43] Steve Fincham: Hi Ben How did you get on mate is the job mine mate
>
> [17/05/2023, 16:38:32] Ben James: Can you start on Monday?
>
> [17/05/2023, 16:55:06] Steve Fincham: I can start with getting the scaffolding sorted and stuff on Monday mate but men will start the following Monday Tom needs to get the scaffolders there on Monday too mate to alter the scaffolding with ladder beams above the door way and make gates into the hoarding to get the equipment in He will know what we are talking about mate Appreciate this work I really do Ben
>
> [17/05/2023, 17:43:15] Steve Fincham: Ben Are we saying it's my job mate so I can start getting organised mate
>
> [17/05/2023, 20:06:42] Ben James: Yes

99. My conclusion that, subject to an exchange a few minutes later clarifying payment terms, the contract was then concluded. That exchange a few minutes later concluded the contract.

100. On that basis, the Claimant's Subcontract terms were not incorporated into the Parties' contract when it was concluded.

101. The Claimant attempted to incorporate those terms a few days later when a zip file of contract documentation was sent to the Defendant on 26 May 2023, but that attempt at incorporation received no acceptance from the Defendant.

102. That leaves an issue as to interpretation of the terms of the contract. Does the exchange which I have set out at paragraph 93 above mean that the Defendant could only make one application each month?

103. The Claimant's primary submission, set out in paragraph 94.4 of Mr Hanna's skeleton argument (see paragraph 79 above) is that payment terms were not agreed as the "Parties were talking past one another on payment terms" (this was repeated in paragraph 17 of the Claimant's Post-Hearing Submissions).

104. In his skeleton argument, Mr Frampton submitted:

> 75. There was not an agreement that the Defendant could only make one application each month.
>
> 76. Rather the agreement was that the final date for payment would be 28 or 30 days following an invoice. That was the clarification or counter-offer raised by the Defendant which was accepted by the Claimant ("*Ok*").
>
> 77. It also reflected the parties previous dealings. Mr Smith's WhatsApp message on 3 February 2023, when the Defendant was chasing for payment on a different job, confirmed that:
>
> > "Our payment terms are <u>always</u> 30 days from application so if we applied that then the payment isn't due for another 2 weeks as you only finished 2 weeks ago"
> >
> > [<u>emphasis</u> added]
>
> 78. Mr Fincham's reference to "*not on draw downs*" was because the Defendant had worked for the Claimant on previous projects and the Claimant had delayed payments on the grounds that it was waiting for bank drawdowns. See Fincham 1, §23:
>
> > "…when Mr Smith said the works were awarded to me at the same time he suggested monthly applications. I had had issues before with such an approach with Mr Smith via other companies in the Jaevee Group, as I would be told sums couldn't be paid due to draw-downs, so I was reluctant to agree to this. I replied saying: "Are you saying every 28 or 30 days from invoice that's a yes not on draw-downs then good". I was only prepared to take on the job if I was paid within 28 or 30 days of an invoice."
>
> 79. An example is shown by the WhatsApp messages on 24 June 2022:
>
> > "Steve Fincham: Remember it's payday mate

> Ben James: We're chasing the bank for payment now as we speak
>
> Steve Fincham: [3x thumbs up emoji]
>
> Steve Fincham: You are breaking your promise again mate still not been paid Ben
>
> Ben James: [Missed voice call]
>
> Ben James: We've not received the payment though I put £10k in in your account from other funds. We get our money on Monday so the balance will be with you then."
>
> 80. The agreement in this case was to the benefit of both parties. The Claimant would have 28-30 days to pay an invoice. The Defendant knew that it would (or should) be paid after 28-30 days.

105. I accept that what happened on previous contracts is relevant background, but I do not find it conclusive in this case.

106. In paragraph 20.1 of its Post-Hearing Submissions, the Claimant submits:

> The phrase *"monthly applications"* cannot bear the construction that the Defendant seeks to give to it. The plain and ordinary meaning of those words is that there would be one application per month. The Defendant's interpretation – namely that there could not only be 1 application per month but as many applications as the Defendant wished – turns the plain meaning of the words on its head.

107. I accept the Claimant's argument in that regard: in my judgment the agreement was that the Defendant was free to make one, but only one, application for payment each month.

108. There was however no agreement as to when in the month such an application could be made.

109. Mr Frampton submits that if he is wrong in his primary submission (that there could be more than one application in any particularly monthly period), the

Defendant is entitled to succeed in respect of three of the four contested invoices. I return to that alternative case below.

The First Two Declarations Sought

110. As set out in paragraph 1 above, the first two declarations sought are as follows:

(1) That Jaevee engaged Mr Fincham to carry out works at the former Mercy nightclub ("the Demolition Works") pursuant to the terms of a written sub-contract agreement in accordance with the standard terms of business of Jaevee; or, alternatively

(2) Jaevee engaged Mr Fincham to carry out the Demolition Works subject to a basic contract formed by the exchange of written communications by email and whatsapp text messages between April 2023 and in or around 23 May 2023 which included a requirement that Mr Fincham issue applications for payment on a monthly basis.

111. It follows from my conclusions above that I refuse to make the first declaration sought.

112. The second declaration is inappropriate in the terms set out given that I have concluded that the contract was concluded on 17 May 2023. I also consider that the word "requirement" is inappropriate – "entitlement" would be more appropriate.

113. Subject to submissions before this judgment is finalised for formal hand down, the second declaration will be as follows:

The Claimant engaged the Defendant to carry out the Demolition Works subject to a basic contract formed by the exchange of written communications by email and WhatsApp text messages between April 2023 and 17 May 2023 which included an entitlement on the part of the Defendant to issue monthly applications for payment in respect of which the Defendant would be paid 28 to 30 days following the date of submission by the Defendant to the Claimant of an invoice.

The Application of the 1996 Act and the Statutory Scheme to the Invoices

114. The Claimant submits at paragraphs 20.2 to 20.4 of the Claimant's Post-Hearing Submissions:

> 20.2 Further, even the Defendant's interpretation were correct (which is denied), it did not provide *"an adequate mechanism for determining either what payments become due under the contract, or when they become due"* (paragraph 3 of the Scheme, applying s.110(1) of the Act) and hence the implied terms of paragraphs 2 to 4 Scheme would be substituted. It is not an adequate mechanism because:
>
> (a) On the Defendant's case, it would have been entitled to issue payment applications in an unlimited number each month. There would be nothing to stop it from issuing these daily, or indeed several times per day or per hour. Each of those applications would have to be responded to by the Claimant in the form of payer payment notices and payless notices – and in the event that any one of the applications was missed, the notified sum in the application would become payable. That system would be unworkable and oppressive and is not an *"adequate mechanism"* for the purposes of the Act.
>
> (b) The Defendant's alleged terms do not deal with how to determine *what* amount becomes due with each stage payment (invoice). It is alleged that invoices can be submitted when the Defendant wishes to do so. However, the question is, for what payments are they entitled to apply in the invoice? It is one thing to be entitled to submit an invoice whenever one chooses; it is another question what payments can be applied

> for in that invoice. If the Defendant's answer were "the Defendant is free to apply for whatever sum it wishes in the invoice", that is not an adequate mechanism for determining what payments become due in each stage payment. Under the Scheme, paragraph 2 provides the answer, namely the work done in the relevant period preceding the application. The Defendant's alleged payment terms provide no answer, with the result that the Scheme applies in order to ensure an *"adequate mechanism"*.
>
> (c) For both or either one of the reasons above, the mechanism in paragraphs 2 and 4 of the Scheme must apply instead.
>
> 20.3 The suggestion that the Parties agreed that the due date for an invoice would be the date on which it was issued is simply not borne out in the WhatsApp exchange. Objectively, there is no indication that either party directed its mind to the due date, let alone that there were *ad idem* on the matter. There is no reason for the Court to find an agreed term where none existed on the facts because, in the absence of agreement, the due date is supplied by paragraph 4 of the Scheme.
>
> 20.4 The suggested final date for payment *"28-30 days"* after the invoice is itself an inadequate mechanism for payment and is contrary to the Act. S.110(1)(b) requires "a final date for payment" i.e. a singular date, not a date range. It would be unworkable in practice to say that the final date for payment could be *as early* as 28 days after the invoice

115. Section 110 of the 1996 Act, to which the above submissions refer, provides:

> **Dates for payment**.
>
> (1) Every construction contract shall—
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide for a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
>
> ….
>
> (1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction

> contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.
>
> ….
>
> (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1)..., the relevant provisions of the Scheme for Construction Contracts apply.

116. The Scheme for Construction Contracts provides:

> **Entitlement to and amount of stage payments**
>
> **1.** Where the parties to a relevant construction contract fail to agree—
>
> (a) the amount of any instalment or stage or periodic payment for any work under the contract, or
>
> (b) the intervals at which, or circumstances in which, such payments become due under that contract, or
>
> (c) both of the matters mentioned in sub-paragraphs (a) and (b) above,
>
> the relevant provisions of paragraphs 2 to 4 below shall apply.
>
> **2.**—(1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3).
>
> (2) The aggregate of the following amounts—
>
> (a) an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with sub-paragraph (b)),
>
> (b) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period, and
>
> (c) any other amount or sum which the contract specifies shall be payable during or in respect of the period from the

> commencement of the contract to the end of the relevant period.
>
> (3) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period.
>
> (4) An amount calculated in accordance with this paragraph shall not exceed the difference between—
>
> (a) the contract price, and
>
> (b) the aggregate of the instalments or stage or periodic payments which have become due.
>
> **Dates for payment**
>
> **3.** Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.
>
> **4.** Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later—
>
> (a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or
>
> (b) the making of a claim by the payee.

117. I have accepted the Claimant's submission that the agreement between the Parties provided for only one application per month. For that reason, the point made at paragraph 20.2(a) of the Claimant's Post-Hearing Submissions falls away.

118. As to the second point, it is the Claimant's case that the terms agreed to do not deal with how to determine what amount becomes due with each stage payment.

119. The short WhatsApp agreement between the Parties made no provision as to how monthly instalments were to be calculated. In those circumstances the statutory scheme steps in to provide by paragraph 2 how to calculate the

monthly instalments to which the Defendant was entitled. To that extent, I accept the submission in paragraph 20.3(b) of the Claimant's Post-Hearing Submissions.

120. On the authorities I have cited above, the Scheme steps in to fill the gap identified in the contract. It does not displace the other matters agreed between the parties which stand unless effectively displaced by the statutory arrangements.

121. It seems to me that the calculation of the payments sought in the contested invoices complied with the provisions of paragraph 2 of the Scheme. Accordingly, it is of no significance that the provision for calculation of the amounts due by way of instalments, stage or periodic payments is derived from the Scheme rather than being agreed expressly between the Parties.

122. I do not accept the submissions in paragraphs 20.3 and 20.4 of those submissions. In my judgment, the Defendant was free to submit an application for payment by way of invoice at any stage during each monthly cycle. To the extent that the invoice claimed sums due under the contract, those sums were due at latest 30 days after the invoice.

Did the Invoices set out the basis upon which the sum claimed was calculated?

123. Sections 110A to 111 of the 1996 Act provide:

> Section 110A
>
> **Payment notices: contractual requirements**
>
> (1) A construction contract shall, in relation to every payment provided for by the contract—

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person—

(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated.

(3) A notice complies with this subsection if it specifies—

(a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

(b) the basis on which that sum is calculated.

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.

(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

(6) In this and the following sections, in relation to any payment provided for by a construction contract—

"payee" means the person to whom the payment is due;

"payer" means the person from whom the payment is due;

"payment due date" means the date provided for by the contract as the date on which the payment is due;

"specified person" means a person specified in or determined in accordance with the provisions of the contract.]

Section 110 B

Payment notices: payee's notice in default of payer's notice

(1) This section applies in a case where, in relation to any payment provided for by a construction contract—

(a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but

(b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

(4) If—

(a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—

(i) the sum that the payee considers will become due on the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated, and

(b) the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

Section 111

Requirement to pay notified sum.

(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means—

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify—

(a) the sum that the payer considers to be due on the date the notice is served, and

(b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3)—

(a) must be given not later than the prescribed period before the final date for payment, and

(b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), "prescribed period" means—

(a) such period as the parties may agree, or

(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.

(8) Subsection (9) applies where in respect of a payment—

> (a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
>
> (b) a notice under subsection (3) is given in accordance with this section,
>
> but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.
>
> (9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—
>
> (a) seven days from the date of the decision, or
>
> (b) the date which apart from the notice would have been the final date for payment,
>
> whichever is the later.
>
> (10) Subsection (1) does not apply in relation to a payment provided for by a construction contract where—
>
> (a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and
>
> (b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).
>
> (11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.

124. The Claimant submits at paragraphs 21 and 22 of its Post-Hearing Submissions:

> 21. If the Defendant's alleged terms were in fact agreed (which is denied) and if they complied with the Act (which is denied), then those terms would apply to the Invoices as follows:
>
> 21.1 The Claimant's case regarding the timing of the Invoices would fall away.
>
> 21.2 However, it would still be necessary for the Invoices to set out *"the basis on which the sum is calculated"* (in order to be a payee's default notice under s110B) and hence that part of the Claimant's case remains. The Invoices did not so comply.

> 21.3 Further, the Invoices had to set out the sum due at the payment due date (in order to be a payee's default notice under s110B).[5] The Claimant's case that the Invoices did not set out the sum due at the relevant date therefore applies here also.
>
> 22. It is however submitted that, even if the Defendant's alleged payment terms had been agreed, they were not compliant with the Act for the reasons already given above – with the result that *inter alia* paragraphs 2 and 4 of the Scheme apply instead. That is the same position as is considered in the Claimant's case on the Scheme (paragraphs [49]-[75] of the Claimant's Skeleton and see below in these submissions).

125. In *Everwarm Ltd v BN Rendering Ltd* [2019] EWHC 3060 (TCC); 187 Con LR 240, Alexander Nissen QC, sitting as a Deputy High Court Judge, had to consider a situation in which:

> [181] As sent, the claim was not, in any sense, detailed. It was limited to one-page. Within the Statement of Final Account, no detail was given as to the "Final Invoice Value" of £378,118.84, which, in this context, is the critical figure. It was simply and singly expressed as a lump sum from which previous payments were deducted. That was the sole information which BN provided with the Statement.

126. The argument before him, which he accepted, was that the claim did not satisfy a contractual requirement for a "final detailed statement of the value of the Subcontract Works". What Mr Nissen said at paragraph [182] of his judgment is of some assistance to me, given that this is a case where the Parties agreed a lump sum for the Defendant's works:

> Whether it is sufficient to refer to a lump sum in this context will depend on the pricing terms of the contract and other surrounding circumstances For example, in the case of a lump sum price contract, it may suffice simply to give the lump sum and deduct previous payments because there is nothing else that can be stated in order to specify the basis on which the sum is calculated. …..

[5] As set out above, the Defendant's alleged set of agreed terms do not cover what sums the Defendant may apply for / which become due in each invoice.

127. In *Advance JV v Enisca Ltd* [2022] EWHC 1152 (TCC); 202 Con LR 219, Joanna Smith J. said:

> [47] In summary, the approach to be taken by the court as gleaned from these authorities is as follows:
>
> (i) In considering the true construction of a contractual notice (including notices under the payment regime in the Act – see *Grove Developments* per Coulson J at [21]-[22] and *S&T* in the Court of Appeal at [58] per Sir Rupert Jackson), the question is not how its recipient in fact understood it. Instead "the construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices", i.e. a reasonable recipient "circumstanced as the actual parties were" (see *Mannai* at 767 G-H and 768B-C per Lord Steyn).
>
> (ii) The notice must be construed taking into account the "relevant objective contextual scene", i.e. the court must consider "what meanings the language read against the contextual scene will let in" (see *Mannai* at 767H and 768A-B). This means that, amongst other things, the reasonable recipient will be credited with knowledge of the relevant contract (see *Mannai* at 768B-C).
>
> (iii) The purpose of the notice will be relevant to its construction and validity (*Mannai* at 768E).
>
> (iv) The court will be "unimpressed by nice points of textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis" (*Thomas Vale* per HHJ Kirkham at [43]; *Grove* at [26]). Instead, as Sir Peter Coulson says in paragraph 3.36 of his book on *Construction Adjudication* (4th ed. 2018), focusing specifically on Pay Less Notices:
>
> > "The courts will take a commonsense, practical view of the contents of a payless notice and will not adopt an unnecessarily restrictive interpretation of such a notice…It is thought that, provided that the notice makes tolerably clear what is being held and why, the court will not strive to intervene or endeavour to find

> reasons that would render such a notice invalid or ineffective".

v) There is no principled reason for adopting a different approach to construction in respect of different kinds of payment notices (for example because some may give rise to more draconian consequences than others) as that would be contrary to the guidance in *Mannai* (see *Grove* at [27]). However:

> "the particularly adverse consequences for an employer that follow from, say, a contractor's unanswered application/payment notice are relevant to the test of the reasonable recipient".

vi) To qualify as a valid notice, any payment notice must comply with the statutory (and, if more restrictive, the contractual) requirements in substance and form (*Henia* per Akenhead J at [17]). Payment notices and Pay Less Notices must clearly set out the sum which is due and/or to be deducted and the basis on which the sum is calculated. Beyond that, the question of whether a notice is or is not a valid notice is "a question of fact and degree" (*Grove* at [29] and *S&T* at [53]).

vii) Over and above the question of whether a notice has achieved the required degree of specificity, will be the additional question of whether the document that is alleged to constitute a valid notice was in fact intended to be such and whether it is "free from ambiguity" (*Henia* at [17] and *Grove* at [42]). The sender's intention is a matter to be assessed objectively taking into account the context. (*Jawaby* at [43], [59] and [63]).

viii) Although in *Grove*, Coulson J observed that payment notices must make plain what they are, there is no requirement for a particular type of notice, such as a Pay Less Notice, to have that title or to make specific reference to the contractual clause in order to be valid: "[t]he question is whether, viewed objectively, it had the requisite intention to fulfil that function" (*Surrey & Sussex* at [65]).

ix) One way of testing the validity or otherwise of a Pay Less Notice will be to see whether it "provided an

> adequate agenda for an adjudication as to the true value of the Works…" (*Henia* at [32] and *Grove* at [26]).

128. In paragraphs 27 to 29 of the Defendant's Post-Hearing Submissions, it submits:

> 27. The question of whether a payment application sufficiently specified the basis on which the sum is calculated is therefore a question of fact and degree which must consider the context, including the terms of the Contract.
>
> 28. The context in this case includes the following:
>
> > 28.1 It was a lump sum contract. At the time the Contract was agreed on 17 May 2023, there was an agreed overall lump sum of £248k. There was no specific agreed breakdown to that figure. There was a breakdown of £256k figure into 4 elements, but no breakdown to £248k and breakdown was itself 4 (smaller) lump sums. There were no rates or quantities or milestones within the lump sums to use for valuations.
> >
> > 28.2 When the parties had discussed and agreed payment terms on 17 May 2023, the Defendant had specifically referred to payment after "*invoice*". **[CB/18]** The expected applications were therefore invoices. It would be very odd for the Court to nevertheless condemn an invoice which was sent through. An invoice would not typically have the same level of information or detail as a excel valuation.
> >
> > 28.3 On previous projects, the Defendant had issued invoices which had been treated and accepted as payment applications. See for example the invoice at **[MB/ 441]** which just said "*Works carried out. £10k*". That was accepted and paid per the WhatsApp message from Mr Fincham at 19:32 on 24 June 2022 **[MB/23]**. That was accepted as a sufficient basis of the calculation in that case.
>
> 29. In this case, the invoices did provide sufficient detail and an "*adequate* agenda" for a true value adjudication. Contrary to the Claimant's oral submissions, the invoices can be read by reference to the sections as explained below.

129. The Submissions then set out the Defendant's case on an invoice by invoice basis between paragraphs 30 and 34.

130. I do not repeat in this judgment the lengthy and careful analysis in those paragraphs.

131. To recall, there were four invoices.

132. The first, Invoice 1078, was dated 9 June 2023 and provided:

> Mr Ben James as Agreed On The First Interim Payment To Be Paid On Return.
>
> First Interim Payment.
>
> Employees, Scaffolding, Machines supplied
>
> Works Carried Out On The Removal Of The Ceiling,
>
> Breaking Up The station Bases, The Concrete Bases,
>
> Taking Down The Metal Staircase, Breaking Up The
>
> Main Staircase, A Second Staircase & Breaking Up
>
> The Third Staircase By Hand.
>
> First Interim Payment £48,000 + 5% VAT
>
> Leaving £200,000 On Account
>
> As Our Agreement Next Invoice To Be Paid
>
> 28-30 Days From Date Of Invoice

133. The second, Invoice 1079, was dated 23 June 2023 and provided:

> Second Interim Payment
>
> Wooden Ceilings & Steel Completed.
>
> Concrete Slabs Completed.
>
> 3 Concrete Staircases Completed.
>
> 3 Concrete Blocks Completed.
>
> Low Level Wall & Foundation Completed.
>
> Masonry Wall & Steels Completed.

Metal Staircase Completed.

Masonry Wall ¾ Completed.

350 Tons of Rubble & Concrete Removed.

100-150 Tons To Be Removed.

The Whole Of The Inside Works Completed.

Second Interim Payment.

£100,000.00 + 5% VAT.

134. The third, Invoice 1081, was dated 14 July 2023 and provided:

Remaining Money Left From The Contract

Of All The Works Carried Out & Completed

On The Inside Of The Building

The Amount Of £38,750.00 + 5% VAT

Leaving £61,250.00 + VAT On The Outside

Staircase.

135. The fourth and final, Invoice 1083, was dated 27 July 2023 and provided:

As An Agreement Between Myself & Mr Ben James

On Monday 26/06/2023 To Supply 10 Men Plus Skips

To Remove All Debris From The Main Floor & 1st Floor

To Allow The Client To Be Able To Scan The Area.

Price Agreed Was £2,000 Per Day For Labour + Skips.

Labour Completed The Works In 3 Days.

Alex The Manager Of Mercy Has A Record Of this.

The Labour Was For The Dates Of 27/06/2023 – 29/06/2023.

As For The Skips Supplied No Extra Charge Has Been Added

Apart From The Cost Fincham Demolition Has Been Charged

The Invoice [From] Carl Bird Limited Has Been Provided.

Labour £6,000.00 + Skips £3,107.50 + 5% VAT.

136. The payments made against these invoices totalled £80,000, equivalent to £76,190.48 plus VAT, as follows:

(1) 16 June 2023: £10,000

(2) 26 June 2023: £10,000

(3) 21 August 2023: £10,000

(4) 29 September 2023: £10,000

(5) 27 October 2023: £10,000.

137. At the heart of the Defendant's submissions in respect of the first two invoices is reference to the Defendant's quotation in the Core Bundle at page 35 and the marked up plan in the Core Bundle at page 12. I accept that read together with those documents, the first two invoices were sufficiently clear to be valid.

138. The third invoice is simply a claim for the balance under the original contract, which is entirely intelligible, and the final invoice is a simple invoice for extras.

139. Thus in my judgment, all four invoices set out sufficiently the basis for the amount claimed.

Were the Invoices intended to be payment notices pursuant to the Scheme or the Act?

140. In his oral submissions, Mr Hanna set out the Claimant's case that the invoices were not intended to be payment notices under the Act and the Scheme.

141. He drew together that argument in paragraphs 35 to 37 of the Claimant's Post-Hearing Submissions:

> Whether the Invoices were intended as notices under the Scheme / Act
>
> 40. The law is that the document must make "*plain*" that it is a payment application (payee's default notice) and that the question is whether, viewed objectively, it had the requisite intention to fulfil that function [Claimant's Skeleton at [68]].
>
> 41.1 At the hearing, the Defendant argued that the way in which the Scheme and Act operated (under the Claimant's case) was so complex and convoluted that not only would a small contractor be unable to understand it, but that the Court could not expect them to do so. In the Claimant's submission, that is telling:
>
> 41.2 The Scheme is, in Coulson LJ's words *"badly drafted"*. When it is necessary to apply the Act and Scheme in full because parties have not agreed payment terms, the exercise would require even an experienced construction lawyer to reach for a cold towel. However, two points may be made. First, for all its infelicities, it is the law. Secondly and as the authorities emphasise, if a payee wishes to take the benefits of the draconian system that the legislation imposes in relation to payments, then the payee must comply with the requirements of the legislation in full.[6] There is nothing in the case law to the effect that the Court should strive to find that notices are compliant when that is not plainly so.
>
> 42. There is nothing in the evidence in this case to indicate that the Defendant was aware of the existence or provisions of the Act / Scheme, let alone that his intention was operate those provisions when producing and submitting the Invoices. There was no Act-compliant set of agreed payment terms (indeed, no payment terms were agreed at all) and no mention of the Act / Scheme was ever made. The evidence indicates that the Defendant was aware that he was issuing invoices too quickly, but was indifferent to this: when challenged that the second Invoice was too soon, he replied., *"Well I know I have to wait 30 days now or what ever it is and I've finished all inside sections… So will you please pay me something mate"*.[7]

[6] Henia at [17]

[7] **[Main / 42]** and see Claimants' Skeleton at [100.3]

> The Defendant argues that the Claimant understood the Invoices to be applications for payment. The evidence does not support that. The Claimant of course recognised the invoices as requests for payment (in general terms), but the contemporaneous evidence shows that the Claimant considered that the Invoices were not compliant. The Claimant noted internally that the Invoices were being issued too quickly and it then wrote to the Defendant to put him straight on the payment mechanism and dates: see the Claimant's Skeleton at [34]-[35].

142. The Defendant's response to this argument is in the Defendant's Post-Hearing Submissions at paragraphs 35 to 37:

> 35. The Claimant's final argument is that the invoices were not, generally, intended as payment notices pursuant to the Scheme or the Act. This argument is incorrect:
>
> 35.1 The Defendant does not rely on the invoices as payee's payment notices under section 110A(1)(b) of the Act. There is no provision for such notices in the Contract.
>
> 35.2 The Defendant relies on the invoices as applications or claims for payment which satisfy section 110B(4) in circumstances where the Claimant, the payer, failed to issue a payment notice. They are payee's notices in default.
>
> 35.3 The question is whether objectively a reasonable recipient, in the context of the Claimant, would have understood that the invoices were applications for payment.
>
> 35.4 It is clear that a reasonable recipient would have so understood (a relatively low threshold):
>
> 35.4.1 The invoices requested payment.
>
> 35.4.2 The Defendant had previously used invoices on earlier contracts/projects as its applications for payment.
>
> 35.4.3 In the WhatsApp discussions on 17 May 2023 when discussing applications, the Defendant specifically referred to payment following "*invoice*".
>
> 35.4.4 The Claimant in fact understood that the first two invoices were applications and described them as such in its internal email at [MB/995].
>
> 36. Overall, this was a simple contract between two small entities for demolition works expected to take around 12 weeks. The

> Claimant's arguments as to the requirements of the Contract, the application of the Scheme and the requirements for the Invoices are divorced from the factual context and, with respect, the reality as to how these sorts of contracts can and do operate.
>
> 37. The Claimant never complained at the time that the invoices were unclear or needed more information. The Court has made clear that the sort of contrived, technical complaints relied on by the Claimant should not be accepted. If the Court did now mandate such a strict approach, the reality is that very few contractors like the Defendant would ever be able comply and, contrary to the intent of Parliament, the right to interim payments which the Act and Scheme specifically seek to provide for where not agreed, would be lost because compliance with those implied terms would be so complicated and technical that a party seeking payment is unlikely to have ever complied with it. The whole purpose of the Scheme is that it fills a gap where payment terms are not agreed, often therefore it is not understood at the time to apply. Any analysis of compliance must be carried out in that context.

143. I accept the Defendant's submissions set out above.

Only three invoices were valid

144. I return to my conclusion set out above that the Defendant was only entitled to render one invoice per month.

145. In Mr Frampton's skeleton argument for the hearing on 19 March 2025, he submitted as follows at paragraphs 81 and 82:

> 81. Alternatively, even if the Claimant is correct that the Defendant was limited to one application each month, 3 of the 4 invoices were still valid:
>
> 81.1 Absent a statement as to when the monthly period was to run, it should be interpreted as running from the date of the agreement, i.e. 17 May 2023.
>
> 81.2 It follows that the Claimant was entitled to make:
>
> 81.2.1 One application by 17 June 2023.
>
> 81.2.2 One application between 18 June and 17 July 2023.

Monthly Period	**Invoice (ref & amount ex. VAT)**	**Date**
Up to 17 June 2023	1078: £48,000 **[CB/39]**	9 June 2023
18 June to 17 July 2023	1079: £100,000 **[CB/40]** *1081: £38,750 **[CB/41]***	23 June 2023 *14 July 2023*
18 July to 17 August 2023	1083: £9,107.50 **[CB/42]**	27 July 2023

81.2.3 One application between 18 July and 17 August 2023.

81.3 Three of the four invoices fit into these periods:

82. It follows that even if the Claimant is successful on its "monthly applications" argument, declaration (3) in the Claim Form **[MB/4]** should be limited to a declaration that Invoice 1081 did not constitute a valid application for payment. Invoices 1078, 1079 and 1083 were issued one application a month and were valid.

146. I accept the above analysis, with the consequence that the third declaration should be modified as suggested by the Defendant.

Consequential matters

147. I hope that the Parties will be able to reach agreement as to the consequences of my judgment above.