Neutral Citation Number: [2022] EWHC 1478 (TCC)

Case No: HT-2021-000468

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 17/06/2022

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

AM CONSTRUCTION LIMITED
Claimant

- and –

THE DARUL AMAAN TRUST

Defendant

- -
- -

Gideon Shirazi (instructed by **IBB Law LLP**) for the **Claimant**
Mischa Balen (instructed by **Birketts LLP**) for the **Defendant**

Hearing dates: 4, 10 February 2022
- -

Approved Judgment

.....

MR ROGER TER HAAR QC

Mr Roger ter Haar QC :

1. The application before me arises out of an Adjudicator's Decision issued by Mr. J.A. Williams on 19 November 2021.

2. The Claimant seeks declarations as follows:[1]

> By these proceedings, the Claimant seeks declarations that:
>
> (1) The purported adjudicator's decision is unenforceable because it was made without jurisdiction and/or in breach of public policy;
>
> (2) The findings by the purported adjudicator that (1) the Defendant was not obliged to pay any further sums in respect of this valuation, and (2) the Claimant was not entitled to suspend its works, are unenforceable because they were made without jurisdiction and/or in breach of natural justice; and
>
> (3) The correct position is that:
>
> 1) The notified Sum or Alternative Notified Sum remain due; and
>
> 2) Whatever the true valuation, (1) the Defendant is still obliged to pay that sum, and (2) the Claimant is entitled to continue to suspend its works.

3. For its part, the Defendant seeks to enforce payment of the amount which the Adjudicator found had been overpaid by the Defendant to the Claimant.

4. Having heard argument and evidence I provided the parties with a draft judgment dealing with the service point discussed below: in that draft judgment I held that the original adjudication proceedings had not been validly served, with the consequence that the Adjudicator's Decision referred to above was and is invalid.

5. Having received the draft judgment, the Parties were agreed that I should withdraw that draft and issue a fresh judgment dealing with points on two payment notices.

6. Accordingly, this revised judgment deals also with those issues.

The Contract

7. The Defendant ("DAT"), a charitable trust of 54 Merton High Street, Colliers Wood, London SW19 entered into a contract on or about 7 July 2015 with the Claimant ("AMC") for the construction of a new three storey mosque.

8. The Contract Sum was £2,300,000 plus VAT, the Date for Completion was 14 October 2016. It appears that the building is still incomplete.

9. The Contract was a "construction contract" under the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). As such, the Contract included

[1] Paragraph 34 of the Details of Claim

payment provisions setting out requirements for interim payments, with due dates of the 1st of each month or the nearest Business Day.

10. Clause 1.7 provided:

> **"Notices and other communications**
>
> ".1 Any notice or other communication between the Parties, or by or to the Architect/Contract Administrator or Quantity Surveyor, that is expressly referred to in the Agreement or these Conditions (including, without limitation, each application, approval, consent, confirmation, counter-notice, decision, instruction or other notification) shall be in writing.
>
> ".2 Subject to clause 1.7.4, each such notice or other communication and any documents to be supplied may (or where so required) shall be sent or transmitted by the means (electronic or otherwise) and in such format as the Parties from time to time agree in writing for the purposes of this Contract.
>
> ".3 Subject to clauses 1.7.1 and 1.7.4, any notice, communication or document may be given or served by any effective means and shall be duly given or served if delivered by hand or sent by pre-paid post to:
>
> > ".1 the recipient's address stated in the Contract Particulars, or to such other address as the recipient may from time to time notify to the sender; or
> >
> > ".2 if no such address is then current, the recipient's last known principal business address or (where a body corporate) its registered or principal office.
>
> ".4 Any notice expressly required by this Contract to be given in accordance with this clause 1.7.4 shall be delivered by hand or sent by Recorded Signed Special Delivery post. Where sent by post in that manner, it shall, subject to proof to the contrary, be deemed to have been received on the second Business Day after the day of posting …."

11. Clause 9.2 provided:

> "**Adjudication**
>
> "If a dispute or difference arises under this Contract which either party wishes to refer to adjudication, the Scheme shall apply, subject to the following:
>
> ".1 for the purposes of the Scheme the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Contract Particulars …."

The Statutory Provisions as to Service

12. Section 115 of the 1996 Act provides as follows:

> "(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.
>
> "(2) If or to the extent that there is no such agreement the following provisions apply.
>
> "(3) A notice or other document may be served on a person by any effective means.
>
> "(4) If a notice or other document is addressed, pre-paid and delivered by post
>
> > "(a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, or
> >
> > "(b) where the addressee is a body corporate, to the body's registered or principal office,
> >
> > "it shall be treated as effectively served …."

Service and the Adjudicator's Jurisdiction

13. Unless a notice of adjudication has been properly served by the referring party on the responding party, there is no jurisdiction and the adjudication process is a nullity. This principle – which reflects the central importance of the notice of adjudication as the document starting the adjudication process and setting out the scope and limits of the dispute – has been repeatedly confirmed by the TCC. For example, in *Primus Build v Pompey Centre* [2009] EWHC 1487 (TCC); [2009] BLR 437 at [15], Coulson J held "*because an adjudicator derives his jurisdiction from the Notice of Adjudication, if it is proved that the Notice has not been validly served, it will generally operate to deprive the adjudicator of any jurisdiction.*"

14. Similarly, if a referring party approaches the nominating body before a notice of adjudication is validly served, then there is no jurisdiction and the adjudication is a nullity. See, e.g. *Lane End Developments Construction v Kingstone Civil Engineering* [2020] EWHC 2338 (TCC); [2020] BLR 599 at [29]-[35] and [46]-[48]. As the court summarised at [47]: "*In the present case, the Request [to the ANB] preceded the Notice of Adjudication. For that reason, any appointment under the Request could not take place as an appointment in the adjudication. Since Mr Jensen was appointed pursuant only to the Request, his appointment was void. Since it was not made pursuant to a statutory notice of adjudication, the RICS nomination was not capable of conferring on him jurisdiction.*"

AMC's first two objections to jurisdiction

15. It is DAT's case that at about 16.22 on 4 October 2021 a process server, Mr. Nigel Walker, pushed an envelope through the letter box of a house at 259 Kingshill Avenue, Hayes, Middlesex. That address is the registered office of AMC, but is also the home of Mr and Mrs Anwar, the shareholders in AMC.

16. There is no dispute that at about 16.22 on 4 October 2021 Mr. Walker did push the envelope through the Anwars' letter box. The question is, what did the envelope contain? Most importantly, did it contain a copy of the Notice of Adjudication?

17. It is AMC's case that it did not, so that there had not been service of the requisite notice, thus meaning that the adjudication was not properly constituted, and, further, when a request for appointment of an Adjudicator was sent to the RICS at about 16.52, it was not a valid request, because it had not been preceded by valid service of the Notice of Adjudication.

18. Thus, the first issue before me is a factual one – what did the envelope contain?

19. If I decide that issue in favour of AMC (i.e. that the envelope did not contain the Notice of Adjudication) there is then a separate contractual issue as to whether service had been effected even on the basis of that factual finding.

What was in the envelope?

20. In considering this factual issue I had the advantage of sundry email correspondence, which sets the outer framework of the factual issue, and also oral evidence from three witnesses.

21. DAT's solicitors are Birketts LLP. The partner at Birketts with conduct of this matter was Ms. Catherine Andrews. She gave evidence by way of a witness statement and orally. There was nothing controversial in either her written or her oral evidence.

22. She drafted the Notice in relation to this matter. On 4 October 2021 she instructed a paralegal, Ms. Housego, to send instructions to an organisation Birketts regularly instructs to serve documents, Tremark Associates Limited ("Tremark") to serve the Notice, together with its attachments and accompanied by a covering letter addressed to AMC.

23. At 13.18 on 4 October 2021, Ms. Housego sent an email to Ms Smith of Tremark. The subject line referred to "Papers to Serve on AMC Construction". The email read:

> Thank you for your time on the phone. Whilst you are checking the address I thought I should send over the documents to be printed and served.
>
> Please see the attached Letter to AMC Construction and Notice of Adjudication with appendices to be served on AMC Construction this afternoon.
>
> Could you please call us as soon as the documents have been served?

24. The email clearly shows that the attachments included a Letter to AM Construction and a Notice to Adjudicate. I have no difficulty in finding as a fact that the email did transmit the Notice to Adjudicate which is relevant in this case.

25. At 13.46 on 4 October 2021 Ms. Smith of Tremark sent an email to Mr. Nigel Walker, a process server. That email read as follows:

> **Re: AM Construction Limited**

> **259 Kingshill Avenue, Hayes, Middlesex, UB4 8BW**
>
> Please find enclosed documents to be served on the above-named company.
>
> **Service must be effected today before 16.30 hours.**
>
> Personal service can only be effected on someone authorised to accept service of documents on behalf of the above-named company. If there is no-one to accept service, please either leave on reception or letterbox. If you are unable to do either, then please attach to the main door or front gates in a clear plastic wallet.
>
> When returning your certificate/statement, please provide your bank details so that prompt payment can be made to you via bank transfer ….

26. Again, the attachments to the email included (as I find as a fact) both a letter and the relevant Notice to Adjudicate.

27. I heard evidence from Mrs Anwar who, as I have said, was a shareholder in, and also a director of, AMC. In her witness statement she said:

> 11. As is usually the case, I was at my home/the office on 4 October 2021. I was working in my office space which is at the front of the house on the ground floor and overlooks our front garden/drive. I have blinds in the front window which are on a tilt and so I can see out of my window but people cannot see into the property. I recall sitting at my desk in the afternoon just after 4:20pm and seeing a movement in the front garden/drive. As I looked out into the garden, I saw someone come to the front door. I then heard a loud thud of something which had been posted through the letterbox hitting the marble floor in our porch. I then saw someone walk down the path and away. There was no knock on the door and no one rang the doorbell. No one had come to the door before this.
>
> 12. We have a 'smart' electronic doorbell called a 'Ring' doorbell. The doorbell has a video camera with a motion detector built into it. We have the electronic doorbell set up so that it will record when it picks up motion/movement in the front garden along the path, but its range is limited so that it only picks up movement in our garden and not on the pavement out to the front of our house. It does this whether the person approaching rings the Ring doorbell or not. I have an application on my smartphone which sends me a notification on the Ring Doorbell App each time that the Ring doorbell in activated (either by the doorbell being rung or by a person activating the motion detector) and a short video clip is available to be viewed on each occasion. For example, every day that we receive post, our postman is picked up on the Ring doorbell camera and we receive a notification and video.
>
> 13. It was not unusual to have someone come to the door at this time but it was not the postman and the time was a little unusual. The package when it was posted had made a loud noise when it hit the porch floor and I was also surprised that the person who came to the door did not ring the doorbell or knock. Shortly after the item was posted through the letterbox, perhaps 2 minutes afterwards, I received the notification on my smartphone from the Ring doorbell application of

> the movement in the front garden/drive. That prompted me out of interest to go to the door to check what had been posted.

28. I have in evidence before me the footage from the Ring Doorbell camera. It shows a man, who it is agreed was Mr. Walker, walking from a car parked in the drive of the house towards the front door and leaning down clearly, now knowing the other background facts, posting the envelope through the letterbox. The evidence points to this taking place at about 16.22.

29. Having watched the footage, it is clear that on this visit Mr. Walker made no effort to ring the bell or to knock on the door.

30. Mrs. Anwar's account continues:

> 14. The package was a large A4 sized brown envelope and I remember that it had a small tear in the envelope, presumably when it was forced through the letterbox. Because it was larger than the usual post that we would expect to receive, I was interested in its contents and I opened it straightaway. It is a little unusual for us to receive bulky items in the post and if we do, it is normally a pack of drawings or a Health & Safety file that we would expect to receive because we will have been discussing it on a particular project that AMC is working on.
>
> 13. I took the envelope to my desk which is only around a 3m walk from the porch. I took out the contents **[SJA1-4]** I quickly saw that part of the papers were a JCT Contract and as I skimmed through, I could see that it was the main contract section of the JCT Contract that we entered into for our works with DAT. Looking at the front of the papers we received, I saw a cover page which said, "TAB 1" and had the words "IN THE MATTER OF AN ADJUDICATION". It also had both AMC's and DAT's name on it. I also saw that towards the bottom of the cover page it said the words "Birketts" with some correspondence and other details which indicated that they were solicitors with the words "…regulated by the Solicitors Regulation Authority". I was confused because all that was in the envelope was the contract and another document which has a cover page labelled "TAB 2" and a document that was headed "STATUTORY INSTRUMENTS" and that I have since been told is the Scheme for Construction Contracts (England and Wales) Regulations 1998. I was confused as to why there was no cover letter and searching through to see if there was anything that explained what the contents of this envelope related to, I could tell it related to an apparent adjudication, but nothing more.
>
> …
>
> "16. AMC and I have never been involved in an adjudication before. I had no idea what a party to an adjudication might expect to receive and what documents would need to be submitted in an adjudication, but the two documents I did receive, with no cover letter or other document explaining what this all related to, certainly seemed to be wrong to me.
>
> ….

20. When I realised that the documents we had been provided with related to an adjudication, I immediately contact my solicitor, Steven Hayward of IBB LLP, to explain what I had received and get his advice. I called Mr Hayward almost immediately after I received the envelope at 4:26pm. I could not get through to him and reached his voicemail but Mr Hayward returned my call a short while later. I explained to Mr Hayward what we had received and explained my confusion about the fact that what was in the envelope had no covering letter or information about what this was all about.

21. I remember Mr Hayward asking me if the envelope had contained a document which was headed 'Notice of Adjudication' and he explained that a party starting the adjudication would send that document if it was starting an adjudication and that the notice would set out the grounds upon which the adjudication was based. I leafed through the papers and I confirmed to Mr Hayward that no document of that type was enclosed. He asked me to double check if there was a covering letter from any solicitors. I said that there was not a cover letter but it seemed to have been sent by Birketts from the information on the cover page.

22. Mr Hayward asked me to scan and send him a copy of the documents that I had received. I did so, and sent this to him split across three emails (due to the size of the documents received when scanned).

23. At 17:39 Mr Hayward replied to my last email saying *"Thank you for these – is that all you received? Are you able to scan a copy of the envelope also (if you still have it)"*. I understood that he was asking me to double-check that we had not received a notice of adjudication.

24. When I got this email, I checked each and every page we had received in the envelope again. I went back to the porch again to see if there was anything that I had missed. There was nothing else there. I also checked my work email address to see if anything related to this had been sent to me. I searched the words "Darul Amaan Trust" to see if there were any new emails that I had received that day related to the project. There was nothing.

….

28 On 5 October 2021, I visited Mr Hayward at IBB's offices and brought him a copy of exactly what we had received – the envelope and all of the papers that were enclosed.

29 I also reviewed the recorded footage on Ring doorbell application on my smartphone and shared the footage with my solicitors **[SJA1-3]**. Having reviewed the video again I can see from the timestamp on the video that at 16.22 an individual walked down our garden path with a single envelope package in his hand and posted it through our letterbox. The person did not ring the doorbell or knock on the door and did not wait before walking away from our house and leaving. I did not see the same person visiting our office prior to that during the afternoon and mr Ring doorbell application would have been activated and recorded a prior visit by the same person. It did not.

31. Mrs Anwar refers to emails passing between herself and her solicitor. These have been placed in evidence before me.

32. Mrs Anwar was cross-examined. It is important to note that she was not cross-examined on the basis that she was not telling truthful evidence. I understand that before the Adjudicator it was suggested that she was not telling the truth, but before me Mr. Balen expressly disavowed any such suggestion. It was suggested to her that she might have mislaid the letter and the notice, but she firmly refuted that suggestion.

33. She was also asked questions as to precise timings of the sequence of events after she received the envelope, particularly as to when she scanned the documents which she did send on by email to her solicitor, but I am not persuaded that the relatively small matters which this questioning elicited detracted from the overall reliability of her evidence.

34. I have already referred to the evidence adduced on behalf of DAT from Ms. Andrews. To return to her evidence, she said:

> 6. By email timed at 16:28 …., Miss Smith responded to Miss Housego as follows
>
> *"…We attended at the above address on Monday 4th October at 16:00 hours and met with no response, we therefore effected service via letterbox…"*
>
> 7. Miss Housego duly reported this to me and I instructed her to proceed with the application to RICS for the appointment of an Adjudicator. By an email timed at 16:52 on 4 October 2021 …, Miss Housego issued the Nomination Form, together with a copy of the Notice and its attachments to RICS.
>
> 8. Accordingly, the Notice was served on AMC before the RICS nomination was requested.

35. Given the confirmation received from Ms. Smith, Ms Andrews was entitled to act upon the basis the Notice had been duly served.

36. In addition to calling Ms. Andrews, DAT called Mr. Walker to give both written and oral evidence.

37. Before turning to that evidence, it is relevant to note Ms Smith's letter to Birketts dated 8 October 2021. This said:

> We refer to your instructions to personally serve the above named.
>
> We attended at the above address on Monday 4th October 2021 at 16:00 hours and met with no response: we therefore effected service via letterbox.
>
> We now enclose a Certificate of service, along with a note of our fees which are payable within the next fourteen days….

38. The enclosed Certificate of Service said:

> I, Nigel Walker, process server of Tremark Associates Ltd, Joshua Chambers, 332 York Road, Leeds, LSS9 9DN, instructed by Birketts LLP make this Certificate of Service and WILL SAY as follows:
>
> 1. That I did on Monday 4th October 2021 at 16:00 hours attend at 259 Kingshill Avenue, Hayes, Middlesex, UB4 8BW that being the registered office of AM Construction Limited.
>
> 2. Having failed to find any other Director, officer, employee or any other person authorised to accept service of the document on behalf of AM Construction Limited and after checking with Companies House that this remained the registered office, I therefore effected service of the Letter from Birketts LLP dated 4th October 2021, Notice to Adjudicate and Notice Tabs, by inserting the aforementioned documents into a sealed envelope marked clearly for the attention of AM Construction Limited and inserted it securely through the letterbox 259 Kingshill Avenue, Hayes, Middlesex, UB4 8BW.
>
> 3. It is my belief that as the address remains the company's registered office and the company does not appear to be listed as dormant, that any mail posted address[ed] to the company at this address will be either collected by or forwarded to and come to the attention of the company's directors or officers of AM Construction Limited.

39. It seems me highly probable that that Certificate of Service was created by inserting details into a standard template.

40. In his witness statement he said this:

> 4 On 4 October 2021 I received instructions from Tremark to effect service of documentation on AM Construction Limited at 259 Kingshill Avenue, Hayes, Middlesex, UB4 8BW ("the Property"). I understood this to be the company's registered office address and confirm that I checked the same at Companies House before putting the documents through the letterbox.
>
> ….
>
> 5 I printed the documents myself from an email dated 4 October 2021 from Emilie Smith at Tremark, timed at 13:46 which had the above three attachments attached to it (see page 1 of "NW1"). Each of the attachments were printed off and placed in the sealed envelope. In total the set of documents consisted of 148 pages, and a photocopying charge for this number of pages was issued to Tremark (see page 3 of "NW1").

41. In cross-examination he told me that he has been a process served for over 30 years. In a typical week he might serve over 50 different documents.

42. He said that generally he would only remember details of any service for a day or possibly a week, but he had served process at the Anwars' house before and he remembered the house.

43. He confirmed that he personally had pressed the button on the printer to print out the documents which Ms. Smith had emailed to him. He always checked if there was enough paper before printing.

44. He perfectly fairly accepted that it was possible either that he omitted to print the two documents which AMC say were missing or failed to put them in the envelope, but he was clear that that was highly unlikely.

45. Both his witness statement and the Certificate of Service refer to him checking with Companies House as to whether 259 Kingshill Avenue was the registered office of AMC. In cross-examination he said that he could only assume that it would have been his secretary who would have called Companies House.

46. In the Certificate of Service (but not in his witness statement) it was said that service by posting through the letter box was only effected "having failed to find any other Director, officer, employee or any other person authorised to accept service of the document on behalf of AM Construction Limited".

47. Asked about that, he said that he had attended earlier in the afternoon at about 3 p.m. and attempted to find someone in: having failed to do so, he left, effected service of documents upon another party in some other matter, and then returned.

48. Thus I have on the one hand the evidence of an immensely experienced process server who gave evidence of a process which would have been absolutely second nature to him.

49. On the other hand I have the evidence of Mrs Anwar who says emphatically that the crucial document, the Notice, was not in the envelope.

50. In deciding between these two accounts, it is in my judgment necessary to repeat that DAT through Mr. Balen do not put forward any suggestion that Mrs Anwar was doing anything other than telling the truth. Thus the case put is that Mrs Anwar accidently mislaid two of the documents which had been in the envelope.

51. For the record, I should say that in my judgment DAT's approach before me was quite right: I had the impression that she was truthful – and, if she had been intending to deceive, she must have decided to do so very rapidly given that she told her solicitor of the missing documents very soon after the envelope was delivered.

52. It seems to me improbable that she mislaid the documents. Her evidence was that she carried the envelope to her desk 3 metres from the door and opened it there, and also that she later carried out a thorough search without finding the documents.

53. On the other hand, there were parts of Mr. Walker's evidence that I did not find reliable. First, his oral evidence that he tried to find someone in at about 3 p.m. is refuted by Mrs Anwar's evidence that she had been in all afternoon and nobody had rung the doorbell, her evidence in this regard being supported by the absence of any "Ring" footage of such an attempt. It is also to be noted that it was not put to Mrs Anwar that there had been any such earlier attempt to effect service.

54. Secondly, as I have recorded above, it is clear from the "Ring" video footage that on the 16.22 visit Mr Walker made no attempt to see if anybody was at home. This seems to me to have been contrary at least to the spirit of the instructions of Ms. Smith in her email to Mr. Walker. I find it very surprising that if Mr Walker unsuccessfully attempted personal service earlier in the afternoon, he did not try again at 16.22 – all it would have taken was to ring the doorbell.

55. Thirdly, I find the suggestion that he or his secretary checked the registered office of AMC improbable. Leaving aside the discrepancy as to whether he did so (as stated in the Certificate of Service and Witness Statement) or his secretary did (as stated in oral evidence), it seems unlikely that this happened. If, as seems to me probable, he made only one visit, not two, the "Ring" footage completely destroys the suggestion that Companies House was contacted after a failure to effect personal service (which appears to be what the Certificate of Service says, and the witness statement suggests) because that footage shows him coming from his car, not making contact, and then leaning forward to post the envelope. There is no space in that sequence for a call to Companies House.

56. Further in this regard, it is hard to see why contact would have been made with Companies House. Ms. Smith's instructions were clear as to where the documents were to be served. There was no reason for Mr Walker to second guess those instructions.

57. For these reasons, I do not accept that Mr Walker's recollection of events was reliable. It seems to me that what he recorded was what he knew he ought to have done not what he actually did. That is understandable given how busy his practice as a process server was. In that regard it is also of note that he had between about 14.00 and 16.30 to effect service having printed out the documents as well as having at least one other visit to make that afternoon.

58. However, even if sloppy in other respects, it does not follow that he also omitted to print out what he had to print out and to put the full set of documents in the envelope.

59. At the end of the day, I have to decide between a witness describing what was to her a highly unusual event whose account is supported by emails sent within a couple of hours of the delivery of the envelope (Mrs Anwar) and a witness describing a routine process whose evidence I have concluded was unreliable in certain respects (Mr Walker).

60. I have come firmly to the conclusion that Mrs Anwar's evidence is to be preferred.

61. Thus I resolve the essential factual dispute in AMC's favour.

62. I should say that the Adjudicator came to the opposite result. However he did not have the benefit of hearing the relevant witnesses give evidence, and it is possible he would in any event have come to a different conclusion if he had had the acceptance before him that Mrs Anwar was not dishonest in the evidence she gave.

Was there service complying with the Contract?

63. As set out above Clause 1.7.3 of the Contract provided that

any notice, communication or document may be given or served by any effective means and shall be duly given or served if delivered by hand or sent by pre-paid post

64. This provision differs from the statutory provision as to service in one presently relevant respect. As set out above, Section 115(4) accepts that service may be valid if "a notice or other document is addressed, pre-paid and **delivered** by post" whilst clause 1.7.3 refers to the document being "**sent** by pre-paid post."

65. Mr. Balen argues that in this case the delivery of the document was effective service. He argues that for the purposes of Clause 1.7.3 the relevant Notice was "sent" by being provided to Ms. Smith and/or Mr. Walker for delivery. He contends that this is equivalent to putting the documents in a Royal Mail post box.

66. His argument was expressed as follows:

1. The Defendant has not been able to find a definition of 'post' or 'by post' in **Stroud** that would assist in the interpretation of Clause 1.7.3. However, the following may be of assistance. Whilst postal services in the United Kingdom are provided predominantly by the Royal Mail, in 2006 the market was opened up to competition and Royal Mail no longer holds a monopoly. Section 27 of the Postal Services Act 2011 defines 'Postal Services' as *"the service of conveying postal packets from one place to another by post"*. Section 28 provides that there is no need for licence or authorisation to provide these services. Royal Mail is referred to in Section 29 which imposes a duty on OFCOM to secure the provision of a *"universal postal service"*, but there are other postal service providers.

2. It follows from this that references to 'post' or 'by post' should not be taken to refer exclusively to Royal Mail but can encompass any service (like a process server) which carries on the business of conveying letters, parcels, etc. from one place to another. Thus, in Clause 1.7.3, the 'deeming provision' that a notice is deemed served *"if ... sent by pre-paid post"* encompasses a process server because:

    a. The word *"post"* should be given its ordinary meaning, i.e. *"letters, etc. that are delivered to homes or places of work"*. There is no need to read this as limited to Royal Mail. By sending the notice via a process server the Defendant sent it by post.

    b. Further/alternatively, *"post"* should be read consistently with the Postal Services Act 2011 i.e. to send something by post is to engage the services of someone who conveys postal packets from one place to another. This is the business which is carried on by Tremark.

    c. Pre-paid is directory rather than mandatory: first, it would be odd if the outcome turned on whether Tremark were paid in advance; secondly, the purpose of pre-paying is simply to ensure that the instructions were actioned which they were in this case.

> d. There is no need for the notice to actually come to the attention of the receiving party, if the deeming provision is satisfied: see Lobo v Corich [2017] EWHC 1438 (TCC) at paragraph 42 …

67. In my judgment, Mr. Shirazi for AMC is correct to say that in effect Clause 1.7.3 allows for three methods of service:

(1) By any effective means

(2) By delivery by hand

(3) If sent by pre-paid post.

68. Obviously on the facts of particular cases delivery by hand or sending by pre-paid post may be an "effective means" of service, but the provision for "any effective means" allows a wider discretion as to what method of service is chosen. However on the facts of this case there was, in my judgment, no "effective" service since the Notice of Adjudication did not get to the registered office of AMC or to anybody else representing AMC.

69. It is clear that what Birketts, on behalf of DAT, wanted was "delivery by hand". That is what process servers do, and the instructions from Birketts to Tremark and from Tremark to Mr Walker clearly were to effect service by delivery by hand.

70. Thus, in my view, what was attempted was not "sending by pre-paid post" but "delivery by hand".

71. Further, I do not accept that what was attempted was "post". In my judgment, sending "by post" conveys the entrusting of a physical communication or package to a third party for physical conveyance, whether that be by putting a letter in a letter box or entrusting a parcel physically to a third party for delivery.

72. Thirdly, I do not regard the expression "pre-paid" as being merely directory. In my judgment the primary method of post contemplated by both the 1996 Act (which, of course, pre-dated the Postal Services Act 2011) and the Contract was the Royal Mail, in respect of whose services a pre-paid item of post has a special significance because it means that the Royal Mail will not decline to deliver that item if no, or an inadequate amount of, postage has been paid before posting.

73. It is also clear that Clause 1.7.4 refers to two methods of postage which are (and were) Royal Mail methods of postage ("Recorded Signed" and "Special Delivery"). This suggests that the draftsman of the Contract, apprehending that the 1996 Act must have contemplated post by the Royal Mail when referring to pre-paid post, was using the expression "pre-paid post" as meaning Royal Mail pre-paid post.

74. I leave for decision by another Court on another occasion whether use of some rival organisation to the Royal Mail can be treated in some cases as being the use of the "post" and thereby enabling effective service. I am satisfied that this is not one of those cases.

75. In this case there is no suggestion of either Tremark or Mr. Walker having been paid before service was purportedly carried out. Accordingly, even if, contrary to my view, the envelope was sent "by post" it was not sent "by pre-paid post."

Conclusion on the first two objections

76. For the above reasons I conclude that the Notice of Adjudication was not served, and that accordingly the request to the RICS for nomination of the Adjudicator was ineffective.

77. Accordingly the Adjudicator had no jurisdiction, and AMC is entitled to declaratory relief to that effect.

AMC's Other Objections

78. In addition to the points on service, AMC also contends that the Decision should be set aside on other grounds.

79. Put shortly, what AMC says is that there was a "Notified Sum" notified to DAT in respect of which DAT did not serve a "Pay Less" notice. Unusually, AMC relies in the alternative upon two different notices in very different sums. AMC says that one or other was a valid notice and, says that consequent upon DAT's failure to serve a Pay Less Notice in respect of either, there was a sum of money which DAT had to pay before commencing a true value adjudication, applying *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448; [2019] Bus LR 1847.

80. The same point is also deployed as a substantive point, it being AMC's case is that one or other of the sums notified is due and payable, and also that the failure to pay justifies AMC's cessation of work under the Contract.

81. Given my conclusion on the jurisdiction of the Adjudicator, it is not necessary for me to consider in this judgment whether he was also deprived of jurisdiction on this ground.

82. However, the pleading in this case does seek the Court's decision on the substantive issue, and, as I have indicated above, the Parties having received the draft judgment containing my reasoning above, were agreed that I should also determine certain other issues argued before me.

The First Default Notice

83. Clauses 4.10 to 4.12 of the Contract provide as follows:

> "**Interim Certificates and valuations**
>
> "4.10.1 The Architect/Contract Administrator shall not later than 5 days after each due date issue an Interim Certificate stating the sum that he considers to be or have been due at the due date to the Contractor in respect of the interim payment, calculated in accordance with clause 4.9.2, and the basis on which that sum has been calculated.
>
> **…Contractor's Interim Applications and Payment Notices**

"4.11.1 In relation to any interim payment the Contractor may not less than 7 days before the due date make an application to the Quantity Surveyor (an 'Interim Application'), stating the sum that the Contractor considers will become due to him at the relevant due date in accordance with clause 4.9.2 and the basis on which that sum has been calculated.

"4.11.2 If an Interim Certificate is not issued in accordance with clause 4.10.1, then:

> ….2 where the Contractor has not made an Interim Application, he may at any time after the 5 day period referred to in clause 4.10.1 give an Interim Payment Notice to the Quantity Surveyor, stating the sum that the Contractor considers to be or have been due to him at the relevant due date in accordance with clause 4.9.2 and the basis on which that sum has been calculated.

"**Interim payments – final date and amount**

"4.12.1 Subject to clause 4.12.4, the final date for payment of an interim payment shall be 14 days from its due date.

".2 Subject to any Pay Less Notice given by the Employer under clause 4.12.5, the sum to be paid by the Employer on or before the final date for payment shall be the sum stated as due in the Interim Certificate.

".3 If the Interim Certificate is not issued in accordance with clause 4.10.1, but an Interim Payment Notice has been given under clause 4.11, the sum to be paid by the Employer shall, subject to any Pay Less Notice under clause 4.12.5, be the sum stated as due in the Interim Payment Notice

".4 Where an Interim Payment Notice is given under clause 4.11.2.2, the final date for payment of the sum specified in it shall for all purposes be regarded as postponed by the same number of days as the number of days after the expiry of the 5 day period referred to in clause 4.10.1 that the Interim Payment Notice is given.

".5 If the Employer intends to pay less than the sum stated as due from him in the… Interim Payment Notice… he shall not later than 5 days before the final date for payment give to the Contractor notice of that intention in accordance with clause 4.13.1 (a 'Pay Less Notice'). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall be not less than the amount stated as due in the notice."

84. On 11 March 2020 AMC sent by email "Valuation 22".

85. This gave a value to 9 March 2020. The amount said by AMC to be claimed by this document was £809,259.97 plus VAT.

86. It is conceded by Mr. Shirazi in paragraph 51 of his skeleton argument that this document did not strictly comply with the requirements of the contract in that (i) it

valued the works to 9 March 2020, which was not a due date; and (ii) it did not include a deduction for the amount claimed and consequently did not set out the sum due. However, he submitted that the document is nevertheless valid because it would have been clear to any reasonable recipient how much was due.

87. For DAT, Mr. Balen, contends in paragraph 10 of his skeleton argument that this was not a valid payment notice:

> "The First Notice is not described as a payment notice but as a *"Valuation"*. Contrary to s.110A(2) of the HGCRA 1996, it does not state the sum which the Claimant considered was due to it, and also purported to value the works to 9 March 2020 rather than the pleaded due date of 2 March 2020. It is impossible to tell from the First Notice what sum the Claimant considered should have been due to it on 2 March 2020. Further, the Claimant conceded contemporaneously that the First Notice was invalid, as the adjudicator noted."

88. In *Jawaby Property Investment Ltd v The Interiors Group Ltd* [2016] EWHC 557 (TCC); [2016] BLR 328, Carr J. said:

> "[39] The interim payment provisions in the Contract reflect the requirements of section 110A and section 111 of the Act. Their effect is to require an employer at periodic intervals to pay "the notified sum" by a final date for payment, irrespective of whether or not that sum in fact represents a correct valuation of the work to date. If an employer fails to give relevant notice, irrespective of whether this is by mistake, administrative oversight or any other reason, then a sum for which the contractor has applied becomes immediately contractually payable, even if it is wrong in valuation terms.
>
> "[40] The consequences of such a failure can of course have severe consequences, as this court has recognised, particularly where, as here, there is no contractual provision for interim repayments of any overpayments and where, as here, there is a risk of contractor insolvency. Reference can be made readily by way of example to the judgment of Coulson J. in *Caledonian modular ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC); [2015] BLR 694 at paragraph 37:
>
> > "In the UK (unlike other jurisdictions with mandatory construction adjudication, such as Malaysia) the employer's failure to serve a payless notice within a short period challenging the payee's notice can have draconian consequences. A failure to serve a notice in time will usually mean a full liability to pay. That is what the run of recent cases on this topic, including *ISG v Seevic College* [2014] EWHC 4007 (TCC) and *Galliford Try Building v Estura Ltd* [2015] EWHC 412 (TCC), are all about. But, it seems to me that, if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place."

> "[41] Also of relevance is the judgment of Akenhead J. in *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC); [2015] BLR 704 at paragraph 17:
>
> > "I consider that the document relied upon as an Interim Application under clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity. In this context, the Interim Certificate should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."
>
> "[42] Guidance on what is a "certificate" can be found in *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 WLR 963. There Devlin J (as he then was) commented (at 981 to 982) in the context of a certificate of quality to satisfy a contract of sale that:
>
> > "… A document which has to be handled in commerce must be in a form which leaves no reasonable doubt about its nature … I think that a certificate of this sort must, to satisfy the contract, be unambiguous and readily understandable …"
>
> "[43] The requirement for "form", "substance" and "intent" has often been repeated in the authorities (see, for example, *Token Construction Ltd v Charlton Estates Ltd* [1973] 1 BLR 48). In construing the document or documents relied upon, the exercise is to assess it against its contextual setting how it would have informed a reasonable recipient – see *Mannai Investment Co. Ltd. v Eagle Star Assurance Co. Ltd.* [1997] AC 749 (per Lord Steyn at 772H)"."

89. Finally, in a useful example of the above principles being applied in practice, in *Systems Pipework Ltd v Rotary Building Services Ltd* [2017] EWHC 3235 (TCC); [2018] Bus LR 718, Coulson J. said:

> "[26] Having identified what was required by clause 28.6, it is plain to me that the document of 2 September 2016 was not a proper notification of the amount due for payment in respect of the claimant's final account. There are a number of reasons for that conclusion.
>
> "[27] First, neither the accompanying letter, nor the bulky document which it attached, said that it was the notification of an amount due. Instead, both the letter and the attachment described themselves as a final account assessment.
>
> "[28] Secondly, neither the letter nor the attachment contained any identification anywhere of a particular sum which was said to be due and payable from the defendant to the claimant (or vice versa). It was a purported assessment of the value of the works carried out, no more and no less. It was therefore one half of the necessary exercise only.

> "[29] Thirdly, nowhere in the 2 September documents was there any reference to clause 28.6. Neither the letter nor the attachment said that it was a notification under clause 28.6, much less that it was (on the defendant's case now) actually a notification under two different parts of clause 28.6. In my view, if a notice under a certain clause has a draconian effect pursuant to the contract, the notice should make clear that the documents were a final account assessment only, issued under that clause.
>
> "[30] Fourthly, and perhaps most important of all, it is clear from the defendant's own evidence in this case that the documents of 2 September 2016 were not the notification of "an amount due". Ms King's witness statement accepts that the documents were a final account assessment only, valuing the entirety of the subcontract works, without more."

90. In my judgment the latter decision is particularly apposite in this case. It fully supports Mr. Balen's submission set out above.

91. Accordingly, the First Default Notice was not a valid notice.

The Second Default Notice

92. On 16 July 2020 AMC sent DAT's representative a letter which ended:

> "DAT owes significant sums to AMC. All of the recent valuations are unpaid. We have reassessed the value of AMC's work and attached an updated valuation reflecting AMC's valuation of works as at 2 March 2020. This totals **£206,825.33** excl. VAT. Can you please now arrange for this sum to be paid (as broken down in the attached valuation) as soon as possible."

At the foot of the page is a line reading "Encl. Interim Payment Notice (by electronic copy only".

93. The "enclosed" document:

(1) was headed "**Interim Payment Notice Pursuant to Cl 4.11.2.2 of the Contract**".

(2) complied with all the contractual requirements for a clause 4.11.2.2 default notice. It valued the works to the due date (2 March 2020), set out the basis on which the Contractor said those sums were due, and set out both the previous sums paid and the total amount due.

94. Mr. Balen points out that this notice was issued over four months after the due date (2 March 2020) and baseline final date (16 March 2020) for the payment cycle. He also points out that it valued the Claimant's works in the sum of £206,825.33, which was considerably lower than the figure of £809,259.97 which could be derived from the earlier notice. He then submitted at paragraphs 12 and 13 of his skeleton argument:

> "12. Further, the Claimant did not withdraw the First Notice. In fact, the Claimant continues to rely on the First Notice in this action and it is therefore clear that the Second Notice did not impliedly withdraw the First Notice. But the relationship between the two is never explained. It was not clear what sum the

Defendant was supposed to pay: £809,259.97 or £206,825.33. It still is not clear. In this regard:

> "a. The HGCRA 1996 prohibits a payee from serving a payment notice where he has already made an application for payment (see s.110B(4)). (The Contract gives effect to this in Clause 4.11.2.2).
>
> "b. The HGCRA 1996 does not envisage or allow a second payment notice to be issued under s.110A(3) after the final date for payment which, on the Claimant's primary case, expired on 20 March 2020.
>
> "c. In light of these provisions of the HGCRA 1996 it was incumbent on the Claimant to make clear what the Second Notice was and how it related to the First Notice, but the Claimant did not do so.
>
> "13. In the circumstances, it is not clear what the Second Notice is, what relation it bears to the First Notice, or how the Defendant was supposed to respond. The Second Notice therefore failed to set out the Claimant's claim with proper clarity and failed to give the Defendant reasonable notice that a payment period had been triggered …"

95. I accept that the statutory machinery, reflected in the Contract, permits only one Payment Application and one Payment Notice per period. However, on the view I have taken, the First Default Notice was invalid and therefore service of the Second Default Notice was permissible. Accordingly I reject the challenge to the validity of the second notice set out in sub-paragraphs 12(a) and (b) of Mr. Balen's skeleton argument.

96. The argument that the position was confusing and that the intent of the second notice might not have been understood by DAT is also rejected. It seems to me that on receipt it must have been clear that it was intended to be a formal notice under Clause 4.11.2.2 and that it superseded any earlier valuation or application for payment.

97. In reaching this conclusion I accept the arguments put forward in paragraphs 56 to 64 of Mr. Shirazi's skeleton argument.

98. It follows from this that not only was the Second Default Notice valid, but also that, there having been no payment and no Pay Less Notice, the sum of £206,825.33 is due.

What is the effect of DAT's non-payment of the due sum upon DAT's right to adjudicate?

99. It is AMC's contention that DAT cannot commence a "true value adjudication" until DAT has paid the amount due to AMC under the provisions of the 1996 Act, which I have held is £206,825.33. DAT's case is that AMC misreads the authorities.

100. In a recent decision, *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC), O'Farrell J. has summarised the applicable legal principles:

> "[35] The applicable legal principles relating to adjudication enforcement in the circumstances that arise in this case are well-established and not in dispute.

"[36] Where a valid application for payment has been made by a contractor in accordance with the terms of a construction contract falling within the scope of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) ("the 1996 Act"), an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with section 111 of the 1996 Act by the final date for payment. If the employer fails to pay the 'notified sum', the contractor is entitled to seek payment of such sum by obtaining an adjudication award in its favour.

"[37] Clause 30 of the Contract provides that the Scheme for Construction Contracts (England and Wales) Regulations 1998 (or as amended) applies ("the Scheme"). Paragraph 21 of the Scheme provides that in the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties.

"[38] The courts take a robust approach to adjudication enforcement, enforcing the decisions of adjudicators by summary judgment regardless of errors of procedure, fact or law, unless the adjudicator acted in excess of jurisdiction or in serious breach of the rules of natural justice: *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 per Dyson J at [14]; *Carillion v Devonport Royal Dockyard* [2005] EWHC 778 (TCC) per Jackson J at [80]; *Carillion v Devonport Royal Dockyard* [2005] EWCA 1358 per Chadwick LJ at [85] – [87]; *J&B Hopkins Ltd v Trant Engineering Ltd* [2020] EWHC 1305 per Fraser J at [12] – [16]; *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 per Lord Briggs at [17] – [26].

"[39] Where a party is required to pay the 'notified sum' by reason of its failure to issue a valid Payment Notice or Pay Less Notice, such party is entitled to embark upon a 'true value' adjudication in respect of that sum but only after it has complied with its immediate payment obligation under section 111 of the 1996 Act: *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 per Jackson LJ at [107] – [111]; *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) per Stuart-Smith J (as he then was) at [21] – [25], [35] & [37]."

….

"[74] Further, in this case, section 111 of the 1996 Act would preclude ESG from relying on clause 30.3 to refer the 'true value' dispute in respect of Interim Application 23 prior to satisfying its obligation to pay the 'notified sum' as explained in *S&T v Grove* (above) by Jackson LJ at [107]:

> "… Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in section 111. As required by section 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication

> provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation."

"[75] Although this part of the judgment was technically obiter, the principles enunciated were considered further in *Davenport v Greer* (above) by Stuart-Smith J (as he then was) and followed:

> "[21] … it seems to me consistent with the policy underlying the adjudication regime that a defendant who *has* discharged his immediate obligation should generally be entitled to rely upon a subsequent true value adjudication and that a defendant who *has not* done so should not be entitled to do so. In answer to the question whether a person who has not discharged his immediate obligation *should* be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to implement the Payment or Payless Notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision. In my judgment, the passages I have cited from *Harding* (at first instance and in the Court of Appeal) are at least consistent with and provide support for the policy-based approach I have outlined. Adopting a phrase from [141] of the judgment of Coulson J in *Grove* at first instance "the second adjudication cannot act as some sort of Trojan horse to avoid paying the sum stated as due".
>
> …
>
> [25] To my mind these statements are clear and unequivocal: the employer becomes free to commence his true value adjudication when (and only when) he has paid the sum ordered to be paid by the earlier adjudication.
>
> …
>
> [34] I recognise that the relevant section of the judgment of the Court of Appeal in *Grove* is technically obiter. However, it was provided after full argument and was expressly intended to provide authoritative guidance on an issue that Coulson J had decided in the contractor's favour. I would feel obliged to follow it even if I did not agree with it. As it happens I agree with the reasoning and the outcome.
>
> [35] In my judgment, it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication. Both policy and authority support this conclusion

> and that it should apply equally to interim and final applications for payment.
> …
> [37] The decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can *commence* a 'true value' adjudication…"

"[76] Thus, it is now clear that:

i) where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with section 111 of the 1996 Act;

ii) section 111 of the 1996 Act creates an immediate obligation to pay the 'notified sum'

iii) an employer is entitled to exercise its right to adjudicate pursuant to section 108 of the 1996 Act to establish the 'true valuation' of the work, potentially requiring repayment of the 'notified sum' by the contractor;

iv) the entitlement to commence a 'true value' adjudication under section 108 is subjugated to the immediate payment obligation in section 111;

v) unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a 'true value' adjudication under section 108.

"[77] Applying the above principles, ESG's exercise of any contractual right under clause 30.3 of the Contract to require the adjudicator to determine the 'true value' dispute together with the 'notified sum' dispute in the same adjudication must be subject to compliance with its immediate payment obligation of the 'notified sum'. As ESG failed to comply with its immediate payment obligation in respect of the 'notified sum', it was not entitled to adjudicate on the 'true value' dispute, whether pursuant to clause 30.3 or otherwise."

101. In a letter to the Court setting out DAT's position on the *Bexheat* decision, DAT's solicitors, Birketts, said:

> "4. The Claimant's solicitors have not interpreted the decision in Bexheat Ltd v Essex Services Group Ltd [2022] EWHC 936 (TCC) correctly. In particular, that was a case in which the contractor obtained an adjudication decision in its favour that the employer had failed to pay the 'notified sum' in respect of its application no. 23. The employer contended that the true value of the account had already been addressed in relation to an earlier adjudication which concerned application no. 22. The judge held that the earlier adjudication (regarding application no. 22) was not concerned with the same dispute as the later adjudication (concerning

application no. 23) and was therefore no bar to enforcing the later adjudication. That is not the case in the present dispute: there is simply an (incorrect) assertion by the Claimant that the Defendant failed to pay the notified sum in respect of either the notice dated 11 March 2020 or the notice dated 16 July 2020. There is no adjudication decision in the Claimant's favour that the employer failed to pay the 'notified sum' as there was in Bexheat.

"5. Indeed in her judgment O'Farrell J made it clear that the contractor's remedy if it considers the employer has not paid the 'notified sum' is to commence an adjudication seeking an award in its favour. Thus, at paragraph 36 O'Farrell J held *"if the employer fails to pay the 'notified sum', the contractor is entitled to seek payment of such sum by obtaining an adjudication award in its favour*". The Claimant did not seek an adjudication award against the Defendant and any such adjudication would have failed because both of the notices relied on by the Claimant are invalid for the reasons already explained. This is an additional reason why the Court should find in the Defendant's favour: if the Claimant considered that the Defendant had not paid the 'notified sum', it could and should have adjudicated the question. It should not have been left to the Defendant employer to clear the path by commencing an adjudication on the validity of the Claimant's notices (especially given that both are plainly invalid) just so that it could commence a true value adjudication.

"6. When in paragraph 76 O'Farrell J refers to *"a valid application for payment"* she does so in the context that an adjudicator had already decided that there was a valid application for payment and that there was a 'notified sum'. The question as to whether there was a 'notified sum' had therefore already been conclusively determined. In this case however there is no adjudication decision for the Claimant to fall back on. As O'Farrell J said in paragraph 36, the contractor's remedy in that case is to adjudicate, which the Claimant failed to do. The Claimant's reliance on Bexheat is therefore misplaced. O'Farrell J was not asked to decide 'where a contractor asserts that there is a notified sum, but the employer disputes this, and the contractor does not have an adjudication decision establishing that there is in fact a notified sum, can the employer commence a 'true value' adjudication?' and nor did she decide that question. It is therefore unclear to us why the Claimant relies on this decision, which does not stand for the proposition alleged in its letter dated 29 April 2022."

102. Thus DAT seeks to distinguish *Bexheat* (as well as the Court of Appeal decision in *S&T (UK) Ltd v Grove Developments Ltd* and the decision of Stuart-Smith J in *M Davenport Builders Ltd v Greer*) on the basis that in the present case there was no unsatisfied adjudication decision in the Contractor's favour. This amounts to a submission that a contractor in the position of AMC cannot prevent the commencement of a 'true value' adjudication relying upon the above cases unless it has first obtained a monetary adjudication award in its favour.

103. I do not accept that submission. Firstly, no such limitation was suggested by the Court of Appeal or the first instance judges in this Court in any of the three cases cited.

104. Secondly, the submission is contrary to the requirement referred to in those cases and repeated by O'Farrell J. in sub-paragraphs [76(v)] and [76(vi) of *Bexheat* that

> "(v) the entitlement to commence a 'true value' adjudication under section 108 is subjugated to the immediate payment obligation in section 111;
>
> "(vi) unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a 'true value' adjudication under section 108."

105. Thirdly, the submission runs contrary to the policy considerations underlying the above trio of cases, that where no Pay Less Notice has been served, the Employer must pay before disputing the amount outstanding.

106. It follows that I accept AMC's submission that DAT cannot commence a 'true value' adjudication until it has paid the amount I have found to be due.

Was AMC's suspension of work valid?

107. As I understand the Parties' submissions, it is agreed that if DAT failed to pay a sum due, AMC was entitled to suspend work. Accordingly, on the findings I have made, AMC was entitled to suspend work.

Conclusion

108. I invite the submissions of the Parties as to the terms of the order which I should make.