



Neutral Citation Number: [2023] EWHC 3122 (TCC)

Case No: HT-2023-NCL-000008

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

The Moot Hall, Castle Garth,
Newcastle upon Tyne, NE1 1RQ
Date: 06/12/2023

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE KING'S BENCH DIVISION)

Between :

ILUMINESIA LIMITED
(t/a ALTEREGO FACADES)

Claimant

- and -

RFL FACADES LIMITED

Defendant

Mr John McMillan (instructed by **Hay & Kilner LLP**) for the **Claimant**
Mr James Bowling (instructed by **Ridgemont Legal Services Ltd**) for the **Defendant**

Hearing date: 20 November 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 6 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE KING'S BENCH DIVISION)

HH Judge Davis-White KC :

Introduction

1. This is my judgment on a summary judgment application in adjudication enforcement proceedings brought by the Claimant, Illuminesia Limited (trading as AlterEgo Facades) (“AlterEgo”) against the Defendant, RFL Facades Limited (“RFL”).
2. The hearing had been adjourned by agreement due to the unavailability of counsel by reason of illness.
3. In addition to the adjudication enforcement proceedings, RFL has commenced Part 8 Proceedings (the “Part 8 Proceedings”). It has also served, without any court order, particulars of claim in the Part 8 Proceedings. By the Part 8 Proceedings, and in the event that it fails on the summary judgment application, RFL seeks declaratory relief, in effect, overturning the Adjudicator’s decision in whole or part on the basis of error of law, any such decision of the court being a final one and replacing the interim decision of the Adjudicator.
4. It has been agreed before me that I should first deal with and give judgment on the summary judgment application in the adjudication enforcement proceedings. In light of that judgment, the parties will then address me further as to the appropriate procedural course to take. In particular (among other things), in the event that I grant summary judgment, there may be an issue as to whether I should stay any order for summary judgment pending resolution of the Part 8 Claim.

The Adjudication

5. The Adjudication in this case was conducted by Mr Donald Pugh MSc, FCIArb, FCIOB, Solicitor (“Mr Pugh” or the “Adjudicator”). It was commenced by a Notice of Intention to Refer to Adjudication dated 23 June 2023 (the “NOI”). AlterEgo requested the President of the Royal Institution of Chartered Surveyors (“RICS”) to nominate an adjudicator. By email dated 24 June 2023, RICS appointed Mr Pugh, a solicitor. Mr Pugh accepted the appointment on 26 June 2023. His final decision was given on 28 July 2023.
6. On 29 June 2023 AlterEgo served a Referral Document. The Defendant’s Response was served on or about 14 July 2023. A Reply was served on 18 July 2023. A Rejoinder was served on 20 July 2023. By his decision dated 28 July 2023 the Adjudicator ordered RFL to pay AlterEgo £776,920.32 plus applicable VAT, interest and 80% of the Adjudicator’s fee, within 7 days of the decision.
7. During the adjudication process, RFL raised three jurisdictional challenges, in brief that (1) the NOI failed to identify the relevant contract (or identified the incorrect one: this being a case where the formation of the contract depends upon an analysis of relevant correspondence between the parties); (2) the NOI and Referral failed to particularise breach of an “Order Acceptance” which document I shall refer to below and which was said by RFL to be the only contract identified in the NOI and (3) that a common law claim (of a repudiatory breach of contract), as opposed to breach of contract claim, was said to be raised as an alternative claim which was not a dispute arising under a contract for the purposes of s108 of the relevant Act. It then raised a fourth jurisdictional

challenge, which was that the nature of the dispute and details of where and when it arose were included in the NOI but a brief description of the dispute was not. AlterEgo contested each of these challenges.

8. On 7 July 2023, the Adjudicator gave his non-binding views on jurisdiction. His conclusion was that there was nothing raised that would lawfully deprive him of jurisdiction, at least at that stage.
9. RFL then raised a fifth jurisdictional challenge which was that the contract in question was not a “construction contract” for the purposes of s104 of the Housing, Grants, Construction and Regeneration Act 1996 (the “1996 Act”). Adjudication could only apply if AlterEgo’s terms and conditions were incorporated into the contract which, said RFL, they were not. By further written submissions dated 10 July 2023, RFL made yet further submissions on its five jurisdictional challenges and engaged with and challenged the Adjudicator’s non-binding views. RFL also complained about the costs being incurred in the adjudication.
10. On 14 July 2023, the Adjudicator gave further supplemental non-binding views on jurisdiction. Among other things, he confirmed his view set out in an earlier email where he accepted that his earlier expressed view that the contract would be a “construction contract” was wrong:

“However, as properly mentioned by [RFL’s solicitors], a right to adjudicate potentially exists because of clause 13.1 of AEF’s terms and conditions. The formation of the contract (and applicable terms) is a matter yet to be decided. It is a substantive issue in the adjudication and, properly, cannot be decided until submissions from both parties have been received. However, RFL confirm, as is to be expected, that they will address the issue in the Response.”

11. He also referred to a further submission by RFL, inviting him to resign on the basis that he should direct a preliminary issue as to the issue of contract formation but that as there was now no time to do so, he could be satisfied that he could not fairly and reasonably arrive at a decision in the allotted time (citing *Coulson on Construction Adjudication* (4th edn) paras 4.64/65). He rejected that invitation. His overall conclusion remained unchanged.
12. The Adjudicator’s final decision was, as I have said, given on 28 July 2023.

Advocates and evidence before me

13. The Claimant was represented before me by Mr McMillan of Counsel. The Defendant was represented by Mr Bowling. I am grateful to them for their helpful written and oral submissions.
14. The evidence before me on the summary judgment application comprised two witness statements of Mr Jan Rzedzian, of Hay & Kilner LLP, solicitors for the Claimant, AlterEgo and one witness statement of Mr Timothy Seal of Ridgemont Legal Services Limited, solicitors for the Defendant, RFL.

15. In addition extra documents were handed up during the hearing, without objection, by Mr Bowling. These comprised further pages 388 to 404 of the hearing bundle comprising a revised purchase order of RFL dated 9 January 2023, omitting the GRC Fins; a letter of 20 February 2023 from Hay & Kilner LLP on behalf of AlterEgo dealing with termination of the contract; the Letter of Claim sent by Hay & Kilner LLP dated 27 March 2023; the Letter of Reply of Ridgemont Legal Services Limited dated 5 May 2023 and another copy of the quotation of 15 December 2021.

The Parties and the background

16. AlterEgo is a supplier of architectural stone and concrete cladding.
17. The dispute in this case relates to a supply, or potential supply of cladding materials by AlterEgo to RFL in relation to RFL's works on a site at Eastbourne Terrace, London W2 (the "Site").
18. One of the issues between the parties is whether a supply contract was entered into between them, and if so on what terms, in relation to the supply of goods/materials by AlterEgo to RFL.
19. As part of the relevant negotiations it was envisaged that a separate contract would be entered into by each of the parties before me and main contractor to RFL, RFL being its sub-contractor, regarding the relevant supply (the "Advance Payment Agreement"). The following detail is taken from a draft of that agreement. CSHV IUK ET Devco Limited (the "Employer") and Gilbert Ash Limited (the "Main Contractor" or "GA") had entered into a building contract under which the Main Contractor, GA, was to provide the design and build of cladding at the Site. The Main Contractor, GA, entered into a sub-contract with RFL for the purposes of carrying out the relevant defined works. RFL was in turn looking to enter into a contract with AlterEgo for the purposes of AlterEgo providing materials and/or goods for the works. In broad terms, under the proposed agreement between (1) GA, (2) RFL and (3) AlterEgo, in the event of a relevant payment default by RFL, GA would assume responsibility for the payment obligations of RFL to AlterEgo under the contract between AlterEgo and RFL and title to the goods that GA paid for would pass directly from AlterEgo to GA.
20. At various times, as I shall explain, AlterEgo quoted for the supply to RFL of 3 components (a) about 770 GRC (glass reinforced concrete) cladding panels (referred to as "GRC Fins"); (b) a hanging system for the GRC Fins, including casting rod, hanging clasp and rail (referred to before me as the "Carrier Rails System") and (c) a subframe, including mullions and brackets (referred to before me as the "Subframe"). Over time the quotations changed as prices varied. However, some indication of the different prices at stake can be gleaned from a quotation from AlterEgo dated 15 December 2021 where the break down was (a) GRC Fins: £674,803.30; (b) Rails: £90,770.40 and (c) Sub-Frame: £102,116.70.
21. AlterEgo supplied RFL with the Carrier Rails System and Sub-Frame in about May 2022. However, RFL decided not to proceed with taking delivery of any GRC Fins. At the time, AlterEgo, treated the refusal to proceed with the GRC Fins as being a repudiatory breach of contract by RFL which it purported to accept.

Summary judgment: the principles

22. Before turning to the defences to the summary judgment application, I turn to the applicable law. I did not understand there to be any dispute as to the applicable law regarding the grant of summary judgment.
23. The Claimant must show that the Defendant has no real prospect of succeeding on the claim or issue on which summary judgment is sought and there must be no other compelling reason why the case should be disposed of at trial (CPR r24.3). No point was raised by the Defendant that there was some other compelling reason for trial. The case therefore turns on whether the Claimant can show, at this stage, that the Defendant has no real prospect of succeeding in each of the defences that it raises.
24. I was referred to the relevant notes in the White Book and in particular, the summary of principles formulated by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] as approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]:

“i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All E.R. 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason

is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: IC/ Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

25. I was also referred to the well-known passage from the judgment of Cockerill J in *King v Steifel* [2021] EWHC 1045 (Comm) at [21] to [22]: .

"[21] The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

[22] So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

The Defences

26. The burden of proof is of course in the Claimant to make out its case that there is no real prospect of the Defendant successfully defending the case at trial. Nevertheless it is best to start with the defences that RFL has raised.
27. RFL raises four points by way of defence:
- (1) There was no agreement to adjudicate and therefore the adjudicator lacked jurisdiction;
 - (2) The NOI was defective in not complying with the applicable rules. The defect was not waived. Again, the Adjudicator lacked any jurisdiction.
 - (3) The Adjudicator decided the dispute on a basis that was not within his jurisdiction to decide and in circumstances where there was a breach of natural justice, accordingly (a) he lacked jurisdiction and (b) his award falls away for breach of the principles of natural justice;

- (4) The claimant is seeking to approbate the Adjudicator's award by taking advantage of the monetary sum he awarded under the contract that he found had come into being, whilst at the same time, reprobating the award, by seeking to assert to the court that the relevant contract was a different contract. That it is not permitted to do. In short, the parties accept that the decision of the Adjudicator regarding the contract that was formed was wrong but if that is so, then the claimant cannot seek to rely on his decision based on that contract.

28. I deal with the defences in the same order that the parties did.

(1) Alleged absence of jurisdiction: was there an agreement to adjudicate?

29. It is common ground (as the Adjudicator himself, finally, accepted) that any relevant contract between AlterEgo and RFL was not a "construction contract" within the meaning of s104 of the 1996 Act. No "construction operations" within the meaning of that section (as expanded upon by s105 of the 1996 Act) were involved in a relevant manner under whatever contract there was. In effect, the contract was one for the supply of goods. Accordingly, the statutory right to adjudication under s108 of the 1996, either by way of express terms required to be included in the contract under the Act or, in default, the implied statutory scheme, and which applies to any "construction contract" does not apply in this case.
30. The question is, therefore, whether or not a contract was made which incorporated express adjudication terms. If there was such a contract with such terms then the parties could take advantage of adjudication and the Defendant's first defence is shown to have no real prospect of success.
31. As regards the term in question, AlterEgo relies upon its standard "Terms and Conditions of Engagement" which were enclosed with other documents, including an "Order Acceptance" from AlterEgo dated 31 January 2022 (the "AlterEgo Standard Terms"). Those terms and conditions include a provision setting out the terms applicable to the adjudication if the contract in question is a "construction contract" for the purposes of the 1996 Act (see clause 12.1) but also a self-standing clause 13 as follows:

*" 13 Dispute Resolution
13.1 Adjudication is available as a dispute resolution procedure in
accordance with the Construction Act and the Scheme."*

32. I did not understand Mr Bowling to contest the case that, if the AlterEgo Standard Terms were incorporated into a relevant contract, they were adequate to confer a contractual right to adjudication.
33. The case for a contract and the incorporation of the AlterEgo Standard Terms is said by the Claimant to rest upon the correspondence. It is said that there is and will be no further evidence and the court will be in as good a position as a trial Judge to construe the correspondence and determine whether or not there is a contract incorporating the relevant terms.

34. The Defendant says that although there was agreement in principle between the parties as to certain matters, there was no completed agreement between them. Secondly, it is said that in any event, the matter has to be tested by disclosure, witness evidence and submission. The court should not conduct a mini-trial on incomplete evidence. Thirdly, the fact that the Adjudicator found there to be a different contract demonstrates at least the second point.
35. I therefore turn to the correspondence. I go through this in some detail and not just the documents shown to me at the hearing. This is because the Defendant relies upon all the correspondence it exhibits to show (it submits) that no final contract was ever agreed.
36. There were clearly discussions about pricing, specifications, delivery dates and the like from at least June 2021, as shown by an email of 22 June 2021 from RFL to AlterEgo referring to RFL's post tender interview of the day before.
37. By email dated 15 December 2021, AlterEgo emailed RFL enclosing their latest price revision "on the latest take-off provided". The costing of the GRC Fins was £674,803.30 and the remainder of the system (which the e-mail indicated could be split between the Carrier Rails system and the vertical Subframe on a 50:50 basis. On the bottom of the quotation the following "Notes" appeared:
- "Notes:*
- offer valid only with order placed and 10% deposit paid before 22nd Dec 2021***
- Payment terms by vesting as produced between March and June 2022***
- Storage and relevant costs to be agreed further***
- date of Issue: 15.12.2021"*
38. By email dated 20 January 2022, AlterEgo made plain that there was no negotiation on the price. The order was already a month late and the increases in material costs did not facilitate any discounts.
39. Under cover of an email dated 24 January 2022, RFL sent a letter of intent and a draft copy of the Advance Payment Agreement. AlterEgo was asked to sign and return the latter. As regards the letter of intent, RFL confirmed in the letter its intention to proceed with AlterEgo's offer. It had not decided on the sub-frame but was willing to pay 10% of the £674,803.30 (contained in the 15 December 2021 AlterEgo quote) to secure the GRC fins. Once final details were received, RFL intended to instruct AlterEgo with a formal purchase order with bill of quantities and drawings.
40. AlterEgo replied by email of the same date (24 January 2022) saying that it needed an order number to process order acceptance and to invoice for the deposit. If RFL was in doubt about the subframe, it should forward an order for the carrier rail system as required. An order for the carrier rails system was "paramount" because AlterEgo would not supply the panels without the carrier rail system.

41. Under cover of an email some hours later but also on 24 January 2022, RFL sent AlterEgo a purchase order (No 1223) for the GRC fins and rails as per the quote of 15.12.2021 in the sum of £765,574.02 ex Vat.
42. Under cover of email dated 31 January 2022, AlterEgo sent to RFL an “Order acceptance and T&Cs accordingly” and as per its agreed terms also attached an invoice for the “10% project value deposit for immediate payment” so that it could “liaise with factory and put the ball rolling”. It also sought confirmation that the GRC fins dimensions on the RFL purchase order were correct so that AlterEgo could “proceed design accordingly” and payment confirmation of the 10% Deposit. I have already referred to the key aspect of AlterEgo’s terms and conditions for present purposes. The order acceptance, referring back to the RFL purchase order by number, 1223, set out the same relevant details as the purchase order and the same price but included in red certain further details such as thickness and colour and referred back to the 15.12.21 quotation. Notes at the bottom included:

“ All work and supply shall be carried out and completed in accordance with Illuminesia limited t/a AlterEgo Facade's Terms and Conditions of Contract as attached herewith and available upon request. Signing of this document constitutes acceptance of those Terms and Conditions.

Special Instructions: No special instructions have been received regarding delivery, therefore the contract allows for a standard vehicle only with offloading by others. Storage costs applicable if goods are not collected on completion/ payment as per programme of production

Payment Terms:

10% deposit applicable and to be deducted from the last invoice due; Payments on phased completion of the material, backed up by relevant vesting certificates, Payable in 7 days from the date of invoice/ vesting certificate [sic];

Lead in Time: Production provisionally [sic] booked to start in early April and complete by the end of June 2022”

43. The Invoice for the deposit was for 10% of the overall ex Vat price set out in the Order Acceptance, with VAT being added. The total invoiced was £91,888.82. The invoice was headed:

“ Please refer to AE Order Acceptance: "OA-5108_RFL Fins and Hanging System BULK Order Acceptance Form - 40 Eastbourne Terrace - 31 .01 .22”

44. AlterEgo’s case is that these documents formed an offer by AlterEgo which was accepted by conduct rather than by the signing by RFL of the Order Acceptance.
45. By email dated 1 February 2022, RFL wrote to AlterEgo to say that the deposit should only be on the “GRC and casting rods” and asked for the deposit invoice to be amended and re-sent.
46. By email of the same date, AlterEgo wrote to say that the 10% was indeed and as requested for the GRC fins and hanging system/subframe so the invoice was correct. In fact this seems to be an error, by reference to the earlier documents the rods were included but not the subframe.

47. In response to an email from RFL dated 9 February 2022, which raised various questions, AlterEgo replied by email of the same date enclosing the deposit invoice and asking if RFL had managed to look at it and asking when the invoice would be paid. As regards design, AlterEgo sought confirmation by email of what had been confirmed orally by RFL, namely that the dimension on the purchase order were correct so that it would be alright to proceed to design. As regards a proposed impact test, AlterEgo said that it had been agreed that RFL would be sending production drawings in the meantime. This would need to be priced and an order placed for the material in question. AlterEgo then asked if it could proceed to production once the design was complete or whether it should wait for the test results.
48. By email dated 11 February 2022, AlterEgo referred to a telephone conversation earlier that day and thanked RFL for the heads up regarding the deposit payment. It confirmed that confirmation for PMU had been received from RFL, re mock up panels and enclosed a schedule with rates allocated and asked for a purchase order to be raised for the Mock-up accordingly. Transport costs were to be confirmed closer to the dispatch date.
49. By email dated 15 February 2022, AlterEgo sent a chasing email asking about the deposit and any order for mock up panels. RFL wrote back the same day saying that it had not received payment from the contractor and would update AlterEgo in due course.
50. By email dated 22 February 2022, AlterEgo attached the latest drawings together “with fab drawings for the panels”. It asked for these to be checked and confirmed so that an order could be placed by AlterEgo with the factory.
51. By email dated 23 February 2022, RFL confirmed that the GRC panels were the correct dimensions.
52. By email dated 25 February 2022, AlterEgo, further to a telephone conversation and “this correspondence”, stated its belief that “all is confirmed so we can out this material into production as soon as a deposit is paid from your end”. Once the deposit was paid, AlterEgo would liaise with the factory and only then would they have a production plan from the factory to forward to RFL.
53. On 11 March 2022, as shown by a payment advice of that date, RFL paid AlterEgo £50,000 by way of Faster Payments.
54. Under cover of an email dated 16 March 2022, RFL sent a revised purchase order now including the subframe. It asked for the production and vesting schedule to be sent. The revised purchase order was now for the full sum of £867,690.72 (ex VAT) as per AlterEgo’s quote of 15 December 2021.
55. Two emails from AlterEgo followed. Essentially, they made the point that the second tranche of the deposit had not been paid on 18 March as promised and that an order could not therefore be placed with the factory. Further, AlterEgo could not wait to keep the current price offer open, if an order with the factory was not placed then the quotation would have to be amended.

56. RFL's response, by email also of 24 March 2022, was that payment of the remainder of the deposit had been processed and the funds should be with AlterEgo the following morning.
57. On 24 March 2022, as shown by a statement of that date, £41,888.82 was paid by Faster Payments by RFL. With the payment of 11 March 2023, this completed payment of the full deposit invoiced by AlterEgo by invoice dated 31 January 2022.
58. By email dated 29 March 2022, AlterEgo sent RFL a revised cutting schedule with latest changes on the GRC fin types and addition of the subframe. It asked for the detail to be reviewed and, if correct, for a revised purchase order and an instruction to manufacture the whole order.
59. By email dated 14 April 2022, RFL asked AlterEgo for a copy of its, AlterEgo's, purchase order to the manufacturer (with any commercial matters being hidden at AlterEgo's option). RFL was looking for reassurance that the production line was booked, fixed prices would be maintained for the duration of the project and materials would be manufactured in line with the project needs. The email made reference to AlterEgo's "recent appointment for Eastbourne Terrace".
60. By email dated 19 April 2022, RFL asked AlterEgo to sign and return a copy of the Advanced Payment Agreement, sent to AlterEgo in January: the "Client is chasing".
61. By email dated 4 May 2022, AlterEgo sent RFL paperwork relevant to the purchase order placed by AlterEgo with the manufacturer, Kroe Spółka z Ograniczoną in Poland. The email made the point that it was based on the recent schedule of material that had yet to be confirmed by means of an updated purchase order from RFL and that AlterEgo was waiting on the purchase order and the go ahead for production, which was provisionally booked for May-July 2022. Prices would not be able to be kept beyond that period.
62. By email dated 5 May 2022, AlterEgo wrote to RFL complaining that the order and deposit payment from RFL were substantially delayed and moved the start of production by 2 months and forced AlterEgo to change manufacturer. Production still had not started as it was pending RFL's go-ahead, required to start moulds design and production. Once again, by holding confirmation back of the final requirements for the project and the go-ahead, RFL was causing delay. Various suggestions were made as to updating the Supply Contract (purchase order and order acceptance) and to the Advanced Payment Contract. As regards the latter one suggestion was the annexation of the final purchase order/order acceptance "as already requested and agreed by email on 27 April 2022".
63. On 19 May 2022, AlterEgo sent RFL a draft vesting certificate (of title).
64. By email dated 24 May 2022, AlterEgo expressed concern regarding progression of agreement on the vesting certificate and the non-alignment of the various agreements involved.
65. By email dated 1 June 2022, AlterEgo sent invoices and detailed schedules of the materials manufactured in May that were said to be subject to the vesting certificate upon payment within 14 days. An immediate meeting was requested if matters were not

agreed. Mr Bowling for RFL accepted that the Carrier Rail System and Subframe were delivered in May 2022. As I shall go onto explain, the GRC Fins were in fact never delivered and the contract was terminated with the parties disagreeing as to the mode and timing of termination.

66. The invoices included one for £91,078.80 (ex Vat) for “Total Hanging system (rails and clasps)” and one for £102,463.65 (ex VAT) for Subframe. RFL’s order reference was given as 1223 “24.01.22/ revised 16.03.22” and AlterEgo’s Order Acceptance was given as “S-5108 RFL 40ET Contract Value Summary 28.03.22”.
67. By email dated 9 June 2022, whilst denying “trying to dispute or not pay” RFL said it could not approve the invoices or make payment as the materials had not been vested (it was said the items had not been labelled correctly or delivered). As regards time for payment it said it had not agreed 14 days and could only agree what it had agreed with the contractor: namely 30 days.
68. According to the Adjudicator, RFL received a vesting certificate dated 14 June 2022 enabling it to obtain payment from the contractor. That vesting certificate, in terms, refers in paragraph 1.1 to “a supply contract between us”, AlterEgo and RFL, dated 31 January 2022.
69. By email dated 24 June 2022, RFL made various responses to various points raised by AlterEgo by email dated 22 June 2022, cumulating in a statement by AlterEgo that various matters needed to be agreed to enable production to be started by the manufacturer of further items.

The Adjudicator’s decision on contract formation and adjudication

70. The Adjudicator rejected each party’s case on contractual formation. He found that there was a contract, but that RFL was estopped by convention from denying an implied term into the contract for disputes to be referred to adjudication under the terms of the 1996 Act and the 1998 Scheme (see paragraphs 22 to 30).
71. As regards the contract itself, he found that it was formed on or around 24 January 2022 and that it was based upon the quote of 15 December 2021 (found by the Adjudicator to be an offer) and accepted by the issue of its purchase order by RFL on 24 January 2022 (see paragraphs 34 to 62 and especially paragraphs 57 and 62). He held that the conditions about payment of deposit and so forth in the Notes to the quotation of 15 December 2021 were waived by conduct.
72. As far as I can tell the submissions of AlterEgo at least has been slightly refined since the Adjudication.

Discussion and Conclusions: contractual right to adjudication

73. In my judgment, and based on the documentary material that the parties have provided, the contract was not formed on 24 January 2022. The purchase order of 24 January 2022 was not an acceptance within the time period laid down by the 15 December 2021 quotation. First, it did not accept (or include) the subframe so there was no correspondence between the materials set out in the original quotation and the purchase order. Secondly, as at 24 January 2022, there was no waiver of the terms of the

quotation. Initially RFL sent only a letter of intent. Its followed up with a purchase order, but that was in response to the intervening email from AlterEgo to the effect that an order number would be needed “to process order acceptance” (in other words, the purchase order would need to be the subject of an acceptance and would not itself be a partial acceptance of a (lapsed) quotation). Then AlterEgo issued the raft of documentation on 31 January 2022 which was clearly a new offer. That offer was then clearly accepted by conduct. The offer included the terms and conditions of AlterEgo put forward as the terms on which the offer was made and thus the adjudication provision. All further correspondence proceeded on the basis that the relevant terms of the contract were set out in the offer of 31 January 2022 even though there were negotiations about varying terms or including new terms.

74. I do not need to decide precisely when the contract was formed and whether or when the terms were varied but one obvious later variation is the inclusion of the subframe.
75. The acceptance of the offer is demonstrated by the payment of the deposit (in the context of all the surrounding contemporaneous correspondence) as invoiced and the delivery and acceptance of the rails (as well as the subframe, in the latter case under a variation). The suggestion that there was simply no concluded contract is, in my judgment, fanciful.
76. Although I disagree with the Adjudicator as to the precise offer and acceptance, I do agree with him that in terms of subsequent conduct after 31 January 2022 there was clearly a binding contract. He found that the acceptance was of the quotation of 15 December 2021. I find that it was acceptance of the terms offered on 31 January 2022, which of course incorporated the 15 December quotation in terms of the specification (for the goods, although at this stage the sub-frame was excluded) and the contractual prices initially agreed.
77. Turning to the detail of the submissions made to me by Mr Bowling, he makes a number of points.
78. The overall conclusion that he asks me to draw is that I cannot be satisfied to the summary judgment standard that the parties were doing anything other than negotiating and that no contract ever came into being.
79. As regards acceptance of what I have held to be AlterEgo’s offer of 31 January 2022, he says first that the only thing that was agreed was payment of a deposit to secure a price for the GRC Fins. As regards the deposit he says that this was paid on the terms of the RFL statement on 24 January 2022. However this is to ignore the subsequent correspondence (especially the 25 February 2022 email) and the deposit invoices themselves.
80. Secondly, he says that AlterEgo’s email of 25 February 2022 is relied upon by AlterEgo as giving it authority to proceed and gives reasons why by itself it was inadequate to demonstrate acceptance of an offer, however the point is that the deposit was subsequently paid confirming the authority to proceed in this email.
81. Thirdly, he says that the email of 14 April 2022, referring to AlterEgo’s appointment to the project is ambivalent. In context, it seems to me that it is far from ambivalent. It

is notable that it had attached to it the same documents as were attached to the email of 31 January 2022.

82. Fourthly, he refers to the draft unsigned Advanced Payment Agreement circulated on 24 January 2022, but this is to ignore the later development on 19 April 2022 whereby RFL asked AlterEgo to sign a document confirming a contract between AlterEgo and RFL (see recital 2).
83. As a generality, Mr Bowling relied on the principle that just because work is done and money has been paid, it does not automatically follow that there is a contract (see e.g. *Jarvis v Gailliard Homes* [200] BLR 33 at [52]; *The Aramis* [1989] 1 Lloyds Rep 213). He also says that an individual exchange should not be separated from “the surrounding context and the continuum of the correspondence” (see *Hussey v Horne-Payne* (1878) 4 App Cas 311). I accept the general points that he makes as matter of general principle but, in my judgment, in this case I am construing the documents within their continuum and they show that a contract was formed, as I have concluded. I have not used the reasoning or approach that he says is incorrect.
84. Having construed the documents before the court, the question is whether disclosure and/or witness evidence would make any difference. Mr Bowling submitted that these matters held out a real prospect that the conclusion that I have drawn would be found to be incorrect. However, he was unable to point to any particular documents that might come to light or to any particular witness evidence that could be relied upon and on which a dispute might arise that could only be resolved on cross-examination. All he was able to point to was that the Adjudicator had a lot of witness statements which were not before me. I do not consider this to raise a defence with a real prospect of success.
85. It was for RFL to put before me any documents (to the extent that it was said the Adjudicator had been provided with them and I had not) or witness statements and to identify how those would throw light upon the issue before me such that there would be a real prospect of showing, on a trial, that there was no contract or, if there was a contract, that it did not include any adjudication provision. As regards this, the starting point was unpromising. Mr Seal appears to say that all relevant documents are before the court and he does not identify any separate areas of disputed points of factual evidence not covered by the documents.
86. As regards documents, there are clearly some gaps in the documents before me but both parties will have received or sent the relevant documents going between them. The question of contract will be based on such communications between them not internal ruminations of either party. Mr Bowling was unable to point to any further documents (even if lost) which might make a material difference in throwing light upon the issues that I am now considering.
87. As regards witness statements, none were put before me. In my judgment it was for RFL to do so if it wished to raise a case that there might be material oral evidence which could not be resolved without cross-examination and a trial. It is not enough for Mr Bowling to submit, as he did, that the Adjudicator had a lot of witness evidence before him that I do not have that would be relevant. He needed to go much further than that.
88. Having looked at the Adjudicator’s decision in more detail, I note that he had a number of witness statements before him. He considered that the defendant’s witness evidence,

far from supporting a case that no contract had been formed (perhaps other than one regarding payment of a deposit to secure a specific price), supported the conclusion that a contract **had** been formed (see paragraphs 51, 52 and 61). It was not suggested that he had misread the evidence or that there was other relevant evidence that he had omitted to deal with in his decision

89. Not only, therefore, has the defendant failed to put before me any relevant witness evidence throwing light on the correspondence and raising a real prospect of its defence succeeding, the witness evidence it put before the adjudicator apparently did not support its case before him or me but rather supported a case that a contract had been formed.
90. I should add that it does not seem to me that the witness evidence as recorded by the Adjudicator, supports a case or raises a real prospect that the contract did not contain the adjudication clause that I have found to be incorporated.
91. Accordingly, I find that there is no real prospect of the Defendant successfully making out, at trial, its defence that the Adjudicator lacked jurisdiction to proceed with the adjudication on the basis that there was no contract between the parties and/or no contract containing an adjudication provision.

(2) Alleged inadequate notice to adjudicate

92. I understood it to be common ground that in the event that I held that there was a contract between the parties containing the adjudication clause in the terms of Clause 13 of AlterEgo's Standard Terms then Part 1 of the Scheme for Construction Contracts (England and Wales) Regulations 1999 would apply (the "Scheme").
93. Paragraph 1 of Part 1 of the Scheme provides for a party to give written notice of his intention to refer any dispute arising under the contract to adjudication (referred to as a "Notice of Adjudication").
94. Paragraph 1(3) goes on to provide that the notice of adjudication "shall set out briefly" four matters. In this case, RFL says that the NOI fails adequately to set out three of those four matters: namely, (1) the nature and a brief description of the dispute..."; (2) details of where and when the dispute arose and (3) the nature of the redress that is sought.
95. It was common ground that if the NOI is sufficiently defective in failing to comply with paragraph 1(3) of the Scheme then the whole adjudication process is a nullity and relevant shortcomings in the notice of adjudication cannot be put right in the Referral (see *Coulson on Construction Adjudication* at 4-19 to 4.31 and especially 4.20). This statement has to be read subject to an important caveat. If there is no reference at all to (for example) where and when the dispute arose or to any redress sought then the Notice to Adjudicate will be inadequate and any following adjudication will be without jurisdiction. However, if there is set out the nature and brief description of the dispute and the relief sought, an issue then may arise as to whether a particular decision on a particular point (or indeed the decision as a whole) is outside the terms of the Notice of Adjudication. In that event, the Notice of Adjudication will not be a nullity: instead the relevant decision may be a nullity as being a determination made without jurisdiction to do so.

96. Although I was only referred to it indirectly by reference to *Coulson on Construction Adjudication*, it seems to me helpful to set out the summary of Carr J (as she then was) in *Stellite Construction Limited v Vascroft Contractors Limited* [2016] EWHC 792 (TCC). In paragraphs [48] to [51] she said as follows:

[48] *It is common ground that the Notice of Adjudication defines the ambit of the adjudicator's jurisdiction and that any jurisdictional issues will be considered by reference to the nature, scope and extent of the dispute identified in that notice (see Penten Group Ltd v Spartafield Ltd [2016] EWHC 317 (TCC) per Coulson J at paragraph 16). The Notice of Adjudication (and Referral Notice) are however not necessarily determinative of the true dispute: the background facts also need to be considered (Witney Town Council v Beam Construction (Cheltenham) Ltd [2011] BLR 707 at paragraph 38).*

[49] *It is for the party who refers the dispute to adjudication to define the issues which are referred and the adjudicator has no jurisdiction to vary the basis on which the reference has been made : see McAlpine PPS Pipeline Systems v Transco [2004] BLR 352 (at paragraphs 145 and 146) and Vision Homes v Lancsville Construction [2009] BLR 525 (at paragraph 61). The adjudicator's jurisdiction includes any defence to the claim advanced in the Notice of Adjudication (see for example Pilon v Breyer Group [201] EWHC 837 (at paragraph 25)).*

[50] *"Dispute" is a word interpreted broadly to mean "whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference" (see Fastrack Contractors v Morrison Construction Ltd (2000) 75 Con LR 33 per Judge Thornton at paragraph 34).*

[51] *Akenhead J carried out a useful review of the authorities in Cantillon Ltd v Urvasco Ltd (2008) 117 Con LR 1 (at paragraph 55):*

- a) Courts (and indeed adjudicators and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is;*
- b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is;*
- c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration;*
- d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.*

[52] *To determine whether an adjudicator's decision is responsive to the dispute referred to him it is necessary to:*

- a) Determine from the adjudicator's decision what he actually found (Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd [2009] 127 Con LR 110 per Akenhead J at paragraph 50);*
- b) Analyse what claims and assertions were made by the referring party prior to adjudication "[b]roadly, and in the round" (Balfour Beatty (supra) at paragraphs 51 and 55. Thus, a dispute "somewhat like a snowball rolling downhill gathering snow as it goes, may attract more*

issues and nuances as time goes on” (see Witney Town Council (supra) per Akenhead J at paragraph 33);

c) Analyse whether the whole of the pre-adjudication claims and assertions were referred to adjudication (Balfour Beatty (supra) at paragraph 56);

d) Consider the pleadings in the adjudication to determine what “the dispute encompassed, or through the response and the reply and the evidence deployed by both parties during the adjudication became” (Balfour Beatty (supra) at paragraphs 59 to 60).

[53] Generally, given the limited timetable allowed by adjudication, on the question of the scope of the referred dispute the “courts are going to have to give adjudicators some latitude” and not take an “unduly restrictive” view (see Penten Group Ltd (supra) per Coulson J at paragraph 28).

97. In my judgment, it will be rare that a Notice of Adjudication will be “knocked out” as being defective, and any ensuing adjudication in its entirety ruled to be a nullity, simply as a result of looking at the Notice alone, unless there is something obviously missing (e.g. the names and addresses of the parties). In the case of complaints that the nature of the dispute is not adequately described, it seems to me that any challenge is best approached from identifying the particular issue or dispute that is said not to fall within the notice of adjudication, considering what the Adjudicator decided and then considering whether or not the dispute and decision does fit within the notice of adjudication, in the sense that the notice gave the adjudicator jurisdiction to decide the same, or not. In other words, following the process set out by Carr J in paragraph [52] of the *Stellite* case. If a particular decision is one made without jurisdiction, then a further question of severability may arise.
98. The Notice of Adjudication in this case contained the following information:
- (1) Paragraph 1 referred to the Order acceptance document dated 31 January 2022 as accepted by RFL in relation to the design and supply of cladding and associated works at Eastbourne Terrace. The parties were expressly identified in this clause.
 - (2) Paragraph 2 referred to the availability of adjudication under clause 13.1 of the Contract.
 - (3) Paragraph 3 asserted, in the alternative to paragraph 2, that the relevant works under the contract (as defined) amounted to construction operations and that the contract was therefore a construction contract within s104 of the 1996 Act.
 - (4) Under the heading “Nature of the Dispute”, paragraph 4 referred to a dispute having arisen following a Letter of Claim dated 27 March 2023 and RFL’s response dated 5 May 2023 and that a number of claims therein remain unpaid in full or part.
 - (5) Paragraph 5 identified the items in brief terms as being:
 - (a) payment of a withheld deposit (£76,574.02 ex VAT);
 - (b) unpaid contract works (£53,629.53 ex VAT)

- (c) loss of profit (£32,207.89 ex VAT);
- (d) delay damages (£30,540.95 ex VAT);
- (e) interest.

99. Paragraph 6 referred to the total sum said to be due and owing.
100. Under the heading “Where and when the dispute has arisen”, paragraph 7 said that the dispute had arisen following the submission of the Letter of Claim, RFL’s submission of the Letter of Response, subsequent correspondence between the parties and RFLs express or implied refusal to pay the sums claimed.
101. Clause 8 set out the names and addresses of the parties.
102. As regards the nature of the redress sought, paragraph 9 invited the Adjudicator to produce a decision as followed, namely:
- “(1) Value the Claims in accordance with the LOC or such other sum as the Adjudicator considers to be appropriate;
- (2) Require the Responding Party to pay to the Referring Party the sum of £292,952.39 ex VAT or such other sum as the Adjudicator considers to be due and owing to the Referring Party;
- (3) Require the Responding Party to pay interest on the sum awarded to the Referring Party at the Contract rate or such rate and for such period as the Adjudicator shall determine; and
- Require the Responding Party to pay the Adjudicator's fees in any event.”

Discussion and conclusion: validity of NOI

103. In my judgment, the Notice of Adjudication was valid and the entire adjudication does not fall on the ground that, on its face, it did not identify sufficiently the relevant matters set out in paragraph 1(3) of the Scheme.
104. In Mr Bowling’s skeleton argument he did not in terms engage with the basis for submitting that the Notice of Adjudication failed to explain where and when the dispute arose. In my judgment, this is entirely adequately dealt with by paragraph 7 of the Notice of Adjudication.
105. As regards the requirement that the notice should briefly identify the “nature and a brief description of the dispute”, the Notice of Adjudication referred to the refusal to pay the five heads of claim under the identified contract. In my judgment, leaving aside for the moment what disputes those matters covered, I consider that this was an adequate manner of setting out in brief the nature and a brief description of the dispute. Mr Bowling submitted that an analysis of the claims set out in the letter of claim and then as supplemented by the Referral Response, Reply and Rejoinder was that the claim was for (amongst other things) “*a termination account and/or common law damages for RFL’s repudiatory breach alleged to have been accepted by [AlterEgo] on or about 20 February 2023*”, and that this is not made clear in the Notice of Referral. However, he

goes on to assert that the Adjudicator did not decide these matters in any event. If this is correct, this demonstrates the need to analyse the matter by reference to the decision that the Adjudicator actually reached and to consider whether he had jurisdiction to do so. It does not appear to me to be productive to consider the hypothetical question of whether a decision on one or more issues that were raised before, but not decided upon by, the adjudicator would have been outside the scope of the Notice to Adjudicate.

106. As regards the requirement to set out briefly the redress sought, it again seems to me that paragraphs 5 and 9 are adequate to meet the requirements of paragraph 1(3) of the Scheme, to get an adjudication “off the ground”.
107. Finally, I should say that if I am wrong with regard to the adequacy, as a general matter, of the NOI on the basis that I have identified, and standing completely alone, then it seems to me that the Notice of Adjudication would have to be read together with the Letter of Claim being a document referred to in the Notice of Adjudication. Mr Bowling accepted that if this letter had been annexed to the Notice of Adjudication his point on the Notice of Adjudication being invalid for want of compliance with paragraph 1(3) of the Scheme would have fallen away. I have some concerns as to whether the Notice could be said to “briefly” set out the relevant matters in such a scenario but given this concession, it seems to me to follow that Mr Bowling’s general objection to the Notice of Adjudication falls away. In my judgment the Letter of Claim is incorporated by reference in paragraph 9 of the Notice of Adjudication, even if it is not incorporated by the earlier references to it in the Notice.
108. As regards incorporation of documents into a notice of adjudication, the Adjudicator, in his non-binding decision, considered that the Letter of Claim was incorporated and cited *Grove Developments Ltd v S&T (UK) Limited* [2018] EWHC 123 (TCC) in support of his conclusion. I was not addressed on this authority in this context and say no more about it.

(3) Excess of jurisdiction/breach of natural justice?

109. In substance, RFL complains that the Adjudicator decided a matter that had not been referred to him and was therefore outside his jurisdiction and that he did so also in breach of the rules of natural justice. It is necessary to go into the facts in a little more detail.
110. I have set out the key facts until about May 2022 above. Although the Adjudicator came to a different view to the one that I have reached about the formation of the contract between the parties, he determined that there was a contract and that under the contract AlterEgo was obliged to supply, and RFL to accept and pay for, the GRC Fins. In fact, the GRC Fins were never supplied and AlterEgo raised claims based on that non-supply, which it said resulted from a repudiatory breach of contract by RFL in seeking to cancel the order for the same.
111. During the remainder of 2022, RFL made various requests to AlterEgo to hold off on production of the GRC Fins.
112. On or about 9 January 2023, RFL agreed to certain price increases (resulting from the delays) and submitted a revised purchase order 1223 showing all the components at a combined price (ex VAT) of some £962,337.88.

113. On 30 January 2023, RFL emailed AlterEgo enclosing a revised purchase order 1223 dated 9 January 2023. The revised purchase order in effect omitted the GRC fins and was for only the hanging system and the subframe. The order showed a total price (ex VAT) of £193,542.45. By reply AlterEgo sought confirmation that in amending the order to remove the GRC fins, RFL was terminating the remainder of the order. In the event that AlterEgo did not hear within 7 days it said that it would treat the email of 30 January as such termination.
114. Following further correspondence, by email dated 10 February 2023, AlterEgo asserted that the removal of the GRC fins from the order constituted a material breach of contract and, under clause 9.1 of its terms and conditions, it gave RFL 7 days to confirm that it wished to proceed with the full order including the GRC fins, failing which it would have no choice but to terminate the contract.
115. By letter dated 20 February 2023 from its solicitors, Hay & Kilner LLP, AlterEgo gave notice that the contract had been terminated in accordance with clause 9.1, alternatively that the repudiatory breach was thereby accepted.
116. In its Letter of Claim, dated 27 March 2023, AlterEgo dealt with the first four heads of claims for loss and damage. Two of the claims are relevant for present purposes. Under the heading “unpaid contract works”, AlterEgo claimed £53,629.53 (ex VAT) being the value of the goods and services supplied up to the date of termination. The letter enclosed a spreadsheet breakdown of the sums in question and an invoice for the same. Separately, there was a claim under the heading “loss of profit” which was a claim under clause 9.2.1 of the AlterEgo Standard Terms for loss of profit on goods and services remaining to be performed at the date of termination £132,207.89. Again this was backed up by a Schedule. Towards the end of the letter, the Claim was summarised as being for a sum of a little over £292,952 “being the loss and damage particularised above”, alternatively damages for breach of contract and various other heads of relief. The sum of just over £292,000 included the two quantified sums of just over £53,600 and £132,000 that I have referred to above under the two heads of claim.
117. Among other things, the Letter of Response, asserted that if there was a contract and if AlterEgo’s Standard Terms applied (both of which it denied) then clauses 3.5 and 4.2 of the same (dealing with remeasurement) permitted RFL to omit the GRC Fins from the contract. It also asserted that any repudiatory breach had been waived/lost “not least by service of the notices alleging material breach instead.”
118. I have dealt with the NOI above. In paragraph 9 the redress sought was set out as follows:

“Nature of the redress sought

9. The Referring Party requests the Adjudicator to produce a decision as follows;

- (i) Value the Claims in accordance with the LOC or such other sum as the Adjudicator considers to be appropriate;*
- (ii) Require the Responding Party to pay to the Referring Party the sum of £292,952.39 ex VAT or such other sum as the Adjudicator considers to be due and owing to the Referring Party;*

- (iii) Require the Responding Party to pay interest on the sum awarded to the Referring Party at the Contract rate or such rate and for such period as the Adjudicator shall determine; and*
- (iv) Require the Responding Party to pay the Adjudicator's fees in any event."*

119. In the Referral Document, among other things, AlterEgo asserted that:

- (1) Under the contract (or at common law), RFL had no right to omit the bulk of the goods (the GRC Fins, being approximately 75% of the contract calculated by reference to contract prices);
- (2) In the light of the correspondence (the key parts of which are summarised by me above), the contract had been terminated by AlterEgo in accordance with the contractual terms or, by reason of acceptance of a repudiatory breach by RFL in seeking to remove the GRC Fins from the contract and AlterEgo "became entitled to the loss and damage flowing from those breaches".
- (3) RFL having admitted in the Letter of Response that it had decided to omit the GRC Fins from its order and the only question was whether that was justifiable within the terms of the contract or at common law.
- (4) Clauses 3.5 and 4.2 of the AlterEgo Standard Terms did not apply: they covered remeasurement following design changes and did not confer an ability simply to withdraw parts of the contractual order, alternatively if there was a power to omit works it did not extend to a power to omit works the scale of which would undermine the "basic bargain" between the parties or with the intention of giving the order to another contractor.
- (5) As regards the Unpaid Contract Works, AlterEgo was said to be entitled to payment for goods and services manufactured, supplied or produced since the last payment date under clause 9.2.1 of AlterEgo's Standard Terms. The sums had been invoiced and a breakdown was given.
- (6) As regards loss of profit, reliance was placed on clause 9.2.1 of AlterEgo's Standard Terms; alternatively it was said that there was a claim for loss and damages arising from RFL's repudiatory breach. Again further detail was given of the quantum of the same.

120. The Response of RFL, asserted, among other things:

- (1) That there was no contract and therefore no breach, repudiatory or otherwise by RFL;
- (2) If RFL was wrong on (1), and there was a contract containing the AlterEgo Standard Terms then this was a re-measurement contract (relying on clauses 3.5 and 4.2) and accordingly RFL was entitled to adjust the quantities under the Order as it did in January 2023.
- (3) That any repudiatory breach was by AlterEgo. The breach was accepted by RFL on 5 May 2023. The contract was thereby terminated.

- (4) That as regards the Unpaid Contract Works and assuming there to be a contract which included AlterEgo's Standard Terms (a) the contract was a remeasurement contract by virtue of conditions 4.2; (b) there was no independent evidence of the individual components said to make up the unpaid for works; (c) there was a duty to mitigate and (among other points) any loss was limited to the difference between the sale price and the market price of the goods in question.
 - (5) That as regards loss of profit, without prejudice to its position regarding absence of any contract and absence of material breach by RFL, there was no entitlement to loss of profit as there was only ever entitlement to payment for work done, as measured (by reason of clause 4.2 of the AlterEgo's Standard Terms).
 - (6) The evidence of loss of profit was not properly explained, insufficiently evidenced and not made out. There was no evidence of mitigation of loss.
121. On 7 July 2023, the Adjudicator gave his non-binding views on the jurisdictional challenges that RFL had raised. Among other points:-
- (1) as regards the question of whether there as a contract, he indicated that he was satisfied that there was but that the question of the relevant terms and conditions was a matter for RFL to address in its Response.
 - (2) as regards the question of breach, the issues raised were again "*a matter to be addressed in the Response, being points that go to the substantive matters of the contract and its terms...*".
 - (3) as regards the claims to loss and damage following from a repudiatory breach, that, although a common law issue, was properly within the NOI.
122. On 14 July 2023, the Adjudicator issued supplemental non-binding views on jurisdiction. In a number of places he referred to the issue of the terms and conditions which might apply to the contract in question. For example;
- (1) He referred to his letter of 10 July 2023, where he had referred to the fact that the formation of the contract and its applicable terms was a matter still to be decided. It was a substantive issue in the adjudication and could not be decided until submissions from both parties had been received.
 - (2) He also referred to the following matter: "*In the circumstances where RFL has not advanced any positive case in connection with formation of the contract and its applicable terms (there is no suggestion from either party that no contract exists) it seems to me that the determination of that fundamental issue can only be made as a substantive matter in the adjudication.*"
123. The Reply to Response (dated 18 July 2023) and the Rejoinder (dated 20 July) repeated the parties' previous positions with more detail but did not deal with the position were the Adjudicator to find the contract to be one that was not governed by the AlterEgo Standard Terms.
124. It seems to me therefore that the jurisdiction conferred on the adjudicator included (a) determining whether there was a contract and its terms so far as relevant to the claims

made arising from the attempted cancellation of the order for GRC Fins; (b) whether the terms of the contract, as found, permitted RFL to cancel the Order for Fins without being in contract and (c) if they did not, whether either by way of debt/liquidated sum or by way of damages for breach of contract, the Claimant was entitled to sums and what those sums were. Although the Claimant was founding its case as to quantum on the contractual provisions under the AlterEgo Standard Terms, it does not seem to me that as a matter of jurisdiction the Adjudicator was bound by that, subject to, as I shall explain, questions of natural justice.

125. The next development is explained in the Adjudicator's decision and it is easiest if I simply set out the relevant paragraphs (or parts thereof) of his decision:

"(5) Is AEF entitled to loss of profit on omitted work?"

84. Although AEF advanced its claim on the basis of its own terms and conditions, it is also noted in the Referral in respect of omitted work at paragraph 22 that:

RFL had no right under the Contract or at common law to omit the bulk of the goods from the agreement between the parties.

and at paragraphs 32 and 33, so far as relevant:

32. In the LOR, RFL suggested that clauses 3.5 and 4.2 of the Terms & Conditions enabled omission on the basis that the Terms & Conditions provided that "the price will be subject to remeasurement based upon the quantities and specification of work carried out."

33. Respectfully, this betrays a fundamental misunderstanding of contractual remeasurement as:

(iii) even if AlterEgo is wrong on the above (which it respectfully would suggest is not the case) then the authorities are clear that in order to omit works, there must be a clear power in the contract enabling that omission:

1. the leading authority on the point makes plain that contract for the execution of work confers on the contractor not only the duty to carry out the work but the corresponding right to be able to complete the work which it contracted to carry out. To take away or vary the work is an intrusion into and an infringement of that right"¹;

85. Footnote 1 cites Abbey Developments Ltd v PP Brickwork Ltd [2003] EWHC 1987 (TCC).

86. On 27 July, I informed the parties by e-mail that I had decided the basis of the contract between the parties and its terms and was now considering other aspects of the dispute. I referred to paragraphs 22, 32 and 33 of the Referral, as noted above, and invited submissions saying;

In Trustees of the Stratfield Saye Estate v AHL Construction Limited [2004] EWHC 3286 (TCC), Jackson J (as he then was) refers with apparent approval to Abbey v PP and to the comments of HH Judge Lloyd QC: see in particular paragraph 35, which includes paragraphs 45 to 47 from Abbey v PP.

Those cases concerned in part the use of what HHJ Lloyd QC referred to as a clause permitting variations additions and/or omissions, unless by the agreement of the parties), it appears to me that that situation falls squarely within the judgment of the Court of Appeal in SWI Ltd v P & I Data Services Ltd [2007] EWCA Civ 663 (copy attached for ease of reference).

I invite the parties submissions in respect of the applicability (or otherwise) of the case of SWI Ltd v P & I Data Services Ltd in connection with what AEF claim to be the omission of the GRP Fins.

Also, [request for confirmation as to identity of GRC Fins claimed to be omitted].

87. I received submission, as requested, on the morning of 28 July. So far as relevant AEF s submissions are:

I agree that Abbey is more applicable to disputes where the contract contains an omission clause and the lawfulness (or not, as the case may be) of omitting works and then giving them to a third party in those circumstances.

It appears that SWI v P&I is indeed more relevant in circumstances such as this, namely where there is no omission clause and the contracts are more straightforward in nature. As you will have identified, the authorities in those circumstances are even more beneficial to AlterEgo and, if applicable, would enable increased recovery. SWI v P&I is on all fours with instant adjudication with the exception (not that it is material for the purposes of this point) that SWI's were not incorporated into the contract but we say that AlterEgo's were.

Paragraph 18 of the authority is helpful to instant adjudication as it sets out what Lord Justice Waller calls "the norm", namely "the paying party is not entitled to vary the contract by reducing the work to be done..." and "If, of course, the paying party simply waives his right to have the complete works performed the builder will be entitled to his full price for what he has done..."

I would respectfully suggest that in this case RFL is even more culpable than P&I as, in the authority, P&I were rather stuck in the middle as their client (GSK) had themselves omitted works. In this case, RFL has no such excuse. RFL still procured the materials, they just did so from a third party and hence the breach. If RFL wanted to be able to omit the balance of works then it should have negotiated a term enabling the same.

Similarly the doctrine of substantial performance is no more helpful for RFL than it was for P&I as RFL, like P&I, was the one to ask AlterEgo to do less (paragraph 24).

Lord Justice Waller then helpfully wrapped up the point as follows at paragraph 25: "If P&I had established that it was expressly agreed that

P&I could reduce the contract work and pay less if they did so, they would be entitled to succeed, but they failed to establish the term as an express term.” There is nothing further I could add to that conclusion.

As to your understanding of the omitted items (highlighted below for ease of reference), you are correct.

88. *And the submissions of RFL state:*

As for the relevance of SWI Ltd v P&I Data Services Ltd (“SWI”) to the present case, RFL submits that it is indeed relevant and it makes the following submissions:

- AEF's case on the nature of the Contract is not that it is a fixed price contract. On no occasion have they said anything that is consistent with them saying that it is a fixed price contract. On the contrary, paragraph 33 of the Referral makes it clear that AEF say that the Contract is a remeasurement contract. AEF simply say that the parties disagree on what sort of remeasurement contract it is we note that the Referring Party appears to have changed track again by way of Mr Rzedzian's email of this morning and we say that goes to credibility;*
- in SWI the Court held that: “I am clear, despite the arguments of Miss Asgarian, that the judge was right in holding that the subcontracts and indeed the series of subcontracts were all fixed price contracts (paragraph 16); and*
- therefore when the Court said in paragraph 18: “Normally without some term allowing for variations under a fixed price contract to perform works, the paying party is not entitled to vary the contract by reducing the work to be done,” it was not talking about an agreement such as the Contract.*

The issue of substantial performance that arose in SWI is not relevant here and we do not think you are suggesting that it is.

SWI is helpful authority for RFL, since it highlights the problem for a party such as RFL when not proceeding with the fins, where there is a fixed price contract, but that is not the case here.

The disagreement between the parties about the nature of the Contract is not fixed price v remeasurement, but as to whether, as a remeasurement contract, it envisaged RFL changing the quantities. AEF's position is that it relies on the Order Acceptance, in that that document they say made clear that “Design remeasurable upon completion of the Designand Engineering” and therefore any remeasurement was anticipated to be as a result of design changes rather than a comprehensive omission of 75% of the Works (paragraph 33(i) Referral). RFL say that the Order Acceptance was not part of the contract (in fact there was no binding contract), it could not have been both an offer and an acceptance as AEF claim, and it cannot rewrite what the Contract said, namely that the parties could adjust the quantities, including via omissions (see paragraphs 3.5 and 4.2 and

definition of Variation in the Contract, plus the evidence of Phil Crossley, QS).

*Clause 4.2, read in conjunction with clause 3.5, of the Contract states that remeasurement would be on the basis of the “quantities and specification of work carried out”. It goes on, “The Supplier’s rates are subject to variation pending the quantities and specification of the work carried out”. The term “variation” is defined as “an alteration...of the ..quantity of the work included in the Contract..including the ..omission... of any work”. Such specification and rates are set out in the attached documents. The unit price is calculated for Fin Type 1 as follows: Fin Type 1 231 No * 2.78m²/each = 695.31m² * £297/m² = £190,812.53. Such unit rates would enable the remeasurement mechanism (see para 14 Waller LJ). Unit prices are referred to in the Referring Party’s quote and the subsequent purchase orders. Mr Cossley provided helpful evidence on the nature of these clauses. The Contract is not a fixed price contract.*

You have not asked us to comment on the other cases that you mention or of anything else to do with issue of RFL not proceeding with the fins, and so we do not do so.

On the 2nd point that you raise, RFL confirm that the fins omitted were []

89. I duly considered the parties submissions and set out below are my consideration of the application of SWI Ltd v P & I Data Services Ltd in light of the decisions of the learned TCC judges in Abbey Developments Ltd v PP Brickwork Ltd and Trustees of the Stratfield Saye Estate v AHL Construction Limited.”

126. The Adjudicator, having then set out his analysis, concluded that:

“94..... There are, in my view, no such terms in the contract between RFL and AEF by which RFL is permitted a reduction in the quoted price, and in the absence of any agreement from AEF any such reduction is not permitted.

95. It follows from the above that AEF is entitled to be paid the full value of Purchase Orders dated 24 January and 16 March 2022, that is £674,803.62 plus £102,116.70, total £776,920.32 (excluding VAT).”

127. Accordingly this encompassed any claim for loss of profit and also (see paragraphs 72 to 73) for unpaid contract works.

128. I should also note that the request for submissions was made on 27 July 2023, the day before the Adjudicator gave his decision and that the submissions were delivered on the day that the Adjudicator made his decision. Mr Bowling described this as being “at the 58th minute of the 11th hour”.

129. I summarised in paragraph 124 above, the matters that I consider that the Adjudicator had jurisdiction to decide. In my judgment, the above decision as summarised by me fell within his jurisdiction.
130. Mr Bowling submitted that the dispute of which the Adjudicator was seized was of a claim to damages based on a termination account. I do not agree with that analysis. It seems to me that he was seized of a claim to relief flowing from an alleged breach of contract by RFL in “cancelling” the GRC Fin order and that as regards relief it was to a liquidated sum due under the contract (sounding in debt as evidenced by the invoice AlterEgo in fact issued) further or in the alternative a damages claim. Accordingly, I reject the submission that the Adjudicator exceeded his jurisdiction.
131. I also reject a separate submission which is that the Adjudicator failed to exhaust jurisdiction because he did not decide issues referred to him. First, having come to the conclusion that he did with regard to an entitlement to the contractual price which he held had been agreed, the Adjudicator decided that he did not need to decide the quantum claim to a price for goods up to the date of the termination. That claim was, as he held, encompassed by the award to the full contractual price. He did therefore deal with it and decide that there should be no double counting. The same is true of the claim to damages for loss of profit. In effect, the award that he made encompassed any losses in that respect and he did not need to deal with it separately. It seems to me that in this respect the Adjudicator is in no different position to a Judge who, in deciding a case, may well come to the conclusion that it is unnecessary to consider certain claims or arguments in the light of her decision on other points.
132. Accordingly, I do not consider that RFL has a real prospect of establishing at trial that the Adjudicator exceeded his jurisdiction in any relevant respect.
133. That leaves the question of whether the Adjudicator failed correctly to apply the principles of natural justice in taking the course he did of putting a new way of analysing the quantum entitlement of AlterEgo as a result of breach of the contract by RFL in changing the order and , in effect, refusing to take the GRC Fins.

Natural Justice

134. I was not addressed at any length on authority on this point. For present purposes, I have considered the helpful summary of Carr J in the *Stellite* case (supra). It suffices to set out paragraphs [58], [59], and

[58] In Cantillon v Urvasco [2008] BLR 250, Akenhead J considered the earlier authorities, including Balfour Beatty v Lambeth² (supra), and summarised the applicable principles as follows (at paragraph 57):

“From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:

- (a) It must first be established that the Adjudicator failed to apply the rules of natural justice;*
(b) Any breach of the rules must be more than peripheral; they must be material breaches;

² [2002] BLR 288.

- (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.
- (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.
- e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Ltd-v-The London Borough of Lamberth was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.”

[59] The suggestion that an adjudicator must be acting on a “frolic of his own” in order for there to be a breach of the rules of natural justice has been described as inapt and demeaning to the adjudicator, who will be doing his best in often difficult circumstances (see *Coulson on Construction Adjudication 3rd edition* at footnote 83). What the phrase does usefully emphasise, however, is the fact that the adjudicator must have strayed significantly outside the ambit of the materials and matters advanced before him without giving the parties an opportunity to comment or, where relevant put in further evidence, in order for there to be a finding that an adjudicator has acted in breach of the rules of natural justice.
[emphasis supplied]

...

[62] Finally on the law, there is helpful general guidance to be found in the judgment of Edwards-Stuart J in *Roe Brickwork*³ (supra) (at paragraph 24): “There is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties are aware of the relevant material and that the issues to which it gave rise had been fairly canvassed before the adjudicator. It is not unknown for a party to avoid raising an argument on one aspect of its case if that would involve making an assertion or concession that could be very damaging to another aspect of its case.”

[63] Indeed, both parties ultimately proceeded on the basis that the question on Issue 1 was whether the issues to which the material relating to whether time was at large gave rise had been “fairly canvassed”.

³ [2013] EWHC 3417 (TCC).

135. I have also considered and taken account of the useful summary of earlier cases set out in the judgment of HH Judge Kramer (sitting as a Judge of the King's Bench Division) in *J A Ball (in administration) v St Philips Homes (Courthaulds) Ltd* (3 February 2022).
136. Here, it seems to me, the position is that the parties were given ample opportunity to deal with the point raised by the Adjudicator (and then adopted by AlterEgo) and that each party duly took advantage of the opportunity offered.
137. I am not impressed by the point made by Mr Bowling about timing. If RFL had needed more time to reply to the request it could have said so. It does not appear to have done so. The fact that the Adjudicator then so swiftly afterwards delivered his decision is to be commended but does not reflect on whether the period between notification of the issue was made and the time within which RFL lodged its response. Finally on this point, there is no evidence by way of witness statement or otherwise as to any difficulties in responding to the Adjudicator within the period requested, as RFL duly did.
138. I am also not impressed by the submission that somehow RFL did not appreciate the point that the Adjudicator was raising and its consequences. The case that the Adjudicator provided is comparatively short and the point obvious to any competent lawyer. Furthermore, there is simply no evidence put forward of any such absence of understanding.
139. It follows that I do not consider that there is any real prospect of RFL establishing at trial that there was any relevant breach of natural justice.
140. For completeness, I should also add that Mr Bowling submits that the Adjudicator erred in law in his reliance on the *SWI Ltd* case. That is not a matter that goes to whether summary judgment should be given in relation to the decision and to be fair Mr Bowling did not suggest that it does. That is relevant to the separate Part 8 Claim brought by RFL.

(4) Approbation and reprobation?

141. RFL says that AlterEgo is seeking to approbate the Adjudicator's decision, in relying on his decision in its favour based upon the contract between the parties as he found it, whilst also seeking to reprobate the decision by rejecting his decision as to the contract which applied and setting up its own, in order to establish the adjudicator's jurisdiction. This, it is submitted for RFL, is not permitted.
142. In my judgment, the starting point can be taken to be the decision of Stuart-Smith J (as he then was) in *RMP Construction Services Ltd v Chalcroft Ltd* [2015] EWHC 3737 (TCC) especially at [44]-[45], [50] and [52]-[53].
143. In the *RMP* case there was a dispute as to the precise basis of the contract. Whichever contractual analysis put forward by the parties was correct, the adjudicator had jurisdiction. However, the different contractual interpretations put forward could have led to different substantive outcomes. The Judge found that the Adjudicator had jurisdiction because under whatever contractual terms applied on the facts, they mandated the use of the Scheme and the adjudicator was properly appointed. Once that point was reached then the legal policy and authority underlying how the grant of

summary judgment on the decision of Adjudicators was to be applied (that is, where the basis of challenge was limited e.g. to absence/excess of jurisdiction or breach of natural justice) had the consequence that any substantive differences in result that might flow from the differences between the contractual arrangements in play would at most involve an error of law by the adjudicator if he referred to the wrong contractual provisions in reaching his conclusion.

144. The key parts of the judgment of Stuart Smith J are as follows:

“[44] In Purton it was not necessary to consider what the position would be if (a) the Adjudicator, if properly informed, should and would have concluded that he had jurisdiction but (b) the proper contractual basis of jurisdiction could make a difference to the substantive outcome. That question is raised on the present case because of the background as I have described it above. There is no decision directly on the point. It needs to be decided on the basis of legal policy in the context of previous decisions.

*[45] Since the earliest days of adjudications under the Act the Courts have, when considering whether to enforce adjudicators' decisions, drawn a clear distinction between questions going to the jurisdiction of the adjudicator and questions about whether the adjudicator (having jurisdiction) has reached the correct substantive answer. The legal policy, derived from the terms of the statute, has been that reasonably arguable challenges to the adjudicator's jurisdiction may be a reason for not enforcing a decision, but the mere assertion that he has misunderstood the factual or legal basis for his or her substantive decision is not. Thus in *Sherwood & Casson Ltd v MacKenzie* [2000] 2 TCLR 418, *HHJ Thornton QC* summarised the approach as follows:*

- “1. A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced.*
- 2. A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced.*
- 3. A decision may be challenged on the ground that the adjudicator was not empowered by the HGCRA to make the decision because there was no underlying construction contract between the parties or because he had gone outside his terms of reference.”*

[In paragraph 46 the Judge went on to refer to the principles, subsequently endorsed by the Court of Appeal and enumerated by Jackson J (as he then was) at paragraph [80] of his judgment in *Carillion Construction v Devonport Royal Dockyard Ltd* [2005] BLR 310.]

[50] The distinction between jurisdictional challenges to enforcement and challenges alleging substantive error suggests that the issue in this case should be approached in two stages. The first question is whether the Adjudicator had jurisdiction. The answer to that question is that he did, on any contractual route being proposed by either party. He had jurisdiction and was to be appointed under the Scheme, on any contractual route being proposed by either party....

....

[52] I would therefore hold that the Adjudicator had jurisdiction because, however the contractual arrangements between the parties are correctly to be described, they mandated the use of the Scheme and he was properly appointed by the Scheme's procedure.

[53] In reaching this conclusion I do not ignore the possible difference in substantive outcome that could arise from identifying the contract correctly. But it seems to me to be consistent with the legal policy and authority that I have summarised above to treat these substantive differences as going not to jurisdiction but to substantive outcome only. Once that approach is adopted, the present case is to be treated as one where the Adjudicator had jurisdiction to resolve the dispute that was referred to him (namely, how much was owing under interim application number 8) and addressed the correct question without bias, breach of natural justice or any other vice that would justify overturning his decision. If, which cannot be resolved now, he has made an error of law in referring to the wrong contractual provisions when deciding the substantive question that was referred to him, that falls within the category of errors of procedure, fact or law which the Court of Appeal has repeatedly emphasised should not prevent enforcement."

145. In this case, the only distinction is that the certainty as to the contract resulting in there being jurisdiction in the adjudicator flows not from the fact that there are two alternative contractual arrangements and under either of them there is jurisdiction but that I have determined as a matter of summary judgment that the applicable contract does have an adjudication clause in it. I do not consider that that makes any material difference to the applicable principle.
146. Once that jurisdiction is established it seems to me that it is not a matter of AlterEgo blowing "hot and cold", as it is put. Rather, it is simply taking advantage of its right to adjudication and the applicable principles regarding summary enforcement of the same. Put more formally in the language of *Banque Des Marchands de Moscou v Kindersley* [1952] Ch 112 (referred to in *Purton v Killer* [2015] EWHC 2624 (TCC) as set out in Stuart-Smith's judgment at [41]), AlterEgo has not made an election from which it cannot resile. It has elected as to which contract it says applies to the issue of jurisdiction (which ultimately the Adjudicator cannot rule on definitively). However, it has not elected that contract for the purposes of the decision of the Adjudicator. It accepts the point that the Adjudicator may make errors of law which will bind the parties on an interim basis as a result of the adjudication and relies on the decision as it is entitled to do. The adjudication is not a final determination of the rights of AlterEgo and RFL. AlterEgo accepts that ultimately liability (and quantum) will be determined finally under a separate process.
147. Finally, I should add that the only material difference in the terms and conditions between the contract as found by me and as found by the Adjudicator was, so Mr Bowling informed me, one of applicable interest rate, but AlterEgo accepts for present purposes of enforcing the Adjudicator's decision the lower interest rate that he applied and does not seek to substitute the higher rate that would apply under the AlterEgo Standard Terms which I have found to apply. In my judgment there may well be other

differences but AlterEgo is content, by way of enforcement of the interim decision, to take the interim decision as it stands.

148. Accordingly I find that there is no real prospect of the principle of approbation and reprobation applying so as to prevent enforcement of the adjudicator's decision.

Overall Conclusion

149. It follows that I grant AlterEgo summary judgment.
150. The question of the form of order, any consequential matters (including permission to appeal) and the interrelationship between this decision and the outstanding Part 8 Claim brought by RFL will have to be dealt with at a further hearing. I also extend the time for filing a notice of appeal so that the relevant 21 day period otherwise provided for runs from the day on which the order referred to in the next paragraph is sealed or further order in the meantime.
151. I accordingly order that the parties shall liaise with the court in providing dates of availability for a further hearing with an agreed estimate which they must supply the court by 4pm on Friday 8 December 2023, in the first instance by reference to the window of 15 December 2023 to 15 March 2024. They should also lodge a draft form of order dealing with this and the preceding paragraph and setting out agreed directions for lodging of any supplementary bundles and further Skeleton arguments by 4pm on Friday 8 December 2023.