Neutral Citation Number: [2024] EWHC 2295 (TCC)

Case No: HT-2023-000006

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 6th September 2024

Before :

MR ROGER TER HAAR KC
(Sitting as a Deputy High Court Judge)

.....

Between:

A & V BUILDING SOLUTION LIMITED
Claimant

- and –

J & B HOPKINS LIMITED
Defendant

- -
- -

Alex Paduraru (a director of the Defendant Company) for the **Claimant**.
James Frampton (instructed by **Hawkswell Kilvington**) for the **Defendant**

Decision on the papers
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 6th September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Roger ter Haar KC :

1. In this action and an associated action, I have previously handed down five judgments:

   (1) On 15 February 2023: [2023] EWHC 301 (TCC);

   (2) On 16 June 2023: [2023] EWHC 1483 (TCC);

   (3) On 6 October 2023: [2023] EWHC 2475 (TCC);

   (4) On 17 October 2023: [2023] EWHC 2576 (TCC);

   (5) On 18 June 2024: [2024] EWHC 1510 (TCC).

2. In this judgment, as in my previous judgments, I refer to J & B Hopkins Ltd as "J&BH" and to A & V Building Solution Limited as "A & V".

3. In the judgment handed down on 18 June 2024, I decided almost all the issues between the Parties on the merits. At paragraphs 521 and 522 I decided:

> 521. Accordingly the amount due to A & V is as follows:
>
> | Claim | Amount Awarded |
> |---|---|
> | Measured works | £407,156.25 |
> | Variation account | £53,200 |
> | Loss of profit | £6,096.56 |
> | Less paid | -£364,909.64 |
> | Amount due | £101,543.17 |
>
> 522. This does not allow for interest or adjudicators' fees.

4. In this judgment I determine the issues between the Parties as to adjudicators' fees and interest.

Procedural background to this Judgment

5. As stated above, judgment on the merits in this matter was handed down on 18 June 2024.

6. On the same day, Mr Padararu on behalf of A & V sent an email setting out A & V's position as to the adjudicators' fees and as to interest. In that email he claimed on behalf of A & V the full amount of Mr Blizzard's fees and that J&BH should bear the costs of Mr Smith's fees.

7. On the same day Mr Frampton in behalf of J&BH submitted J&BH's Submissions on Adjudicators' Fees and Interest. In those submissions he submitted that adjudicators' decisions as to liability to pay their fees is final and is not subject to a final determination or reversal by this Court.

8. In support of that submission, he cited *Castle Inns (Stirling) Ltd v Clark Contracts Ltd*[1] ("*Castle Inns"*) and paragraph 10.25 of *Coulson on Construction Adjudication*.

9. I indicated through my clerk that

> "The Judge has reviewed this case in the light of the forthcoming hearing in respect of the outstanding issues in this case.
>
> The Judge would welcome submissions on the issue of the treatment of the Adjudicators' Awards of costs, as to which the only case cited may raise some points of law for consideration.
>
> In the circumstances the Judge considers that A&V, along with the Court and the other side would be assisted if it was able to obtain representation for the hearing. Litigants who are unable to afford representation often apply to the Bar Pro Bono Unit whose website is at https://www.barcouncil.org.uk/policy-representation/policy-issues/pro-bono.html
>
> If A&V seek assistance from them, A&V should show them a copy of this email."

And then in a later email:

> *"*It may be that a hearing on the adjudicators' costs issue will be desirable: the judge is conscious that, although in this case the amounts involved are small, the issue is one of possibly wide interest. The judge is concerned as to whether the Scottish case cited should be followed."

10. In the event neither party requested a hearing, and appeared to me to be content for this matter to be dealt with on the papers.

11. On 29 July 2024 Mr Frampton submitted J&BH's Supplemental Submissions on Adjudicators' Fees which helpfully referred to further authority on that issue.

12. On 12 August 2024 I invited further submissions on three questions relating to the fees of Mr Smith.

[1] [2005] Scot CS CSOH 178, [2006] SCLR 663

13. On 16 August 2024 Mr Paduraru indicated that A & V had no further submissions it wished to make in response to that invitation. Mr Frampton did file Responses to the Judge's Questions and submitted further relevant authorities.

Adjudicators' Fees

14. There are two fees that I must consider: firstly, those of Mr Blizzard, and secondly, those of Mr Smith.

15. As to Mr Blizzard's fees, there was a claim for £34,800 in the original pleading in this Court. In my second judgment handed down on 16 June 2023[2], I decided at paragraph [46] that A & V could not claim more than 50% of that sum, namely £17,400.

16. There has been no appeal against that decision: A & V have attempted to resurrect the claim for the 100% figure in Mr Paduraru's email of 18 June 2024, but it is not within my jurisdiction to allow A & V to revert to that figure. Accordingly, the claim is now for £17,400.

17. I dealt with these fees at paragraphs 424 to 430 of my last judgment. It has not been suggested by J&BH that there are grounds other than those rejected by me in my last judgment (namely the argument as to a binding agreement, which I rejected) for J&BH to resist an order for it to pay £17,400, and accordingly there will be judgment for A & V in that sum.

18. Mr Smith's fees are referred to by me at paragraphs 431 to 436 of my judgment on the merits.

19. Mr Smith had found in most major respects in favour of J&BH. It followed naturally that he ordered A &V to pay his costs in the sum of £13,962.00.

20. In Mr Paduraru's email of 18 June 2024 he said:

> A&V contends that JBH should bear the cost of Mr Smith's fees and pay Mr Blizzard's fees in full to A&V for the following reasons:
>
> a) The Court has rightfully overturned Mr Smith's decision. Consequently, Mr Smith's "erroneous" assessment of the final account between the parties has failed, meaning that JBH has lost and should bear the cost of Mr Smith's fees ….

[2] [2023] EWHC 1483 (TCC)

21. When I rendered my first judgment in this matter[3], I held that Mr Smith's Decision should be enforced, including the sum of £13,962 in respect of the Adjudicator's own costs. To that was added interest: see paragraphs 21 to 23 of my second judgment[4].

22. That judgment has never been satisfied.

23. The question which now arises is what, following my judgment in very large part disagreeing with Mr Smith, is the appropriate approach in respect of his allocation of his own fees, in which he ordered A & V to pay his fees, this being the natural consequence in a situation where J&BH had been the successful party before him, but I have reached the opposite conclusion.

24. In his first Submissions, Mr Frampton contended that "the position is that the adjudicators' decisions as to liability to pay their fees is final and is not subject to a final determination or reversal by the Court".[5]

25. In support of that contention, Mr Frampton relied upon *Castle Inns* and the following short passage from *Coulson on Construction Adjudication*[6]:

> In addition, an adjudicator's decision as to liability to pay fees is final and is not subject to challenge in subsequent arbitration/litigation: see *Castle Inns (Stirling) Ltd v Clark Contracts Ltd.*

26. *Castle Inns* was a decision of lord Drummond Young in the Outer House of the Court of Session. He had before him what in England we would describe as an application to strike out part of the Claimant's pleading as being unarguable. The Pursuer had claimed to recover an adjudicator's fees which that adjudicator had ordered should be paid by the Pursuer as the losing party in the adjudication.

27. The Pursuer claimed in the Court of Session that because the adjudicator's decision was wrong, it was entitled to recover the amount of fees which the adjudicator had ordered should be paid on the basis that his (the adjudicator's) decision was correct.

28. Lord Drummond Young held that those fees were not recoverable. It is important to note that at the time of Lord Drummond Young's decision, it had not been decided whether the adjudicator had been right or wrong. It was effectively assumed for the purpose of deciding whether the claim for recovery of fees could continue, or should be dismissed as being legally "irrelevant" that the adjudicator had got his decision wrong.

29. At paragraphs [14] and [15] of the judgment, he said:

> [14] If a dispute between the parties is referred to the court, the court's decision on that dispute will thereafter be binding on the parties, and is clearly implicit in the

[3] [2023] EWHC 301 (TCC)
[4] [2023] EWHC 1483 (TCC)
[5] Paragraph 4 of JBH's Submissions on Adjudicators' Fees and Interest.
[6] At paragraph 10.25

> scheme of clause 41A.8.1 that the adjudicator's decision on that dispute will cease to be binding. If the court's decision on the dispute is at variance with the adjudicator's decision, any sums that have been paid pursuant to the adjudicator's decision must obviously be repaid. Neither section 108 nor clause 41A states the legal basis for such repayment. In theory two possible bases might exist, either an implied term of the parties' contract or a restitutionary obligation based on unjustified enrichment. This is a case, however, where the parties' contract remains in full force and effect and the obligation to repay can be said to arise directly out of the contractual scheme. In such a case the use of an implied term of the contract is a more natural mechanism than a restitutionary obligation based on unjustified enrichment, which is necessarily an extra-contractual obligation. For that reason I am of opinion that the obligation to repay is based on an implied term of the parties' contract. Perhaps the most standard ground for the implication of a contractual term is that it is necessary to give business efficacy to the parties' agreement; that test is clearly satisfied in the present circumstances.
>
> [15] In his decision, the adjudicator may determine liability for his own fee and expenses. The relevant contractual provisions are found in clause 41A.7.1 and .2, which provide as follows:
>
> > "41A.7.1 The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned as between the parties. In default of such statement the parties shall bear the cost of the Adjudicator's fee and reasonable expenses in equal proportion.
> >
> > 41A.7.2 The parties shall be jointly and severally liable to the Adjudicator for his fee and for all expenses reasonably incurred by the Adjudicator pursuant to the Adjudication".
>
> Any finding by the adjudicator on these matters forms part of his decision, as clause 41A.7.1 indicates. Nevertheless, any such finding does not relate to the dispute that is the subject of adjudication; it is merely an ancillary finding, obviously analogous to a court's decision on expenses. The "dispute" that is contemplated by section 108 and clause 41A is clearly something that predates the reference to adjudication, and forms the substantive subject matter of the adjudication; the finding relative to the adjudicator's fees and expenses, by contrast, is something that can only be determined at the end of the adjudication process.

30. Thus the learned judge started by identifying what the dispute was which wasbefore the adjudicator.

31. He then continued:

> [16] The critical question that arises in the present case is whether that part of the adjudicator's decision can be reconsidered by the court or, presumably, by an arbiter. In my opinion it cannot, on the basis that such reconsideration would be contrary to the contractual scheme found in clause 41A. I reach this conclusion for four reasons. First, there is no contractual mechanism in clause 41A that would allow such reconsideration to take place. The power in clause 41A.7.1 is conferred

specifically upon the adjudicator. No appeal is possible against an adjudicator's decision, and an adjudicator's decision cannot be challenged on the ground that it is a wrong on the facts or in law: see *Diamond v PJW Enterprises Ltd* 2004 SC 430. It follows that the adjudicator's decision as to liability for his fee and expenses cannot be challenged directly. Secondly, although the contractual scheme does permit an indirect challenge to the adjudicator's decision on any dispute submitted to him by means of court proceedings or arbitration, that mechanism only relates to a dispute or difference; that appears from the wording of clause 41A.8.1, and indeed section 108(3). It accordingly does not apply to the adjudicator's decision on his fee and expenses, as that part of his decision does not involve a "dispute" in the contractual sense. Thus the contract has deliberately excluded any direct challenge to the adjudicator's decision, and does not, at least according to its terms, contemplate that anything other than a "dispute" can be the subject of indirect challenge. The possibility of challenging an adjudicator's decision has accordingly been taken into account in the contract, and the contractual scheme is that an indirect challenge, through court or arbitral proceedings, is possible but only in respect of the underlying dispute. That seems to exclude any challenge to ancillary findings, such as a finding on liability for the adjudicator's fee and expenses. Thirdly, because the adjudicator's decision on liability for his fee and expenses is essentially ancillary in nature, there is no commercial necessity that it should be capable of reconsideration. In any system of dispute resolution the parties are likely to incur irrecoverable outlays and expenses; indeed in some jurisdictions, such as those in the United States, a successful party does not recover anything in respect of expenses, outlays and other costs. Thus the normal criterion for the implication of a contractual term does not apply to the part of the adjudicator's decision dealing with his fee and expenses.

[17] The foregoing reasons for the conclusion that an adjudicator's decision on his fee and expenses cannot be reconsidered by the court all relate to the contractual structure of clause 41A. The fourth reason indicates an obvious rationale underlying that conclusion; it is the practical difficulty of reconsidering the adjudicator's decision on such a matter. Adjudication is a distinct process, with its own peculiar features. In particular, it is subject to very demanding time limits, which apply both to the parties and to the adjudicator. The result is that the parties' cases may not be as fully prepared as is desirable, and the adjudicator may be compelled to come to a relatively hasty decision. In court proceedings, by contrast, a full and detailed presentation is expected, and the judge has a significantly better opportunity to come to a carefully reasoned decision. Moreover, additional facts may emerge, or additional arguments may be developed. It is accordingly impossible to conclude merely from the fact that the court reached a different decision that the adjudicator's decision was wrong. The decisive factor in the court's decision might not have been presented to the adjudicator, or might have been presented in such a way that its significance was obscured. If, therefore, the court is to reconsider the adjudicator's decision on liability for his fee and expenses, the facts and arguments presented to the adjudicator will frequently require to be investigated and taken into account. That is inevitably a difficult task; it involves weighing the significance of arguments that are not the same as those presented to the court. In addition, in some

> cases matters may be argued before the adjudicator that are not argued before the court. The present case provides such an example; in the first adjudication the question of the adjudicator's jurisdiction was argued, I was informed, at some length. That issue was determined in favour of the present defender. It is not, however, an issue that can arise in the present proceedings. If it is the case that a large part of the argument before the adjudicator was taken up with the question of jurisdiction, it is obviously likely that his decision on liability for his fee proceeded at least in part on the basis that the present defender had succeeded on that part of the argument. Consequently, even if the pursuer were wholly successful in the present litigation, it would not be appropriate to allow it to recover the whole of the adjudicator's fee and expenses. How any apportionment should be carried out, however, is an extremely difficult task for a tribunal that has not heard the same arguments as the adjudicator. For all these reasons I am of opinion that there are sound practical reasons for holding that an adjudicator's decision on liability for his fee and expenses cannot be reopened in any proceedings before the court.

32. Thus there were four strands to the judgment:

(1) There was no contractual mechanism that would allow a reconsideration of the adjudicator's decision in respect of his fees;

(2) Whilst the contractual scheme permits an indirect challenge to the adjudicator's decision on any dispute submitted to him by means of court proceedings or arbitration, that mechanism only relates to a dispute or difference. It does not apply to the adjudicator's decision on his fee and expenses, as that part of his decision does not involve a 'dispute' in the contractual sense;

(3) Because the adjudicator's decision on liability for his fee and expenses is essentially ancillary in nature, there is no commercial necessity that it should be capable of reconsideration;

(4) There is a practical difficulty of reconsidering the adjudicator's decision in such a matter.

33. Further, the learned judge said at paragraph [24] that the basis of the claim for repayment of sums paid was not clearly set out, but the claim in respect of the adjudicator's fee was based upon the principle of unjust enrichment. He then said at paragraph [25]:

> I accordingly agree with counsel for the defender that the pursuer has not adequately stated the basis on which an unwinding of the first adjudication is sought, and should not in any event base that unwinding on principles of unjustified enrichment. My reason for the latter conclusion, however, is that the parties' rights and obligations following a successful unwinding of the adjudicator's decision are better analyzed using an implied term of the parties' contract rather than restitutionary rights based on unjustified enrichment. That is because the obligation to repay monies arises very squarely from the operation of the parties' contract, and

> in particular clause 48A.8.1; consequently an implied term is the natural mechanism to enable the contract to deal comprehensively with the parties' rights and obligations….

34. As already pointed out, this authority is cited in *Coulson on Construction Adjudication* as correctly stating the law.

35. In *TSG Building Services plc v South Anglia Housing Ltd*[7], Akenhead J. held that an adjudicator had been wrong to require the Defendant to pay compensation to the Claimant, a decision turning upon whether the Defendant had lawfully terminated a contract between them. He issued a declaration expressing that conclusion. He then concluded at paragraph [53]:

> However, the adjudicator had jurisdiction to decide what he did, although I have held that he reached the wrong conclusion. It follows that South Anglia must pay the adjudicator's fee of £12,564 plus VAT.

36. There is no further elucidation of Akenhead J.'s reasoning, but it is consistent with the view of Lord Drummond Young in *Castle Inns*.

37. The issue was adverted to by Edwards-Stuart J. in *Halsbury Homes Ltd v Adam Architecture Ltd*[8]. That was a dispute between a client developer and an architect's firm. It is important to note that in the applicable conditions of engagement, there was a clause 5.20 which provided:

> Recovery of costs
>
> 5.20 The Client of the Architect shall pay to the other party who successfully pursues, resists or defends any claim or part of a claim brought by the other:
>
> > 5.20.1 such costs reasonably incurred and duly mitigated (included costs of time spent by principals, employees and advisers) where the matter is resolved by negotiation or mediation; or
> >
> > 5.20.2 such costs as may be determined by any tribunal to which the matter is referred.

38. In a situation where the learned judge had decided that the adjudicator had reached the wrong conclusion, he had to consider what order to make in respect of the adjudicator's order that the now successful party should pay his fees.

39. Edwards-Stuart J referred at length to Lord Drummond Young's judgment in *Castle Inns*. He referred to the brief passage from Akenhead J.'s judgment in *TSG Building Services* which I have set out above, and also cited the relevant passage from *Coulson on Construction Adjudication* (albeit in an earlier edition). He then said:

[7] [2013] EWHC 1151 (TCC); [2013] BLR 484
[8] [2016] EWHC 1422 (TCC); [2016] BLR 419.

> [64] …. There is nothing in Lord Drummond Young's Opinion which suggests that his decision might be confined to Scotland: it seems to me that his reasoning is equally applicable to the relevant provisions of the RIBA Conditions that apply in this case.
>
> [65] However, Ms. Stephens submitted that it would be an extremely unjust outcome if an erroneous exercise by an adjudicator should be at the expense of the (correct) responding party. If this were to be the ultimate position, then there would be some force in her point, but of course an adjudicator's decision as to how his or her fees should be allocated between the parties may represent more than just the outcome of the decision. An adjudicator is not required to make a binary decision based simply on the result: he or she can, like the courts, take into account the conduct of the parties, other issues that were raised and the overall course of the referral.
>
> [66] However, in this case I do not consider that the outcome rests on the decision of the Adjudicator. The provisions of clause 5.20, which I have already set out, apply equally to costs incurred by the client as well as by the architect. Halsbury is entitled under that clause to its costs of successfully resisting the claim brought by Adam.
>
> [67] I can see no reason why the fees and expenses of the Adjudicator, once paid by a party, should not form part of its costs of successfully resisting a claim brought by the other. I do not regard this as inconsistent with the fact that clause 5.20 does not refer to the adjudicator's fees and expenses, because the allocation of those is clearly dealt with in clause 9.2.4.
>
> [68] In those circumstances, therefore, I consider that the Adjudicator's decision in relation to his fees and expenses must be complied with by Halsbury. However, once those fees and expenses have been paid, Halsbury will have a contractual right to recover them from Adam under clause 5.20.

40. Thus Edwards-Stuart J. followed *Castle Inns*, but circumvented its effect by the application of clause 5.20.

41. In the commentary in the Building Law Reports report of this case, the learned editors say:

> The case [underlines] a real lacuna in the amended adjudication legislation, which can produce real injustice, whereby substantial sums can be paid out for adjudicator's fees and, if the underlying contract does not contain something comparable to clause 5.20 of the RIBA conditions, they will never be recoverable even if the adjudicator's substantive decision is later found to be hopelessly wrong. As the legislation was only reviewed after some 15 years, there may be a long wait for any amendment.

42. Edwards-Stuart J.'s decision was overturned by the Court of Appeal who did not find it necessary to consider this issue[9].

43. The final case to which I was referred by J&BH was another decision of the Outer House of the Court of Session: *D McLaughlin & Sons Ltd v East Ayrshire Council*[10]. In that case an adjudicator had found in favour of the Pursuer and had ordered the Defender to make payment not only of a principal sum, but also interest. The Defender paid what it had been ordered to pay.

44. In the court proceedings the Pursuer sought enforcement of the adjudicator's decision. The Defender resisted enforcement unsuccessfully, but also lodged a counterclaim seeking orders contrary to the adjudicator's findings, including a repayment of the sums the Defender had paid.

45. In respect of the counterclaim for repayment on interest, the Pursuer argued, relying upon *Castle Inns*, that the Court could not order repayment of interest. The Defender's argument was summarised by the judge, Lord Clark, as follows:

> [16] It was a necessary legal consequence of adjudication provisions which are consistent with the provisions of the 1996 Act that parties must have a directly enforceable right to recover any overpayment to which an adjudicator's decision can be shown to have led, once there has been a final determination of the dispute. The right arises by way of an implied term to that effect in the construction contract (*Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] 1WLR 2961, at para [23]). Such a right arises out of restitutionary considerations (ibid at para [24]). An overpayment arises if and to the extent that the basis on which payment has been made falls away as a result of the court's determination (ibid). If a more detailed implied term was required, the term averred by the defender would be appropriate. If the present case was resolved in favour of the defender, that would establish that the defender has made an overpayment to the pursuer in the whole amount paid by the defender pursuant to the adjudicator's decision, including the payment of interest. There 11 was in any event a right to payment of interest, at an appropriate rate fixed by the court, on any repayment to be made to the defender (*Aspect Contracts*, at para [24]).
>
> [17] The pursuer's reliance on the reasoning of the Lord Ordinary in *Castle Inns (Stirling) Ltd v Clark Contracts Ltd* was misplaced. That case preceded *Aspect Contracts* and in any event concerned the separate question of recoverability of the adjudicator's fees and expenses. The adjudicator's decision on interest was, like all other aspects of his decision on the dispute referred to him, only binding until the dispute is finally determined by legal proceedings, such as this counterclaim. In any event, the Lord Ordinary's reasoning in *Castle Inns* ought not to be followed in this case, on the ground of it not being in accordance with the normal principles of contractual construction discussed above.

[9] *Adam Architecture Ltd v Halsbury Homes Ltd* [2017] EWCA Civ 1735; [2018] 1 WLR 3739.
[10] [2021] CSOH 122

46. Lord Clark decided the merits of the principal issue between the parties against the Defender, but did deal with the interest issue, albeit on an *obiter* basis:

> [41] As a result of my decisions on the Final Certificate not being conclusive evidence for present purposes and on the Interim Payment Notice, this issue does not arise. However, it is appropriate that I express my views on it. The short point is whether, following enforcement of an adjudicator's award, interest on the sum awarded for the period from the date of the award until payment, is recoverable if the defender succeeds in its claim for repayment of the sum awarded. In *Aspect Contracts Ltd v Higgins Construction plc* (at para [23]) Lord Mance (with whom the other Supreme Court judges agreed) stated that the payer "must have a directly enforceable right to recover *any overpayment* to which the adjudicator's decision can be shown to have led, once there has been a final determination of the dispute" [emphasis added].
>
> [42] In my view, the adjudicator's fees and expenses (discussed in *Castle Inns (Stirling) Ltd v Clark Contracts Ltd*) are quite different from interest which has to be paid from the date of the award. The latter is not ancillary to the dispute; rather, it is part and parcel of the adjudicator's award. Interest payable from the date of the adjudicator's decision will commonly arise because the decision is being challenged. It would not be right to allow a party who has received a payment to which it was not entitled to retain that part of the payment which comprised interest arising from the date of the award. Accordingly, if (contrary to the view I have reached) the defender's counterclaim had resulted in final determination of the dispute in its favour, I would have allowed recovery of this element of interest.

47. Thus the position is that all the authority in this Court and in Scotland supports J&BH's position.

48. It seemed to me when considering this matter on the papers that there may be arguments to suggest that *Castle Inns* should be reconsidered. However, upon reflection, I have decided that this is not the case to do so.

49. There was and is no pleaded claim in respect of Mr Smith's fees, and even in A & V's very full written Closing Submissions no claim in respect of those fees was put forward. The claim first emerged, probably prompted by the terms of my judgment, in Mr Paduraru's 18 June email. In his Response to my questions, Mr Frampton has taken the position that there is no pleaded claim relating to those fees. Accordingly, such a claim would involve an amendment to the pleadings. In my judgment it is too late for such an amendment to be allowed, particularly as it could only be successful on its merits if I were to depart from the authorities I have cited above.

50. Accordingly, I make no order in respect of Mr Smith's fees: I consider those fees further in respect of interest below.

Interest

51. A & V claims interest as follows:

> The current statutory rate of interest under the [Late Payment of Commercial Debts (Interest) Act 1998] is 8% above the Bank of England's base rate, which currently is 5.25%, totaling 13.25%. This interest rate should apply to the judgment award sum of £101,543.17 plus Mr Blizzard's fees of £34,800.
>
> Judgment Sum £101,543.17 +
>
> Mr Blizzard Fees £34,800
>
> Sub-total of £136,343.17
>
> Adding interest rate at 13.25% from 06.05.2021 to 18.06.2024 (1140 days) which is £56,400.67 interest
>
> Totalling of £192,743.84 sums due from JBH to A&V.

52. J&BH challenges A & V's interest claim insofar as it depends upon the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act"). It contends that there is a contractual interest rate which should be applied.

53. J&BH also claims interest on Mr Smith's fees and on its enforcement costs.

Judgment sums to which the 1998 Act could apply

54. A & V's claim for interest at a rate of 13.52% is based upon the 1998 Act.

55. A threshold point taken by J&BH is that not all of the sums which I have awarded to A & V can attract interest under that Act.

56. As I have awarded A & V £17,400 in respect of Mr Blizzard's fees in this judgment, the principal amounts which I have awarded to A & V are as follows:

(1) Measured Works Claim: £95,446.61;

(2) Loss of profits damages claim: £6,096.64;

(3) Mr Blizzard's fees: £17,400.

57. In respect of (1), the Measured Works Claim, J&BH accept that that could be the subject of an interest claim under the 1998 Act, were it not for the existence of a contractual interest rate.

58. In respect of (2) and (3), J&BH contends that the 1998 Act cannot apply.

59. Section 3(1) of the 1998 Act provides:

Qualifying debts

(1) A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a "qualifying debt" for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section.

60. Mr Frampton says, in respect of (2) , that payment of damages for loss of profit is not a debt or created by virtue of an obligation to pay the whole or any part of the contract price, and, in respect of (3), that payment of an adjudicator's fees is not an obligation to pay the whole or any part of the contract price.

61. In support of his submission, particularly in respect of the damages award, Mr Frampton refers to the decision of Akenhead J. in *Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd*[11], in which he said:[12]

> The 1998 Act specifically identifies "debt" only as attracting the specific interest provisions. It is only "qualifying" debts which attract statutory attention and those debts are by s 3 specifically to relate to "an obligation under a contract to which this Act applies to pay the whole or any part of the contract price". There is a very clear distinction to be drawn between the payment of the contract price and any liability for damages for breach of contract because the latter does not usually arise as such pursuant to an obligation to pay the "contract price". In any event, a debt is usually considered to be a sum due for work done, materials delivered or services rendered which sum is either specifically ascertained and agreed within or by the contract in question or is ascertainable from what has been agreed. Of course, in the case of a claim for breach of contract for (unliquidated) damages, that claimed entitlement can only convert into a debt as a result of a judgment or arbitration award; it does not become a debt until that stage and at that stage it attracts the specified judgment rate of interest for late payment of a judgment sum.

62. I agree with Akenhead J.'s reasoning and accept that it precludes interest under the 1998 Act being recovered by A & V in respect of the award of damages for loss of profits.

63. I also accept that the award I make in this judgment in respect of Mr Blizzard's fees is not an award in respect of a "debt" for the purposes of the 1998 Act, since the debt in respect of Mr Blizzard's fees is created by this judgment not by virtue of an obligation under a contract. However, in case there should be any confusion, I am dealing here with the obligation for J&BH to pay to A & V part of the sum which A & V was obliged to pay to Mr Blizzard. I am not dealing with an obligation on the part of a party to an adjudication to pay an adjudicator's fees. I say nothing as to whether that could create a debt falling within the 1998 Act.

[11] [2013] EWHC 3025 (TCC); [2014] 1 Costs LO 39
[12] At paragraph [7]

Does Clause 12 of the Sub-Contract have the effect of preventing A & V from recovering interest under the 1998 Act?

64. Given the decision I have made in the previous section of this judgment, the only sum upon which interest under the 1998 Act could be awarded is in respect of my award of £95,446.61 in respect of the Measured Works Claim.

65. In that respect, Mr Frampton relies upon the combined effect of Clause 12 of the Sub-Contract and Sub-Section 8(2) of the 1998 Act.

66. Section 8 of the 1998 Act provides:

> Circumstances where statutory interest may be ousted or varied.
>
> (1) Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late payment of the debt.
>
> (2) Where the parties agree a contractual remedy for late payment of the debt that is a substantial remedy, statutory interest is not carried by the debt (unless they agree otherwise).
>
> (3) The parties may not agree to vary the right to statutory interest in relation to the debt unless either the right to statutory interest as varied or the overall remedy for late payment of the debt is a substantial remedy.
>
> (4) Any contract terms are void to the extent that they purport to—
>
> > (a) confer a contractual right to interest that is not a substantial remedy for late payment of the debt, or
> >
> > (b) vary the right to statutory interest so as to provide for a right to statutory interest that is not a substantial remedy for late payment of the debt,
>
> unless the overall remedy for late payment of the debt is a substantial remedy.
>
> (5) Subject to this section, the parties are free to agree contract terms which deal with the consequences of late payment of the debt.

67. Clause 12 of the Sub-Contract provides:

> If J& B Hopkins, fails to make payment to the Sub-Contractor of any sum which is due to the Sub-Contractor under this Sub-Contract by the final date for payment of that sum, J& B Hopkins shall pay to the Sub-Contractor in addition to the amount not paid simple interest thereon for the period from the final date for payment to the date payment is made. The rate of interest shall be 2% over the Base Rate of the Bank of England current at the date of J & B Hopkins default. The Sub-Contractor acknowledges that such rate is a substantial remedy for late payment (as defined in the Late Payment of Commercial Debts (Interest) Act 1998).

68. Mr Frampton submits that Clause 12 of the Sub-Contract provides a substantial remedy for late payment, and that accordingly the application of the 1998 Act has been effectively ousted.

69. Section 9 of the 1998 Act defines the meaning of "substantial remedy":

> Meaning of "substantial remedy".
>
> (1) A remedy for the late payment of the debt shall be regarded as a substantial remedy unless—
>
> > (a) the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment; and
> >
> > (b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt.
>
> (2) In determining whether a remedy is not a substantial remedy, regard shall be had to all the relevant circumstances at the time the terms in question are agreed.
>
> (3) In determining whether subsection (1)(b) applies, regard shall be had (without prejudice to the generality of subsection (2)) to the following matters—
>
> > (a) the benefits of commercial certainty;
> >
> > (b) the strength of the bargaining positions of the parties relative to each other;
> >
> > (c) whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise); and
> >
> > (d) whether the supplier received an inducement to agree to the term.

70. Mr Frampton contends that Clause 12 is a substantial remedy:

(1) Interest at 2% over the Base Rate, running from the date of default (i.e. immediately) is, applying this test, a substantial remedy:

(a) Per section 9(2) of the Act, *"regard shall be had to all the relevant circumstances at the time the terms in question are agreed"*. This question must, therefore, be assessed at the time of the Sub-Contract (30 September 2019). At that point, the Bank of England base rate had less than 1% for over 10 years. The inflation and rise in interest rates caused by Covid-19 and the war in Ukraine was not known or foreseeable.

(b) It is not enough, or the test, to say that the rate in the contract is less than the statutory rate. The statutory rate is often described as and is intended to be penal.

(c) The specific contractual wording that A&V *"acknowledges that such rate is a substantial remedy for late payment (as defined in the Late Payment of Commercial Debts (Interest Act) 1998"* must be considered. It shows that the parties had, objectively, specifically turned their minds to the interest rate, the terms of the Late Payment of Commercial Debts (Interest) Act 1998 and agreed that it was a substantial remedy. There is no basis to go behind this agreement by two commercial entities.

(2) A rate of 1%, 2%, 3% above base is common;

(3) Turning to the specific factors at section 9(3):

i) **The benefits of commercial certainty** – this factor points strongly in favour of upholding the agreed rate, particularly given the express reference to the Late Payment Act.

ii) **The strength of the bargaining positions of the parties relative to each other** – JBH is a larger entity, however there is no evidence that in 2019 the parties' bargaining positions were significantly different. A&V had been profitable (albeit the use of those profits was mismanaged) and the evidence is it had a client base in London.

iii) **Whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise)** – the clause was part of JBH's standard terms. However, it was not "imposed" to A&V's "detriment". A&V freely agreed to the terms and conditions.

iv) Whether the supplier received an inducement to agree to the term – there is no evidence of any inducement.

71. In my judgment, Clause 12 does not provide a substantial remedy.

72. I accept that there are a number of factors upon which J&BH legitimately relies:

(1) I accept that there had been low interest rates set by the Bank of England for a substantial period before the Sub-Contract was entered into;

(2) I accept that awards of interest rates of 1, 2 or 3% over base rate are common, but certainly rates of 1 or 2% over base tend to be applicable in respect of awards to relatively substantial corporations;

(3) I accept that of the factors specified in sub-section 9(3), factor (a) is in J&BH's favour.

73. However, despite those factors in favour of J&BH, in my judgment Clause 12 does not provide a substantial remedy:

(1) As to factor (b) in Sub-Section 9(3), J&BH's bargaining power was greater by a very substantial margin;

(2) As to factor (c), I understand Clause 12 to be part of J&BH's standard terms: whether they were "imposed" I have no evidence, but it seems to me that in practical terms A & V was probably faced with "take it or leave it" terms;

(3) As to factor (d), I have no evidence to suggest A & V received any inducement to agree to Clause 12;

(4) Of course, it is right Clause 12 expressly *"acknowledges that such rate is a substantial remedy for late payment (as defined in the Late Payment of Commercial Debts (Interest Act) 1998"*. However I hope I am not too cynical in thinking that this represents competent drafting on the part of J&BH's lawyers, rather than a reflection of both parties' consideration of the pros and cons of including an interest provision in the Sub-Contract which purports to oust the 1998 Act;

(5) I agree with Mr Frampton's observation at paragraph 17(4)(b) that "the statutory rate is often described as and is intended to be penal". I have to judge this issue at the time that "the terms in question are agreed" (Sub-Section 9(2)). Accordingly, I ignore the ex post facto evidence that the contractual interest rate did not in fact deter J&BH behaving from a manner in the adjudication process in a manner which elicited disapprobation from the Court of Appeal, a matter to which I have referred in previous judgments. However, it seems to me that J&BH was never likely to be deterred by Clause 12 from playing procedural games in adjudications;

(6) The contractual provision worked in only one direction: if J&BH failed to pay A & V, the clause applied. If A & V failed to pay J&BH, then there was no limit on what interest rate that J&BH could seek to recover;

(7) Clause 12 provided *"The rate of interest shall be 2% over the Base Rate of the Bank of England current at the date of J & B Hopkins default"*. Thus the rate remains fixed even if interest rates rise during the period of non-payment. In a period of rising interest rates, this is massively weighted in favour of J&BH and against A & V. Given how low interest rates were when this clause was agreed, it was effectively a one-way bet in J&BH's favour.

74. For the above reasons, I reject J&BH's contention that Clause 12 effectively ousts the 1998 Act.

Interest on the Measured Works Claim

75. I accept J&BH's submission that the correct starting date for interest is 5 May 2021, which is the final date for payment of A & V's Payment application 13/14 submitted in March 2021.

76. The rate will be the statutory rate appropriate for the 1998 Act, namely 8% over the Bank of England base rate from time to time applicable. A & V's calculation takes a single rate throughout: this is inappropriate.

Interest on the Loss of Profits Damages Award

77. Mr Frampton submits in paragraph 20 of JBH's Submissions on Adjudicators Fees and Interest that the appropriate starting date for interest to run is 4 June 2021. I accept that submission for the reason he gives.

78. He submits that the appropriate rate is the Clause 12 rate of 2.1%, fixed at the date of default.

79. In contrast J&BH sought, and I awarded, interest at the rate of 4% in my first judgment on the sums due to J&BH. J&BH claims this rate in the alternative.

80. The fact that J&BH claimed 4% as a fair commercial rate is strong material to suggest that a rate based upon Clause 12 is not a fair rate.

81. In my discretion, I determine that simple interest at 4% over base is the fair rate to apply given that (as I found in my judgment on the merits) by 2021 A & V were in financial problems. I order 4 per cent over base since that seems likely to me to represent the bottom end of the range of rates at which A & V would be able to borrow in any conventional market. (By contrast, J&BH were likely to be able to borrow at far more advantageous rates, making 4% flat a more appropriate rate in the case of sums due to it).

Interest on Mr Blizzard's fees

82. Mr Frampton submits in paragraph 24 of JBH's Submissions on Adjudicators Fees and Interest that the appropriate starting date for interest to run is 3 March 2022. I accept that submission for the reason he gives.

83. For the reasons given above, I determine that simple interest at 4% over base is the fair rate to apply.

Interest claimed by J&BH on Mr Smith's fees

Interest due to J&BH on the enforcement costs

84. There has been no appeal against my judgment in respect of enforcement.

85. Consequently the interest consequences in Sections D.1 and D.2 of JBH's Submissions on Adjudicators Fees and Interest are correct: on Mr Smith's fees there is pre-judgment interest due in the sum of £160.66 and post-judgment interest to 18 June 2024 of £1,496.42 and continuing at the daily rate of £3.06; and on the enforcement costs there is post-judgment interest to 18 June 2024 of £2,231.66 and continuing at the daily rate of £4.56.

86. Those sums are due under my first judgment. The relevance to the issues in this judgment will arise when consideration is given to the timing of payment of the sums I have awarded in A & V's favour. There is no formal set-off.

Conclusion

87. I invite the Parties to confer and agree, if possible, the financial consequences of this judgment.