TRANSCRIPT OF PROCEEDINGS

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

Rolls Building
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE FRASER

IN THE MATTER OF

J TOMLINSON LIMITED (Claimant)

-v-

BALFOUR BEATTY GROUP LIMITED (Defendant)

MR T OWEN, instructed by Hawkswell Kilvington Limited (Solicitors), appeared on behalf of the Claimant

MR A CONSTABLE QC, instructed by Pinsent Masons LLP (Solicitors), appeared on behalf of the Defendant

JUDGMENT
29th APRIL 2020
(AS APPROVED)

MR JUSTICE FRASER:

1. This is an adjudication enforcement application in respect of an adjudicator's decision, which has been conducted remotely because of the particular arrangements due to the COVID-19 crisis. The hearing took place this morning using Skype for Business. It has been conducted virtually by video, and this is an ex tempore judgment. I would like to start by thanking the parties for their flexibility in the way that they have provided documents. Most of the relevant documents that have been used for the hearing have in fact been, as it happens, submitted to the court in at least two different forms, both lodged on the CE file, included in a share drop file, and also some of them have been put in separate PDF bundles. This judgment is going to start with a brief introduction into the dispute and the adjudication, and then to move on to the issues between the parties in respect of why, so far as the defendants are concerned, the claimant ought not to have summary judgment, and the claimant's case that it ought to be enforced in accordance with adjudicators' decisions generally, that it is entitled to summary judgment in the sum of the decision. The parties are going to have to bear with me slightly whilst I deliver this judgment, because I am flicking between different screens.

2. The claimant party is J Tomlinson Limited, to which I will refer as JTL, and the defendant is the Balfour Beatty Group Limited, to which I shall refer either as Balfour Beatty or BB. By a subcontract JTL was engaged by BB to provide design, labour, materials and supervision, to perform certain electrical works at a site in Hull, known as Project Ren, for a subcontract price of approximately £435,000. The dispute between the parties, which was referred to the adjudicator, related to a claim for an interim payment sum, number 30, which was applied for by JLT in September 2019. The adjudicator, Dr Milner, was appointed by the Royal Institute of Chartered Surveyors, a referral made to him and submitted in January, and he produced a decision on 24 February 2020. In that decision he awarded JTL the sum of £1.246M approximately, excluding VAT, in respect of that interim payment.

3. The written evidence before the court on the enforcement application is a witness statement from Mr Salter, the claimant's solicitor, which is dated 11 March 2020, and Mr Morrison, the defendant's solicitor, dated 30 March 2020. Mr Morrison's statement also appended the skeleton of leading counsel, acting for Balfour Beatty, namely Mr Constable QC, because of issues which were said, in his paragraph 5, to be "largely a matter of contractual/statutory interpretation and submission". It was because of those issues that the stance taken by Balfour Beatty on this application was that the decision ought not to be enforced.

4. The dispute was framed in the adjudicator's decision, and I am going to read out just three subparagraphs of his paragraph 6. This said of the dispute:

"5.1, the dispute concerns JTL's application for payment number 30, issued on 12 September 2019;

5.2 JTL avers in the foregoing application for payment as a default payment notice in accordance with clause 21(a)(9) of the subcontract;

5.3 JTL avers that the sum of £1,246,467, excluding VAT, is in disputably due and should have been paid by BB by no later than 4 November 2019".

5. Mr Morrison's witness statement for today's hearing also appended other witness statements, those of Mr Burgess for JLT and Messrs Robinson and McGinty for BB, that had been lodged in the adjudication. I am not going to go into the contents of those statements in enormous detail, just to say that there was an issue between the parties, which was one of the disputes within the adjudication, as to whether the September application had in fact been provided to BB at all. Part of the claimant's evidence in the adjudication provided photographs of what was said to have been submitted to BB in either a box or some boxes, because the application by JLT was claimed to have been served by hand. The defendant for today's purposes accepts that those issues of fact, which would remain contentious on a substantive resolution of the dispute, are not ones which can be challenged by BB today, and so the reference to them is for completeness only. However, it puts into context the contractual disagreement between the parties about the nature of the contractual requirements for service of an interim application.

6. In the defendant's evidence for today, reference is made to this adjudication being what is colloquially called a 'smash and grab' adjudication. That is a term of art, which is used to describe what Mr Constable correctly described today as a technical dispute in respect of whether certain notices, default notices and pay less notices have been served either within time or at all. The term 'smash and grab' is one which is usually used by a paying party to portray an adjudication where the dispute does not relate to a substantive disagreement, for example about the value of works performed, but rather technical compliance with the service of notices required under sections 110A, 110B and 111 of the Housing Grants Construction and Regeneration Act 1996 as amended.

7. As summed up in the defendant's evidence for today, the principal thrust of the dispute before the adjudicator centred upon a factual question as to whether the September interim application was part of a hand delivery of boxes to BB, which took place on 12 September 2020, and the adjudicator resolved that factual question in JTL's favour, which is partly why JTL succeeded in the adjudication.

8. Turning to today's enforcement proceedings, I wish to make it perfectly clear at the outset that the defendant in its evidence is not challenging jurisdiction of the adjudicator, or alleging any material breach of natural justice by the adjudicator. There are two aspects to today's stance taken by the defendant, and they are the following, they are both based on the contractual requirements. The first is that an interim application had to be posted and emailed in order to be valid under the contractual terms. It is also said that it is particularly important to comply with these contractual requirements if the payee was seeking to rely upon that document as a default notice for the purposes of turning a sum applied for into the notified sum for the purposes of the statute. It is said by the defendant that for reasons explained in Mr Constable's skeleton argument a failure by JTL to follow the contractual requirements means that the interim application - and I am now quoting from paragraph 15 of the evidence - "cannot be relied upon as a default notice, contrary to the adjudicator's conclusions".

9. It is also said by the defendant that the facts that were relied upon by JTL before the adjudicator could not constitute a variation or waiver of the contractual requirements by BB or give rise to an estoppel. Both Mr Constable today orally and also Mr Owen have accepted that essentially the variation or waiver side of the argument, or component of the argument, is really a peripheral one for today's purposes. For today's purposes it is

necessary to consider the contractual requirements, together with the statutory framework, for reasons which I will come on to explain.

10. It is trite law that adjudicators' decisions will be enforced unless they are made without jurisdiction, or made in material breach of the requirements of natural justice. The procedure for enforcement of adjudicators' decisions by summary judgment in the Technology and Construction Court is very well-known, as is the policy of enforcement. The starting point is that if the adjudicator has decided the issues that were referred to him or her, whether he or she is right or wrong in fact or in law, and has broadly acted in accordance with the rules of natural justice, the decision will be enforced by summary judgment. That is a principle which is set down in many cases, and neatly summarised in a more recent case to which I will come in a little more detail in a moment, called *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] BLR 344, a decision of Mr Justice Coulson as he then was. In other words, if the decision that was reached was within the adjudicator's jurisdiction, and the adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later. "Pay now argue later" is a phrase which has appeared in a number of authorities, and refers to the fact that an adjudicator's decision has a curious status at law, being one of so-called "temporary finality". By temporary finality it is meant that the paying party, dissatisfied with an adjudicator's decision, may embark upon a substantive resolution of the dispute either by litigation (or by arbitration, where there is an arbitration clause), but is expected to comply with the adjudicator's decision in the meanwhile, in order that the winner in the adjudication process effectively has the use of the funds.

11. However, those statements of general principle which I have just explained are subject to two narrow exceptions, and they are both dealt with in the *Hutton* case. The first is an admitted error, and the second is what is effectively a self contained point, concerning timing, categorisation or description of a payment, notice or a pay less notice. Just before I come on to the specific aspects of *Hutton* I will add one further point of general application, which is the dicta of Mr Justice Stuart-Smith, from *PBS Energo AS v Bester Generacion UK Limited* [2018] EWHC 1127 TCC, at [9]. He said adjudication is all about interim cash flow and it is routine to enforce decisions that require substantial allocations of cash to one party or another, in the knowledge it may prove to be merely an interim measure. That is not a case that the parties have cited before me today. It contains the statement of general principle. The reason for quoting it in this judgment is it very usefully sets out in two sentences the principle of adjudication. This is a statement that is of a nature that is widely known, and I do not consider I ought to merely re-produce Mr Justice Stuart-Smith's words without attributing them to him.

12. I will now summarise the points that are relied on by Balfour Beatty in resisting summary judgment. The first is that the interim application ought to have been made on a specific date, namely 24 September 2019. It is made clear in paragraph 16 of the defendant's evidence that this argument is maintained on these enforcement proceedings, but it was an argument that had been rejected by the adjudicator. The terms of payment in the contract are set out in clause 21, and they have to be read together with a table of dates in part 5 of the appendix. I am going to come both to the contractual terms and part 5 of the appendix in detail in a moment, but before I do that I am just going to identify ground 1(a) and ground 1(b) from Mr Constable's skeleton.

13. Ground 1(a) is identified in the following terms in the heading in the skeleton "the September interim application was not served in accordance with the requirements of the subcontract". That point is expanded in his skeleton argument from paragraph 11 onwards, and I am going to identify it in summary by dealing with each of the different points which he has set out in that skeleton. He says that clause 21A(5) explicitly requires an interim application shall be in the form and shall contain such details as the contractor may require, and that when one looks at the appendix, part 5 of it explicitly requires that application should be issued by post to the contractors' Leeds office, with a copy issued by email to the project manager and the project surveyor. He says neither of those two methods of issue or service were adopted in this case for the interim application, and that this means that the application itself was not one that was served in accordance with the requirements of the subcontract.

14. Ground 1(b), which is the second of the two limbs relied upon by Balfour Beatty, is that the September application was issued by JTL prematurely. The reason for that is that the subcontract, at clause 21A(5), uses the following words, "The subcontractor shall, not later than each of the subcontractor's valuation submission dates, submit to the contractor a written application for payment". The subcontractor's valuation submission dates were set out in part 5 of the appendix, but they did not go beyond 24 April 2019. Text appears in the appendix, which I will come on to in a moment, dealing with what the position would be if further subcontractor valuation dates were required. I am just going to say what the words are now, because in the text in part 5 it says, "The date for the submission of the subcontractor's valuation will be the same (or nearest) date for each following month as the last contractor's valuation submission date stated in the above schedule". There was no confirmation of the subcontractor's valuation dates, therefore the case advanced by Balfour Beatty is that the interim applications had to use the actual dates, and to quote from paragraph 33 of Mr Constable's skeleton, it says that 'it' means the dates upon which applications had to be made, is replaced by a regime where the date for submission will be a specific and very particular date calculated by reference to the last tabulated date. In reliance on an authority of Mr Justice Edwards-Stuart, namely *Leeds City Council v Waco UK Ltd* [2015] EWHC 1400 (TCC), Balfour Beatty states that the interim application, as a result of not being submitted on that specific date,would be invalid.

15. I am now going to turn to the contractual terms. The terms for payment are included in clause 21 of the subcontract terms. Terms for payment generally are in clause 21, but that is itself subdivided into 21A and 21B, and 21A(4) states when the first and interim payments shall be made to the subcontractor as follows. 21A(4)(d) deals with the final date for the first interim payments which shall be the date ten days after the due date, that is to be the final date for payment. There is a typo in that clause, in that the word '30' appears before 'ten', as a number in brackets, as the intervals to calculate the date, but Mr Owen tells me that that is a typographical error, and, in my judgment, treating it as though it is ten days is the correct approach in any event and makes no difference to my findings generally on this application. Then there is 21A(5), which says in full, "The contractor shall, not later than each subcontractor's valuation submission date, submit to the contractor a written application for payment setting out the sum considered due to the subcontractor at the due date and the basis for that calculation. The application shall detail all work properly done under the subcontract and all materials delivered to the site for incorporation with the subcontract works. It shall be in the form and shall contain

such details as the contractor may require". I would say it is that final sentence which is relied on by Balfour Beatty, emphasising, as it does, that the form required to be complied with in respect of the interim application.

16. The next two subparagraphs deal with what the process should be, or what the payment notice should contain, and at 21A(8) says, subject to clauses which come later, the payment identifying the payment notice shall be the notified sum payable by the contractor to the subcontractor not later than the final date for payment. Then 21A(9) states the following, "In the event that a payment notice is not issued by the contractor in accordance with clauses 21A(6) and 21A(7), the sum to be paid to the subcontractor by the final date for payment shall, subject to any pay less notice under clause 21C(3) below, be the sum stated as due in the subcontractor's application for payment, and shall be the notified sum, PROVIDED ALWAYS that the said application complies with clause 21A(5)".

17. It is therefore the case that in circumstances such as this one, where the contractual mechanism replicates the process under the Act, if Balfour Beatty wishes to pay a different amount to the amount applied for, a notice has to be issued by it to that effect. In the absence of a notice, either issued at all by BB or issued in compliance with the time limits required, the subcontractor's application for payment, if it is a valid one, becomes the notified sum. In this case there were no notices issued by Balfour Beatty, which is why the term 'smash and grab' is used to describe the adjudication, because the issue for the adjudicator was a technical one in respect of what was the notifying sum, and he had to consider whether or not the application for payment was a valid one.

18. There are two other clauses of the contract which are relevant to today's argument. I am taking them in numerical order. The first is clause 37. This provides for precedence of documents and discrepancies, and says at 37.1 these conditions of subcontract and appendix are intended to be mutually explanatory, but in the event of any conflict or ambiguity arising, the appendix shall prevail, and clause 41 states, in respect of notices, at 41.1, any notice of suspension, determination, litigation, adjudication or arbitration to be given by the subcontractor to the contractor under these conditions shall be in writing, and shall be properly served only if first class pre paid post or by recorded delivery, or, if hand delivered to the registered office of the contractor, and 41.2 says, all other notices to be given by the subcontractor to the contractor under these conditions shall be in writing, and shall be properly served only by first class post or recorded delivery, or if hand delivered to the commercial director at the office stated within appendix 2, part 2. Then turning to the appendix, part 5, which is the final recital from the contract before I turn to the analysis, this is an appendix which has a heading "Part 5 valuation and payment schedule". There are six columns, they provide for dates for 19 different applications. The left hand column says subcontractor's valuation submission date. There is then a calculation, in subsequent columns, firstly of the valuation date, the next column is the due date for payment, the next column is the latest date for the issue of a payment notice, the penultimate column is the latest date for the issue of a pay less notice, and the final column is headed "Final date for payment". There are two paragraphs of text that appear below that table of dates. The first says "Applications received by the contractor after the appropriate date will be processed the following month. Applications should be issued by post to the contractor's Leeds office, with a copy issued by email to the project manager and the project surveyor". It is that wording that is relied on by Balfour Beatty to justify

what is said to be a contractual requirement that unless an interim application is issued in accordance with that text, in other words by post to the contractor's Leeds office, with a copy issued by email to the project manager and project surveyor, it is not a valid application. Then the next paragraph says, "In the event that the subcontract work extends beyond the latest subcontractor's valuation submission date stated above, the absence of the contractor confirming further subcontractor valuation submissions dates, the date for the submission of the subcontractor's valuation will be the same (or nearest) date for each following month as the last subcontractor's valuation submission date stated in the above schedule". That form of words is relied on by Balfour Beatty as justifying a contractual construction which means that the interim application had to be lodged on a particular date, and that the application in respect of which the adjudication took place was, as it is put, invalid because it is premature.

19. Mr Owen put his opposition to the case advanced by Mr Constable in two ways. One is a procedural way, and one is a substantive way, essentially he maintained that the contractual arguments advanced by Balfour Beatty were wrong in any event. It is relevant now to turn to *Hutton Construction Ltd v Wilson Properties (London) Ltd*. As I said, that was a decision of Mr Justice Coulson, who at the time was the Judge in charge of the Technology and Construction Court, and in that case he identified what he said was a fundamental point of principle and practice concerning the enforcement of adjudication decisions. I am just going to read some of those paragraphs in *Hutton Construction Ltd v Wilson Properties (London) Ltd* because they identify the correct approach that the court ought to adopt when it is faced with a resistance to an enforcement application which is effectively based on argument of the substantive dispute.

20. At [2] the judgment says, "As I pointed out to the parties during the course of argument, the defendant's stance is an increasingly common one amongst those who are dissatisfied with an adjudicator's decision. It raises fundamental points of principle and practice concerning the enforcement of adjudication decisions. For that reason, having informed the parties that I would enter summary judgment for the claimant and would not permit the defendant to raise their challenge in defence of the claim, I reserved this Judgment". He identifies at [3] that, "The starting point, of course, is that, if the adjudicator has decided the issue that was referred to him, and he has broadly acted in accordance with the rules of natural justice, his decision will be enforced", and he refers, in the remainder of [3], to *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] EWHC 254 (TCC), and *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2000] EWCA Civ 507. Chadwick LJ summarised the principal reason for this in *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358", and I am quoting now from Lord Justice Chadwick in that case, "the need to have the 'right' answer has been subordinated to the need to have an answer quickly".

21. Coulson J then dealt with, at [4] and [5] what he explained as being two narrow exceptions to the rule. The first involves an admitted error, that does not apply in this case, and I am going to now quote from [5], "The second exception concerns the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice, and could be said to date from *Caledonian Modular Limited v Mar City Developments Limited* [2015] EWHC 1855 (TCC). In that case, the defendant had raised one simple issue, in a detailed defence and counterclaim served at the outset, to the effect that a small group of documents could not have constituted a

claim for or notice of a sum due for payment. If that argument was right, it was agreed that the claimant was not entitled to summary judgment. At [11] of my judgment in that case, I reiterated the general principle that it was not open to a defendant to seek to avoid payment of a sum found due by an adjudicator by raising the very issue on which the adjudicator ruled against the defendant in the adjudication".

22. Later, in that judgment, he dealt with the situation where parties, as had become increasingly common, raised Part 8 proceedings in an attempt to resolve whichever points the adjudicator had dealt with, with finality, and what he said, in [14] onwards, has to be understood to be dealing with situations where a party is seeking a final determination of the substantive dispute by the use of Part 8. He said, at [14]"Many defendants consider that the adjudicator got it wrong. As I said in *Caledonian Modular*, in 99 cases out of 100, that will be irrelevant to any enforcement application. If the decision was within the adjudicator's jurisdiction, and the adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later". He then continues in that paragraph, "If the degree of consent noted in the authorities set out in Section 3 above is not forthcoming, then the following approach must be adopted". Further at [15], "The first requirement is that the defendant must issue a CPR Part 8 claim setting out the declaration it seeks or, at the very least, indicate in a detailed defence and counterclaim to the enforcement claim what it seeks by way of final declarations. For the reasons already explained, I believe a prompt Part 8 claim is the best option".

23. He then dealt, at [16], with the fact that the TCC Guide, could potentially be read to have encouraged the approach that had applied before then, but he said, at the end of that paragraph, that the relevant paragraph of the guide "must now be taken to have been superseded by the guidance given in this Judgment". He also added at [17] "On this hypothesis, there is a dispute between the parties as to whether or not the defendant is entitled to resist summary judgment on the basis of its Part 8 claim. In those circumstances, the defendant must be able to demonstrate", and he then sets out three requirements. The first is, it is a short and self-contained issue, the second is that the issue required no oral evidence, and the third, which, in my judgment, is an important one and I am going to quote in full, "the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore". He then says, at [18] "What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in *Macob*, *Bouygues* and *Carillion*."

24. Two points follow from that. The first is the guidance in that judgment is clearly to deal with situations where a Part 8 claim is being advanced, seeking final declaration on substantive points. That is not the case here; there are no Part 8 proceedings on foot. Secondly, it is also the case that the issue has to be, as it has been explained by Mr Justice Coulson, something where the adjudicator's construction of a contract clause is beyond any rational justification. Neither of those apply in this case. I should add, in fairness to Mr Constable, who freely accepts that no Part 8 claim has been issued, that he says, essentially full notice was given in advance by his skeleton being served with the defendant's evidence. I do not accept that puts this case in the same territory as where a

Part 8 claim had been commenced and is advanced. However, I am going to go on and deal with the substantive issues anyway for this reason. Firstly, to do justice to what have been very helpful and excellent submissions from both counsel about it, but also to make it clear why, in my judgment, Balfour Beatty's contended for construction is in any case not one which persuades me is the correct one.

25. I do not, however, wish this to be taken in any way as diluting what is a very well established procedure in the Technology and Construction Court, which is as follows. Adjudicators' decisions, of which there are a very large number, can only be, subject to the two exceptions that Mr Justice Coulson set out in *Hutton Construction Ltd v Wilson Properties (London) Ltd*, defended on the grounds of lack of jurisdiction or material breach of natural justice. That is more than mere pedantry on my part. There are very real policy reasons for that. The first is, a fully contested Part 8 claim may not be able to be listed as readily or as speedily as an adjudication enforcement application. Some defendants over the last four or five years, have tried to avoid the ethos of the Act, which is "pay now argue later", by bringing the latter argument part of that to take place either at the same time as enforcing the decision or, in some cases, trying to have it done before hand. The reason that the TCC has adopted the procedure that it has is because adjudicators' decisions are to be complied with, and they are to be complied with speedily. It is for those reasons that *Hutton Construction Ltd v Wilson Properties (London) Ltd* makes the very clear points that it does, and also explains why, as Mr Justice Coulson put it, in 99 cases out of 100 the merits of the substantive underlying dispute will not be an obstacle to a party, who has been victorious in an adjudication, obtaining summary judgment on that decision.

26. I will now deal with the actual contractual arguments that were advanced very skilfully by Mr Constable. The correct place to start is the appendix to the contract terms, and the first paragraph of the text which follows the table of dates. It says applications received by the contractor after the appropriate date will be processed the following month. Applications should be issued by post to the contractor's Leeds office, with a copy issued by email to the project manager and the project surveyor. In my judgment that wording is not mandatory wording; it is not wording of the type which would set down such a requirement as a condition precedent, or having something of that force; and it is also not something which, in my judgment, changes the nature of the interim application such that if it is delivered by hand, or a different way of putting it, is served in compliance with the contractual mechanism in clause 41.2, would render it invalid. Much clearer wording would be required to achieve that result. Mr Constable had a very powerful point, which was in terms of the priority of the appendix over the contractual provisions, and correctly identifies that clause 37 does make it clear that in the event of a conflict the wording of the appendix will take priority. However, in my judgment there are two problems with that.

27. First is, there is no conflict at all. All this provision does in the appendix is give guidance as to how interim applications should be served. If there is no conflict then clause 37 does not assist him in any event. The second is that the contract, and this is a well established canon of contractual construction, has to be construed as a whole. If one bears that in mind, and looks at these words, it is two and a half lines of appendix part 5, in conjunction with the requirements in clause 41, together with clause 21A, the following becomes clear. In my judgment, the service of the interim application by hand, (which I

accept is a disputed point of fact, but which is not relevant to enforcement), is valid service and that disposes of one of his two grounds. I should say, and I wish to make it clear, that when the substantive dispute comes to be resolved, if Balfour Beatty issue litigation proceedings in order to do that, the court will in no way be either guided or bound by the adjudicator's findings in this respect about whether the application was delivered. It simply stands as a finding of fact by an adjudicator, but so far as construction of the contract is concerned, in my judgment when it is construed together, the words upon which Balfour Beatty rely in appendix part 5 do not go as far as Balfour Beatty contend.

28. The second point relates to timing. I am going to read it out again, it is the second paragraph in appendix 5. It says, "In the event that the subcontract works extend beyond the latest subcontractor's valuation submission date stated above, and in the absence of the contractor confirming further subcontractor valuation submission dates, the date for the submission of the subcontractor's valuation will be the same or nearest date for each following month as the last subcontractor's valuation submission date stated in the above schedule". That wording has to be read, in my judgment, in conjunction with the wording in clause 21A, because 21A(5) says the subcontractor shall, not later than each subcontractor's valuation submission date, submit to the contractor a written application for payment. Much clearer and stronger wording would be required in the appendix if, once those 19 specific dates had passed, the contract paymentregime were to be changed, and to require applications only on very specific dates themselves to be valid I do not consider that the words in appendix part 5 are sufficient to achieve what Balfour Beatty contend, and in my judgment that effectively disposes of both of the grounds relied upon by Balfour Beatty in any event.

29. I would just add that one of the authorities which has been relied on in respect of this particular argument is called *Leeds City Council v Waco UK Ltd* [2015] EWHC 1400 (TCC), and is a decision of Mr Justice Edwards-Stuart. It can be seen from [2] of that judgment, that it followed an enforcement application where summary judgment was not given, and Leeds City Council were instead given conditional leave to defend. That condition was satisfied by the sum being paid in by Leeds City Council, not into court but being paid to Waco, and then Leeds City Council brought proceedings under CPR Part 8 for a declaration that the application was not a valid application. Mr Justice Stuart-Smith did decide in that case that particular and specific dates had to be complied with in terms of the actual dates for interim applications. However, that case concerned the JCT Design and Build 2005 contract form revision 2 version, and was on completely different words to the case before the court today. It seems to me that, although on the facts of that particular case, Mr Constable correctly identifies what the ratio of it was, this is not that case. In my judgment that authority gives Balfour Beatty no assistance whatsoever in what is essentially a point of construction on completely different contract terms, seeking to have the interim application declared not to be a valid one.

30. It can therefore be seen in summary that the resistance by Balfour Beatty to enforcement in this case, which, as I have said, is not based on a challenge to jurisdiction, or a material breach of natural justice, is also not one that falls within the very narrow exception identified in *Hutton Construction Ltd v Wilson Properties (London) Ltd*. In my judgment, the remedy for a disgruntled party, such as Balfour Beatty in this case, is to have this dispute resolved substantively, and that will probably be by Part 7 proceedings,

on the basis that there seem to be very real disputes of fact relating to the delivery of the application itself. There may also, during the final account process, which, as I understand, is going on, be other disputes as well that it is not necessary to hypothesise about that, but to avoid undermining the ethos of the 1996 Act, in my judgment the correct outcome on this application is to grant summary judgment to JTL for the amount awarded to it by the adjudicator in his decision.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge