Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd [2008] Adj.L.R. 12/04

JUDGMENT : Mr Justice Coulson: TCC. 4th December 2008.

A. THE DISPUTE

1. The Claimant, Balfour Beatty Construction Northern Limited ("*Balfour Beatty*"), seeks summary judgment pursuant to CPR Part 24 in respect of two separate claims. The first is the enforcement of an adjudicator's decision in their favour, dated 2nd October 2008, in the sum of £180,858.69, including VAT and fees, together with interest of £2,633.68. The second is based upon a valuation/interim certificate 29 in the sum of £976,265.20, together with interest of £18,723.

2. The Defendant, Modus Corovest (Blackpool) Ltd ("*Modus*"), seek a stay of proceedings so that the disputes can be the subject of mediation. If the proceedings are not stayed, they oppose both applications made by Balfour Beatty. They also seek to set off their counterclaim against any sums that would otherwise be due to Balfour Beatty and/or they seek summary judgment on that counterclaim for liquidated damages in the sum of £2,073,300.

3. In connection with these applications, I have read the following 10 statements:
   (a) two statements from Ms Davies, Balfour Beatty's solicitor;
   (b) two statements from Ms Thomson, Balfour Beatty's in-house solicitor;
   (c) two statements from Mr Emslie, Balfour Beatty's project director;
   (d) one statement from Mr O'Kane, Modus' solicitor;
   (e) two statements from Mr Parr, an employee of Reay & Co, Modus' agent in connection with the project; and
   (f) one statement from Mr Kilbride a director of Modus.

   In addition, although there are a considerable number of exhibits, the primary documentation relevant to these disputes is actually of relatively narrow compass.

B. THE CONTRACT

4. By a contract dated 17th March 2006, Modus engaged Balfour Beatty to carry out the design and construction of major works at Hounds Hill Shopping Centre in Blackpool. The contract sum was £33,066,218. Modus' agents were Reay & Co, who in turn sublet the quantity surveying aspect of the work to Gleeds. The contract works were subdivided into 33 separate sections and a sectional completion supplement was agreed.

5. The contract incorporated the terms of the JCT Standard Form of Building Contract with Contracted Design (1998 edition). The contract incorporated standard amendments 1 to 5. There were also further homemade amendments agreed by the parties; and some of those homemade amendments related to the clauses that were already amended by way of the standard amendments. This has meant that, on occasion, parts of the same clause are to be found in three different sections of the voluminous contract documentation.

6. I set out below the contract terms that are relevant to these disputes. For convenience I identify those terms under four headings: changes, delay, interim payments and dispute resolution.

7. As to changes to the Employer's Requirements, the relevant terms were principally set out in clause 12. Clause 12.1 defined a change to the Employer's Requirements as including the *'addition, omission and/or substitution of any work'*. Clause 12.2.1 provided:

   "The Employer may subject to the proviso hereto issue instructions effecting a change in the Employer's Requirements. No change effected by the Employer shall vitiate this Contract. For the avoidance of doubt, the approval or sanctioning of drawings, details and other information submitted pursuant to clause 5.3 shall not constitute an acceptance of any changes incorporated thereon and any changes specifically instructed under this clause shall constitute a Change in the Employer's requirements for the purpose of this Contract. Provided that the Employer may not effect a Change which is or makes necessary, any alteration or modification in the design of the Works if the Contractor objects by showing (with reasons) that such alteration or modification would adversely affect the efficacy of the Contractor's designs for the Works …"

8. Supplemental Condition 6 was also concerned with changes. It provided a mechanism whereby, if there was a clause 12 change instruction, Balfour Beatty would obtain estimates within a short period and then endeavour to agree the cost of the proposed change with Modus before the work was carried out. Supplemental Condition 6.6 provided that:

   "If the Contractor is in breach of S6.2, compliance with the instruction shall be dealt with in accordance with clauses 12, 25 and 26, but any resultant addition to the Contract Sum in respect of such compliance shall not be included in the Interim Payments but shall be included in the adjustment of the Contract Sum under clause 30.5. Provided that such addition shall not include any amount in respect of loss of interest or any financing charges in respect of the cost to the Contractor of compliance with the instruction which have been suffered or incurred by him prior to the date of the issue of the Final Statement and Final Account or the Employer's Final Statement and the Employer's Final Account."

9. The terms of the contract dealing with delay were amended to reflect the sectional completion supplement, but the critical provisions were these:
   (a) The completion date was defined as *"the date for completion as fixed and stated in Appendix 1, or any date fixed under clause 25".*
   (b) Balfour Beatty were, in certain circumstances, entitled to claim extensions of time pursuant to the detailed provisions set out in clause 25. One of the relevant events in respect of which an extension might be granted was the instruction of a Change or Changes to the Employer's Requirements.

(c) Modus were entitled to damages for non-completion in accordance with clause 24. The relevant parts of that clause for present purposes were as follows:

"24.1 If the Contractor fails to complete the construction of the Works by the Completion Date, the Employer shall issue a notice in writing to the Contractor to that effect. In the event of a new Completion Date being fixed after the issue of such a notice in writing, such fixing shall cancel that notice and the Employer shall issue such further notice in writing under clause 24.1 as may be necessary.

24.2.1 Provided

- the Employer has issued a notice under clause 24.1 and

- the Employer, before the date when the Final Account and Final Statement … become conclusive as to the balance due between the Parties by agreement or by the operation of clause 30.5.5 or clause 30.5.8 has informed the Contractor in writing that he may requirement payment of, or may withhold or deduct, liquidated and ascertained damages,

then the Employer may not later than five days before the final date for the payment of the debt due under clause 30.6; either

.1.1 require in writing the Contractor to pay to the Employer liquidated and ascertained damages at the rate stated in Appendix 1 … for the period between the Completion Date and the date of Practical Completion, and the Employer may recover the same as a debt; or

.1.2 give a notice pursuant to clause 30.3.4 or clause 30.6.2 to the Contractor that he will deduct from monies due to the Contractor liquidated and ascertained damages at the rate stated in Appendix 1 … for the period between the Completion Date and the date of Practical Completion."

10. Clause 30.3 dealt with the payment mechanism that was relevant to interim payments under this contract. Clause 30.3.1 provided that Balfour Beatty would make monthly applications for stage payments. The critical provisions for present purposes were these:

"30.3.2 Each Application for Interim Payment shall be accompanied by such details as may be stated in the Employer's Requirements.

30.3.3 Not later than five days after the receipt of an application for payment, the Employer shall give a written notice to the Contractor specifying the amount of payment proposed to be made in respect of that application, the basis on which such amount is calculated and to what that amount relates and, subject to clause 30.3.4, shall pay the amount proposed no later than the final date for payment.

30.3.4 Not later than five days before the final date for payment of an amount due pursuant to clause 30.3.3, the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.

30.3.5 Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4, the Employer shall pay the Contractor the amount properly due in the Application for Interim Payment.

30.3.6 The final date for the payment of an amount due in an interim payment shall be 21 days from the date of receipt by the Employer of the Contractor's Application for Interim Payment."

11. Articles dealing with dispute resolution were as follows:

(a) Article 6A provided that:

"If any dispute or difference arises under or in connection with this Contract, where the parties have agreed to do so, the dispute or difference may be submitted to mediation in accordance with the provisions of clause 39B.

(b) Article 6B provided that:

"Subject to articles 5 and 6A, if any dispute or difference as to any matter or thing of whatsoever nature arising under this Contract or in connection therewith shall arise between the Parties either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor, it shall be determined by legal proceedings and the parties hereby irrevocably submit to the non-exclusive jurisdiction of the English Courts."

12. Clause 39A was concerned with adjudication. For present purposes, it is only necessary to set out clause 39A.5.4, which was added by way of amendment, and clauses 39A.7.1 to 39.7.3, which were not:

(a) Clause 39A.5.4 provided that:

"The Adjudicator shall be obliged to give reasons for his decision and to declare any interest in the subject matter of the adjudication or the parties. The Adjudicator shall deliver his decision to the parties within two days from the date of making his decision."

(b) Clause 39A.7.1 onwards provided that:

"39A.7.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given.

39A.7.2 The Parties shall without prejudice to their other rights under the Contract comply with the decisions of the Adjudicator, and the Employer and the Contractor shall ensure that the decisions of the Adjudicator are given effect.

39A.7.3 If either Party does not comply with the decision of the Adjudicator, the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 39A.7.1."

13. Clause 39B has been comprehensively amended so as to remove any reference to arbitration. Instead, the new clause reads as follows:

"39.1 Either party may identify to the other any dispute or difference as being a matter that it considers to be capable of resolution by mediation and, upon being requested to do so, the other party shall within seven days indicate whether or not it consents to participate in the mediation with a view to resolving the dispute or difference. The objective of mediation under clause 39 shall be to reach a binding agreement in resolution of the dispute or difference.

39.2 The mediator or selection method for the mediator shall be determined by agreement between the parties."

C. MODUS' APPLICATION FOR A STAY

14. On behalf of Modus, the first application made by Mr Bowdery QC was that all of these applications should be stayed for mediation in accordance with the parties' agreement at clauses 39.1 and 39.2, set out at paragraph 13 above.

15. I take it as settled law that if the parties have agreed a particular method by which their disputes are to be resolved, then the Court has an inherent jurisdiction to stay proceedings brought in breach of that agreement: see ***Channel Tunnel Group Limited & France Manche SA v Balfour Beatty Construction Limited*** [1993] AC 334. Furthermore, such a stay may be granted even where the term of the contract on which the claiming party is said to be in breach was a general agreement to refer disputes to ADR: see ***Cable & Wireless plc v IBM United Kingdom Ltd*** [2002] EWHC 2059 (Comm).

16. However, there are two reasons why in this case I consider that it would not be appropriate to grant a stay.

17. First, I accept the submission of Mr Furst QC on behalf of Balfour Beatty that the mediation agreement in the present case is nothing more than an agreement to agree. Unlike, say, the ADR agreement in ***Cable & Wireless,*** it is too uncertain to be enforced by the Court. Putting the point the other way round, it seems to me that it cannot be said that these proceedings have been brought by Balfour Beatty in breach of clauses 39.1 and 39.2 (paragraph 13 above).

18. Secondly, even if I was wrong about that and there was a binding agreement to mediate, I would only stay the claim and the counterclaim for mediation if I concluded that:

(a) The party making the claim and/or the counterclaim was not entitled to summary judgment on that claim and/or counterclaim, i.e., that there was an arguable defence on which the other party had a realistic prospect of success, and

(b) The best way of resolving that dispute was a reference to mediation.

19. If a party is entitled to summary judgment on a claim or a counterclaim, it is because there is no defence to that claim or counterclaim, or at least no defence with a realistic prospect of success. In such circumstances, there is no proper dispute to be referred to mediation, and the party with the unanswerable claim would be entitled to summary judgment. That is of course a reason why, for example, a claimant with an unanswerable claim is not required to go through the pre-action protocol process.

20. If there is a realistic defence to the claim or the counterclaim, then directions have to be given for a trial. But, in those circumstances, depending on the positions taken by the parties, it is not uncommon for the Court to allow a window to encourage the parties to settle their differences by way of mediation or (possibly in this case) adjudication.

21. Thus, so it seems to me, even if there had been a binding agreement to mediate here, I would still have to go on to consider the merits of the claims and counterclaims under CPR Part 24. If I concluded that judgment should be given on either claim or counterclaim under CPR Part 24, I should grant that judgment without further ado. If I did not, I would then ask for the parties' assistance as to the directions I should make as to the best way of resolving any underlying claims, in respect of which I will have found that the defending party has a reasonable prospect of success. For those reasons, therefore, the application for a stay must fail.

D. THE FAILURE TO COMPLY WITH 24PD.2

22. The next threshold point taken by Modus is by reference to 24PD.2, which provides at subparagraph (3):

"The application notice or the evidence contained or referred to in it or served with it must -

(a) identify concisely any point of law or provision in a document on which the applicant relies, and/or

(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates …"

23. At the start of the CPR Part 24 process, Modus took the point that none of the statements served by the Balfour Beatty witnesses contained that necessary statement of belief. By the time of the hearing yesterday, notwithstanding the service of further statements in the last few days, there was still no such express statement. Mr Bowdery submits that, as a result of that basic omission, the Part 24 claims must fail.

24. In response, Mr Furst maintains that, on a proper analysis, the statements make it clear beyond doubt that it is indeed the view of Balfour Beatty's witnesses that there is no defence to their claims and that therefore this point

is, at worst, a technical non-compliance with the Practice Direction. He points to paragraph 24.4.11 of the *White Book*, which provides that: *"The court has general power to rectify matters where there has been an error of procedure such as defects or omissions in the documents supporting an application or a failure to serve documents within the time limits applicable: see rule 3.10 and the commentary thereto."*

CPR rule 3.10 does not define a procedural error, but says that it includes a failure to comply with a rule or a Practice Direction.

25. I agree with Mr Bowdery that the failure here is more than merely technical. It does seem to me that it ought not to have happened. But I consider that I can order Balfour Beatty to make good the omission under rule 3.10 because, on analysis, it is a procedural error rather than something more substantive or sinister.

26. Why do I say that? First, because, on a proper analysis of the evidence provided, each of those who have provided statements on behalf of Balfour Beatty have made it clear that, for the reasons set out in those statements (sometimes at great length), there is no defence to the Balfour Beatty claims. Thus, on analysis the statements comply in substance with PD24, although plainly not in the form required.

27. Secondly, in my view, the bare bones of Balfour Beatty's two applications under CPR Part 24, that is to say the application to enforce the adjudicator's decision and the application for summary judgment for the sum indicated by Modus' agents as due to them in September 2008, are not really susceptible to the sort of detailed analysis in respect of which a statement of belief, of the kind referred to in the Practice Direction, would make any significant difference. These are in many ways utterly standard applications for summary judgment in the TCC. The complexities in this case arise out of Modus' counterclaim rather than Balfour Beatty's two claims.

28. Accordingly, for those reasons, it seems to me that I ought to require Balfour Beatty to provide a short statement from Ms Thomson that does comply in form with PD24.2, but, because the statements in substance deal with the reasons why, on the Balfour Beatty case, there is no defence to their claims, I cannot regard that omission as being fatal to Balfour Beatty's claims. It is, therefore, necessary for me to go on and consider them in detail.

E. THE ENFORCEMENT APPLICATION

E1 Introduction

29. A dispute arose between the parties as to whether a shop front structure and associated glazing for a unit to be leased in the shopping centre to Debenhams was a change to the Employer's Requirements. By a referral notice, dated 8th September 2008, Balfour Beatty referred to adjudication the dispute as to whether it was entitled to be paid extra for this work as a change to the Employer's Requirements and, if so, the sum that was due.

30. The Adjudicator was Mr Paul Jensen. On 2nd October 2008, he published a decision which concluded that the works were a change to the Employer's Requirements and that Balfour Beatty were entitled to be paid £149,292.50 plus VAT within seven days. Neither the sum nor the sums ordered by way of fees have in fact been paid by Modus to Balfour Beatty.

31. It is necessary to refer to the detail of the decision. At paragraph 4 of the decision, the Adjudicator describes the dispute in these terms:

> *"4. The dispute is as to the Claimant's entitlement in principle to payment for the design and construction of a shop front and glazing to the internal mall entrance of Debenhams in Unit M4. The Claimant also claims payment of the prime cost of £149,292.50 plus VAT, being the costs of works undertaken by its subcontractors Van Dan & Kinders, plus interest and reserving its right to pursue other costs in due course. The Claimant also claims interest and reimbursement of the appointment fee."*

The decision then goes on to say at paragraph 5 that "*this is not a reasoned decision*".

32. Paragraph 8 is the first paragraph of a lengthy section of the decision, running in total to seven pages, entitled "*Notes to my Decision*". Paragraph 8 says:

> *"I have confined my notes to the essentials only, but nevertheless I have carefully considered all the evidence and submissions, although not specifically referred to in this Decision."*

Thereafter at paragraphs 9 to 19 of these notes, across five pages, the Adjudicator explains why he has concluded that, as a matter of construction, the work at Debenhams was a change to the employer's requirements. He does this by looking at a number of the contract drawings, the agreement for lease and the executed contract itself. On his interpretation of those documents, the Adjudicator concludes at paragraph 19 of those notes that: *"I conclude therefore that the provision of the internal shop front to Debenhams is not included within the Claimant's obligations and is not deemed to be included within the Contract Sum. The Claimant has, as instructed, carried out the work and therefore is entitled to additional payment as a Change."*

33. Thereafter, at paragraph 20, he identifies the sum due and, at paragraphs 21 and 22, he deals with matters relating to interest. He required the sum to be paid by Modus to Balfour Beatty within seven days.

E2 The Starting Point

34. The starting point in this, as in any application to enforce the decision of an adjudicator, is to note the overriding principle that the Court will always endeavour to enforce such decisions. As the parties have agreed, the most authoritative statement of that approach can be found in the decision of the Court of Appeal in ***Carillion Construction Limited v Devonport Royal Dockyard Limited*** [2006] BLR 15, at paragraphs 85 to 87 of the judgment of Chadwick LJ. The relevant parts are these:

'85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator …

86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice" … The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions …

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.'

35. Modus take three principal points as to the alleged invalidity of the Adjudicator's decision. First, they say that, contrary to the contract, it was not a reasoned decision. Secondly, they say that the Adjudicator exceeded his jurisdiction and/or breached the rules of natural justice because he failed to have regard to a particular point that they raised. Thirdly, they say that the Adjudicator exceeded his jurisdiction and/or breached the rules of natural justice because he failed to give Modus an opportunity to put in a rejoinder to Balfour Beatty's reply. I deal with each of those points below.

E3 A Reasoned Decision

36. In ***Gillies Ramsay Diamond & Ors v PJW Enterprises Limited*** [2003] BLR 48, Clerk LJ dealt with the principles relating to the adjudicator's obligation to give reasons. He said, at paragraph 31:

*"31. In my opinion, a challenge to the intelligibility of stated reasons can succeed only if the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them. In such a case, the decision is not supported by any reasons at all and on that account is invalid (**Save Britain's Heritage v No 1 Poultry Ltd** [1999] 1 WLR 153). In my view, that cannot be said in this case. The adjudicator has understood what questions he had to answer. He has reached certain conclusions in law on those questions which, however erroneous, are at least comprehensible. Even if the question is one of the adequacy of the reasons, I am of the opinion that the reasons are sufficient to show that the adjudicator has dealt with the issues remitted to him and to show what his conclusions are on each …"*

37. In ***Carillion*** at first instance, [2005] BLR 310 at page 325, Jackson J (as he then was) said:

*"5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by Lord Justice Clerk in **Gillies Ramsay**, that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice."*

That passage was cited without comment by the Court of Appeal.

38. As noted above, clause 39A.5.4 as amended required a reasoned decision from the Adjudicator. That provision was added by way of homemade amendment and was different to the provision in the standard form, which provided that no reasons were required. It may be that the Adjudicator did not find the amendment buried away in the vast tranche of paper that made up this contract, and I am bound to say that that is an omission with which I have some sympathy.

39. Mr Bowdery maintains that Modus contracted with Balfour Beatty on the basis that, if there was an adjudication, they would receive a reasoned decision and that, because the Adjudicator had said that his was not a reasoned decision, it could not be a decision under the contract, and was therefore unenforceable. As Mr Bowdery put it, his clients had contracted for a bag of apples but had got a bag of pears.

40. It seems to me that, in order to test that submission, I have to look at the detail of the decision itself: is it in substance something different to that for which the parties had contracted? The Adjudicator may have said that it was not a reasoned decision, but that cannot on its own be conclusive. If there were, for instance, no notes at all, or no explanation of how and why he had reached the decision that he did, the Adjudicator's description would be correct; but if there were notes which, on analysis, explained his decision then, notwithstanding what he himself had said about the absence of reasons, his decision would comply with the contract.

41. In my judgment, the decision of 8th October 2008 was a reasoned decision in accordance with the contract. It contains many pages of reasons. Those pages explain how and why the Adjudicator concluded that the works to the shop front amounted to a change to the employer's requirements. It seems to me that there was nothing of significance omitted and, far from being unintelligible, the decision was, in my view, clear and cogent. I note that in this context, Modus did not seek additional reasons or indeed clarification of any part of the notes.

42. Therefore, I conclude that the Adjudicator did provide reasons for his decision and that the reasons comply with the principles set out in ***Gillies Ramsay*** and ***Carillion.*** On a fair consideration of that decision as a whole, I do not believe that it is possible to reach any other conclusion.

43. Finally on this point, just picking up from the paragraph that I have already cited from the judgment of Jackson J in ***Carillion,*** I note that Modus do not say that they have suffered prejudice as a result of the Adjudicator's decision being in the form that it is. In line with the Court of Appeal authorities on enforcement generally, that would lead me to conclude that such an omission is also fatal to this way of attacking the Adjudicator's decision.

E4 The Alleged Omission

44. ***Gillies Ramsay*** is also of assistance in dealing with what an adjudicator is obliged to do when providing a decision on the issues before him. At paragraphs 27 and 28, Clerk LJ said:

> *"27. Counsel for the petitioners submitted that the adjudicator's failure to discuss these references in his decision indicated that he had failed to take them into account. Since the first two references were critical to the issue of extension of time, and since the third set out the legal principles on which professional negligence was to be judged, his failure to explain how he had applied them invalidated the decision.*
>
> *28. I agree with the decision of the Lord Ordinary on this point. Assuming that the petitioners' objection is relevant, I consider that it has not been made out. Although the adjudicator does not mention the references that were given to him, it would be wrong to conclude from that that he failed to take them into account. It was his duty to consider any relevant information submitted to him by either party … and it should be assumed that he did so unless his decision and his reasons suggest otherwise. They do not. On the contrary, in the appendix to his statement of reasons … he indicates that he took the references into account. Whether or not he understood their significance is another matter."*

45. I consider that there is also an analogy to be drawn with those arbitration cases where a defeated party seeks to set aside the award under section 68 of the **Arbitration Act 1996** on the ground that the arbitral tribunal failed to deal with a particular argument advanced before it. It has been repeatedly said that an arbitrator does not have to decide each and every point argued, but only those that are genuinely *'en route'* to deciding the underlying dispute between the parties: see ***Checkpoint Ltd v Strathclyde Pension Fund*** [2003] EWCA (Civ) 84; ***World Trade Corporation Ltd v C Czarnikow Sugar Ltd*** [2004] 2 AER (Comm).

46. Modus' complaint under this head is that the Adjudicator failed to consider the secondary defence that they raised in their response document in the adjudication. That point was to this effect, that if they were wrong and Balfour Beatty were entitled to be paid extra for the work to the shop front for Debenhams, that payment was not due by way of an interim payment but through the final account process. This argument was advanced on the basis that Balfour Beatty were in breach of SC6 for failing to obtain estimates etc., in accordance with the procedure set out there (paragraph 8 above). Balfour Beatty's response in the adjudication was to argue that, since Modus had failed to issue a clear and unequivocal change instruction, they could not comply with that procedure in any event.

47. On a consideration of the Adjudicator's decision, I reject Modus' criticism of the Adjudicator on this ground. It seems to me that he decided that Balfour Beatty were entitled to be paid for this change now, not at the end of the final account process. He, therefore, decided the issue as to when the sum was to be paid. He said it had to be paid in seven days. He was not obliged to set out *in extenso* his response to every last element of Modus' case; nor was he obliged to give detailed reasons for every part of his conclusion.

48. Further, for the reasons I have already indicated, the Adjudicator took all of these matters into account. I have already referred to paragraph 8 of his decision (at paragraph 32 above). That makes plain that the Adjudicator considered every point raised by the parties, whether or not he had dealt with those points expressly in his decision. There is nothing to suggest that the Adjudicator did not do what he said he had done in paragraph 8 of his decision and, therefore, nothing to demonstrate that this Adjudicator was in a different position to the adjudicator whose decision was the subject of the remarks by Clerk LJ in ***Gillies Ramsay.*** It seems to me that the Adjudicator took into account all the relevant points, including this secondary argument.

49. To the extent that this point was put on the basis of a breach of natural justice (because the secondary argument was ignored by the Adjudicator), I reject that criticism on the same grounds. It seems to me clear that the Adjudicator dealt with and decided the point and, therefore, there can be no breach of natural justice.

50. Finally on this point, I ought to add that, on a consideration of the papers, in my view the Adjudicator was right to reject this argument. It seems to me clear that SC6 is predicated on the basis that the instruction issued by the employer is clearly and obviously a change instruction, and that it is agreed by the parties as being a change instruction. It is only then that the prompt timetable for obtaining and agreeing estimates can operate satisfactorily. If the employer is denying that he has issued a change instruction in the first place (as happened here), then SC6 cannot operate as envisaged by the contract. Thus, on this analysis, any breach was committed by Modus in failing to issue the instruction, and not by Balfour Beatty.

E5 The Absence of a Rejoinder

51. It is settled law that within the limitations imposed by the adjudication process (and, of course, in reality that means the very tight timetable in which an adjudicator has to operate) an adjudicator is obliged to comply with the rules of natural justice: see ***Glencot Development and Design Co Ltd v Ben Barratt & Sons (Contractors) Ltd*** [2001] BLR 207.

52. In addition, a mere breach of the rules of natural justice will not – without more - be enough to avoid enforcement of the Adjudicator's decision. The breach must be shown to be of significance or causative of potential prejudice: see ***Carillion*** (above) and ***Kier Regional Ltd (t/a Wallis) v City & General (Holborn) Ltd*** [2006] EWHC 848 (TCC).

53. The provision of late material by a claiming party can sometimes give rise to an arguable breach of the rules of natural justice: see ***London & Amsterdam Properties Ltd v Waterman Partnership Ltd*** [2004] BLR 179 and ***McAlpine PPS Pipeline Systems Joint Venture v Transco plc*** TCC (Unreported) 12th May 2004. Such a finding depends on the information concerned; the lateness of that material; whether it can properly be described as an *"ambush"* as in ***London & Amsterdam***; the surrounding facts; and, most importantly, the adjudicator's obligation to comply with the 28 or 42 day timetable.

54. Modus' contention in relation to this aspect of the dispute was that the Adjudicator wrongly considered Balfour Beatty's reply, without seeking a rejoinder from Modus. On this point, I am bound to say that I consider that Modus' submission is untenable.

55. On 5th September 2008, the Adjudicator set out a timetable for the adjudication and provided it to the parties. As is common, that timetable allowed for a reply from Balfour Beatty, the referring party. The reply had to be served on 29th September 2008. The timetable made no allowance for a further response or a rejoinder to that reply from Modus, the responding party. Modus did not query or challenge that timetable and at no time during the currency of the adjudication did they ask the Adjudicator for permission to serve any such rejoinder. It seems to me that, on that ground alone, this point is now not open to Modus.

56. Further and in any event, I accept Mr Furst's submission that the point is also hopeless because Modus have failed to identify any significant new points allegedly raised by Balfour Beatty for the first time in the reply; they have failed to say what new points they would have included in any rejoinder; and they have failed to identify how, if at all, such a rejoinder would or could have had any effect on the outcome of the adjudication. On the contrary, the evidence suggests that the material in the Balfour Beatty reply was principally there because, although Balfour Beatty themselves considered it to be irrelevant, they were concerned to ensure that, if the Adjudicator looked at some of these background facts, he took their case into account.

57. On that basis, therefore, far from being an ambush, what happened was entirely predictable; indeed, it had been what the Adjudicator himself had ordered. There was no question of prejudice. Accordingly, I reject in its entirety this criticism of the Adjudicator.

E6 The Effect of the Inclusion of the Sum in a Subsequent Valuation

58. During the course of his oral submissions, Mr Bowdery made the point that, following the Adjudicator's decision, the sum that he awarded to Balfour Beatty was included in the subsequent valuation under the contract. Against that valuation there has been a valid withholding notice served by Modus. Therefore, Mr Bowdery submitted that Balfour Beatty had elected to deal with the result of the adjudication in that particular way and they could not now claim summary judgment as a way of avoiding the consequences of that valid withholding notice.

59. I do not need to address the interesting principle to which this argument might give rise, because I am satisfied that on the facts Balfour Beatty made no such election. It is plain to me, having been taken very carefully through the documents by Mr Bowdery that, in dealing with valuation certificate 30, both Reay and Co and Gleeds proposed to include the amount awarded by the Adjudicator in the valuation certificate, and it was only when they had done that that Balfour Beatty produced an invoice in the sum identified. It seems to me that was entirely reasonable, since it was at least one way in which Balfour Beatty could make a claim for the money due pursuant to the adjudicator's decision. It was manifestly not an election by Balfour Beatty, nor a waiver of their right to be paid the sum identified by the Adjudicator in accordance with his decision, which stipulated payment within seven days.

E7 Modus' Acceptance of the Validity of the Decision/Waiver

60. Finally, for completeness, I should note that Mr Furst also put forward what he said was a complete answer to the points raised by Modus on the enforcement. This was by reference to the letter of 28th October 2008, which set out Modus' claim for over £2 million by way of liquidated damages, but which appeared to suggest that the sums due under the Adjudicator's decision could be set off against that amount by Balfour Beatty. This, he said, acknowledged the validity of that decision and Modus could not now resile from that position.

61. I accept that it may be arguable that the letter of 28th October was an acknowledgment of the validity of the Adjudicator's decision. However, I would be reluctant to find, certainly without more, that the letter prevented Modus from subsequently raising any appropriate jurisdiction/fairness points on that decision. Of course, I have been through the points relied on by Modus and I have, for the reasons that I have given, rejected each of them. Therefore, there is no need for me to make any finding as to the effect of the letter of 28th October, and in the circumstances, I decline to do so.

E8 Conclusion on Enforcement

62. Each of the three principal points raised by Modus in relation to the Adjudicator's decision are rejected for the reasons that I have given. This was a valid and reasoned Adjudicator's decision. The election point is also

unarguable for the reasons that I have given. In accordance with the authorities, therefore, the Adjudicator's decision must be enforced by the Court by way of summary judgment. I, therefore, give judgment under CPR Part 24 for the total sum of **£183,492**, inclusive of £2,633.68 by way of interest.

F. THE CLAIM BASED ON VALUATION/CERTIFICATE 29

F1. The Facts

63. On 5th September 2008, Balfour Beatty sent to Gleeds their application for payment for valuation No. 29. It appears that the application had already been discussed with Gleeds.

64. On 10th September 2008, Gleeds recommended to Reay & Co the payment of £830,864 plus VAT by way of valuation 29. They also wrote to inform Balfour Beatty of that recommendation and enclosed a valuation in that sum.

65. Also on 10th September 2008, Reay & Co wrote to Modus and to Mr Emslie of Balfour Beatty enclosing a document entitled "*Certificate for Payment*". It said that it referred to "*Instalment 29*". It was in the recommended sum of £830,864 plus VAT.

66. There is no dispute that clause 30.3.6 required payment within 21 days of the original application. Thus, as Balfour Beatty's valuation document had made clear on its face, the sum was due to be paid to them by 26th September 2008.

67. The sum due on certificate for payment 29, including VAT, was £976,275.20. It is agreed, in particular by reference to the evidence of Mr O'Kane, that there was no withholding notice served by Modus in respect of this amount and/or generally in respect of valuation/certificate 29. Accordingly, on the face of it, this is a sum to which Balfour Beatty would be entitled by way of CPR Part 24.

F2. The Contract Argument

68. Modus deny that Balfour Beatty are entitled to summary judgment for that amount. They say that, because there was no withholding notice under clause 30.3.4, clause 30.3.5 applies to certificate/valuation 29. They say that this only entitled Balfour Beatty to the amount "*properly due*" and that, notwithstanding the absence of the withholding notice, they are entitled to rely on their set-off and counterclaim in respect of liquidated damages in the amount of £2 million-odd. On this basis, Modus conclude that no sum is properly due to Balfour Beatty by way of summary judgment. There are, in my view, a number of reasons why that argument is unsound and I set them out below.

69. The first reason why I consider that Modus' argument must fail concerns clause 30.3.3. That clause required Modus to give a written notice specifying the amount of the proposed payment. That is precisely what Modus did. Reay & Co, their agents, sent a certificate for payment identifying the sum of £830,864 plus VAT as the amount that Modus proposed to pay. Moreover, that was how this contract had been operated from the outset.

70. On that basis, therefore, clause 30.3.5 is of no relevance. That clause only applies if there was no notice under clause 30.3.3. Here there plainly was such a notice. In those circumstances, clause 30.3.6 applies and, as I have indicated, the sum would therefore fall due to be paid no later than 26th September 2008.

71. Secondly, the effect of Modus' interpretation of the contract, and clause 30.3.5 in particular, would allow them to avoid the consequences of their failure to serve a withholding notice under clause 30.3.4. They accept that they have not served any such notice, but they maintain that they can set off the entirety of their counterclaim despite the absence of a withholding notice at the proper time.

72. I consider that it would be contrary to the whole contractual scheme, which is itself derived from the **Housing Grants, Construction and Regeneration Act 1996**, if an employer could flout the withholding notice régime so blatantly. Indeed, it would mean that the JCT Standard Form did not comply with the 1996 Act on this fundamental issue. In my judgment, a proper construction of the contract avoids any such possibility and gives effect to the 1996 Act.

73. Thirdly, even assuming that amended clause 30.3.5 does apply to this payment, I accept Mr Furst's submission that it makes no difference. The words (as amended) are "*properly due in the Application for Interim Payment*". What is the amount properly due in the application for interim payment? The answer must be the amount shown in the application and in the subsequent certificate. That is the amount that both Reay & Co and Gleeds (Modus' agents for these purposes) have agreed and certified as being due to Balfour Beatty. Therefore, it seems to me that Modus cannot now contend that any other (lesser) sum is "*properly due in the application for interim payment*".

74. Fourthly, on this point, it seems to me that a decision that a sum which has been certified by the employer's agent as being due, and in respect of which there is no withholding notice, should now be paid by the employer to the contractor without recourse to cross-claims or other argument, is entirely consistent with the approach of the Court of Appeal in ***Rupert Morgan Building Services (LLC) Ltd v David & Harriet Jervis*** [2004] BLR 18.

F3. Was Valuation/Certificate 29 Superseded?

75. The final point taken by Modus in relation to this aspect of the dispute is that valuation/certificate 29 was superseded in such a way that Balfour Beatty have waived their entitlement to the sum certified by Reay & Co on 10th September 2008. This argument centres on events that occurred in respect of valuation 30.

76. By the end of September 2008, valuation/certificate 29 had not been paid and was overdue. Balfour Beatty chased for the money. It was not suggested by Modus that the sum was not due. Having considered the emails and their responses to the chasing emails from Balfour Beatty, I observe that the responses were of the *"there's a cheque in the post"* variety.

77. At the same time, on 13th October 2008, Balfour Beatty sent Gleeds their next application. Although it was wrongly headed "*Application for Payment for Valuation 29*", the document itself, just a little bit further down the page, made clear that it was "*Valuation No. 30*" dated 13th October 2008, with a payment clearance date of 4th November 2008. On the face of the document, nobody could have thought that it was anything other than the next application for payment.

78. It seems to me clear on the evidence that that was precisely how application 30 was treated by those who dealt with it on behalf of Modus. Moreover, Balfour Beatty continued to deal with application 30 at the same time as chasing payment on valuation/certificate 29. Their email of 17th October 2008 to Gleeds makes plain that these were separate and cumulative applications. There was no question of the claim under valuation/certificate 29 (which by this time was overdue) being waived or somehow swallowed up in valuation 30.

79. It is true, as Mr Bowdery has pointed out, that there was some muddle involving valuation 30 subsequently. This was in part due to the wrongful attempt by Reay & Co and Gleeds to use it as a means of incorporating the Adjudicator's decision: see paragraphs 58 and 59 above. It was also partly due to an error as to the sum previously certified, because the non-payment of valuation/certificate 29 created a confusion between what had been previously paid and what had been previously certified. Of course, that muddle was not Balfour Beatty's fault either, and none of this begins to support the suggestion that valuation/certificate 29 had been superseded. It was plain on the face of the document that it had not been superseded at all.

F4. Summary on Interim Certificate 29

80. The sum of £976,265 including VAT was recommended by Gleeds and certified by Reay & Co when both organisations were acting as Modus' agents. There was no withholding notice in respect of that sum. Accordingly, pursuant to the terms of the contract, it was due to be paid no later than 26th September 2008 and the failure on the part of Modus was a clear breach of contract.

81. Accordingly, the sum of £976,265, together with interest in the sum of £18,723 is now due and owing to Balfour Beatty. There can be no defence to that claim and I, therefore, give summary judgment in the total sum of **£994,988** pursuant to CPR Part 24.

G. THE ALLEGED SET-OFF AND COUNTERCLAIM FOR LIQUIDATED DAMAGES

G1. Introduction

82. It is Modus' case that they have a counterclaim for £2,073,300 by way of liquidated damages. It is said that this counterclaim arose when, on 28th October 2008, Modus sent a notice to Balfour Beatty identifying the claim and purporting to set it off against valuation 30 and the Adjudicator's decision. Mr Bowdery submits that, in the absence of any withholding notice from Balfour Beatty, this sum is due to Modus as a debt and that they are entitled to summary judgment accordingly. He maintains that Modus can set off that sum against the sums otherwise due to Balfour Beatty or, even if they cannot set it off, they are still entitled to summary judgment for the full amount, which overtops the sums due to Balfour Beatty by over £1 million.

83. I propose to deal, first, with the set-off point, because that is a relatively short issue of principle. Thereafter, I summarise what I consider to be the relevant factual background in respect of liquidated damages before going on to analyse the Modus claim for summary judgment in a little more detail.

G2. Are Modus Entitled to Set Off Their Counterclaim Against the Sums Due to Balfour Beatty?

84. In ***Balfour Beatty Construction v Serco Limited*** [2004] EWHC 336 (TCC), Jackson J considered some of the authorities concerned with an employer's ability to set off a claim for liquidated damages against sums due pursuant to an adjudicator's decision. He said:

> "*53. I derive two principles of law from the authorities, which are relevant for present purposes.*
>
> *(a) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).*
>
> *(b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.*"

85. Two of the authorities that he considered were decisions of the Court of Appeal. In the first, ***Parsons Plastics (Research & Development) v Purac Ltd*** [2002] BLR 334, the Court of Appeal held that on a proper construction of the settled provisions in that contract, an employer was entitled to set off his counterclaim for liquidated damages against the sums found due by the adjudicator. In the later case of ***Ferson Contractors Ltd v Levolux AT Ltd*** [2003] BLR 118, the Court of Appeal reached the opposite conclusion on a different set of contractual provisions.

86. All of these authorities were considered by Ramsey J in ***William Verry Limited v The Mayor and Burgesses of the London Borough of Camden*** [2006] EWHC 761 (TCC). In that case, the contractual provisions as to compliance with the adjudicator's decision were precisely the same as they are here, although the numbering was different. At paragraph 28 of his judgment, Ramsey J concluded that there was generally an exclusion of the right to set-off from an adjudicator's decision and that, certainly on the terms of the contract in that case, there was no such right.

87. I respectfully agree with and adopt the approach of Ramsey J in ***Verry.*** Therefore, there could be no set-off against the Adjudicator's decision in the present case.

88. In addition, I consider that, as a matter of construction of the contract, there can be no set-off against the sum due by way of clause 30.3, for the reasons which I have previously noted. The absence of a withholding notice is fatal to the alleged set-off against that amount.

89. Therefore, I conclude that Modus cannot set off their counterclaim against the sums otherwise due to Balfour Beatty. But whether or not Modus are entitled to summary judgment on the counterclaim is a different question and the final issue for me to determine on these applications.

G3. Are Modus Entitled to Summary Judgment on Their Counterclaim?

G3.1 The Relevant Facts

90. There is a good deal of factual material in the statements and I have done my best to summarise that material below. It seems to me that delays were a feature of this contract from a relatively early stage. By a letter from Reay & Co of 21st May 2007, they indicated that there was an agreement that, amongst other things, Balfour Beatty "*shall have no recourse for extensions of time based on the contents of the letters as listed above or any other currently known event*". As I understand it, this approach remains one of the bases for the Reay & Co attitude to extensions of time. However, as the later correspondence made plain, this was not expressly agreed by Balfour Beatty and the correspondence appears to peter out without any express agreement on that point at all.

91. It may be that matters took their own course because, certainly by February 2008, there were different but continuing difficulties in relation to delay. There was apparently a meeting in February 2008, when a schedule of sectional completion dates and available fit-out periods for each unit was discussed and agreed. I note that Mr Emslie of Balfour Beatty thought that he had reached what he calls a *"gentlemen's agreement*" to the effect that, provided Balfour Beatty were able to hand over the units in time to meet Modus' letting requirements, Modus would not deduct liquidated damages. However, it is not argued by Mr Furst that this agreement amounted to a waiver; and one can see that as a matter of law it would be exceedingly difficult to advance such a contention. However, the point made by Mr Emslie, that it was the fit-out dates that were important to the parties as a matter of practicality, seems to me to be of some relevance to the background to this dispute now.

92. At the project meetings from March 2008 onwards, it appears that Modus' letting requirements were indeed used as the means for gauging progress. It was Balfour Beatty's case that, in this spirit of co-operation, the tenants' required access dates were substantially met. It is also clear that some were not and that, in any event, some of these dates were some time after the completion dates (or the extended completion dates) of the individual sections.

93. On 17th March 2008, Balfour Beatty submitted to Reay & Co what Mr Emslie called a "c*ompendious submission*" in relation to extensions of time. It is a relatively detailed document. The basis of Balfour Beatty's submission was that, on their analysis, there had been a great many events for which Modus were responsible and which had caused critical delay to the works in various sections. I note that a large number of these relevant events were, rather like the shop front, said to be changes to the Employer's Requirements.

94. Reay & Co responded on 16th May 2008. Some of the claimed extensions of time were granted. Many others were not. Requests for further information were made by Reay & Co. The letter indeed ended with a request by Reay that Balfour Beatty review and respond to their analysis.

95. There were further discussions on 11th and 25th June 2008. On the latter occasion, it was agreed that Balfour Beatty would produce a further submission dealing with a number of the important matters which they said were changes and which Reay & Co said were not.

96. On 11th July 2008, pursuant to a specific request, Balfour Beatty sent further information to Reay & Co in relation to the claim in respect of section 28. According to Reay & Co's letters of 13th August and 22nd October 2008, that claim is still being assessed.

97. Following handover of the project on 28th July, Balfour Beatty apparently began work on their review of the claims for extensions of time. Mr Emslie refers to some draft documents to that effect and attaches them to his first statement. It is, however, right to say that no further or better claims were provided to Reay & Co during this period. Nevertheless, on 8th October, Balfour Beatty wrote to Reay & Co seeking a review of the extensions of time previously granted and pointing out the delay impact of the Adjudicator's decision in respect of the Debenham's shop front.

98. On 15th October 2008, Balfour Beatty complained about the absence of any further correspondence in respect of extensions of time after 16th May. The letter went on: "*We are preparing further particulars of our claim for extensions of time for each section and we will submit them presently. However, you have sufficient detail to make interim awards.*"

99. Reay & Co's response of 22nd October 2008 made plain that, as they saw it, the ball was firmly in Balfour Beatty's Court. They said: *"Until we receive further and better particulars from you with respect to the claims made within your letter of 17th March 2008, we are not able to proceed with any awards.*"

100. Mr Emslie invited Reay & Co to review their awards on 24th October 2008. However, no further particulars have yet been provided by Balfour Beatty. On both sides, therefore, it might be said that the position as to delay is ongoing.

101. On the basis of that summary, I reach the following conclusions:

(a) Many of the 33 sections appeared to be completed late which would *prima facie* give rise to a claim for liquidated damages on the part of Modus.

(b) The reasons for those delays have been the subject of a large amount of correspondence and discussions between the parties. There are ongoing disputes as to Balfour Beatty's entitlement to extensions of time.

(c) Reay & Co are, in my judgment, right to say that the onus is on Balfour Beatty to produce further particulars in relation to their claims for extensions of time. But Reay & Co also appear to accept that, once those particulars have been provided, they will have to review the whole question of Balfour Beatty's entitlement to extensions of time and, therefore, Modus' entitlement to liquidated damages.

(d) Accordingly, it seems to me that there are ongoing disputes on this contract as to extensions of time and the fixing of the completion dates for the 33 sections. In an ordinary case, those disputes would be dealt with in the way chosen by the parties under this contract, namely mediation, adjudication or litigation.

G3.2 The Contract

102. Notwithstanding the factual background which I have just summarised, it is Modus' case that there can be no dispute in respect of extensions of time and therefore liquidated damages, and that Modus are entitled to summary judgment on their claim. That submission depends on two specific aspects of this contract upon which Modus seek to rely.

103. First, Mr Bowdery points to clause 24.2.1, which I have set out in paragraph 9(c) above. He says that notice pursuant to that clause was provided by way of the letter of 28th October 2008. That letter required payment of the sums due by way of liquidated damages as a debt, and that they had been calculated by reference to the period between the completion dates, as presently fixed by Reay & Co, and the date of practical completion.

104. Secondly, he says that Balfour Beatty could have served a withholding notice in respect of this claim for a debt but they failed to do so. Therefore, he says that the sum claimed in the notice is due and owing in any event. Given the absence of any contractual mechanism for the final date for payment of any sum due under clause 24.2.1, and the absence of any withholding notice mechanism either, he submits that the Scheme for Construction Contracts must apply and that the sum of £2,073,300 fell due on 28th October 2008 (because that is when it was claimed) with a final date for payment 17 days later, namely 14th November 2008. This means that, if the scheme applied, a withholding notice had to be served seven days before that on 7th November 2008. In the absence of such a notice, on this argument, there is no defence to the claim.

G3.3 The Scheme

105. It is, I think, appropriate to take the second point first. Does the Scheme for Construction Contracts apply to sums claimed by the employer by way of liquidated damages pursuant to clause 24.2.1 of the JCT Standard Form? I have concluded that it does not.

106. The whole purpose of Part II of the 1996 Act and the Scheme for Construction Contracts (set out in Statutory Instrument 1998 No. 649) was to improve cashflow for contractors and subcontractors. That was the principal concern of the Latham Report, which gave rise to both the Act and the Scheme. Not only is there nothing specific in either the Act or the Scheme about payments to the employer, there are many parts of both which I consider to be inconsistent with the construction for which Mr Bowdery contends.

107. For example, sections 109, 110 and 111 of the Act deal with stage payments: when they should be paid and the régime of withholding notices. They are aimed at ensuring that the party carrying out the works receives proper stage payments. Section 112 allows the contractor carrying out the work to suspend work if the sums are not paid. Moreover, section 112(4) says that the period of suspension has to be discounted in considering questions of delay. I accept, therefore, the submission of Mr Furst that that can only make sense if it is the contractor, the person doing the work and being paid for doing the work, who is the party suspending the work if he is not paid for doing it. It is impossible to read that section of the Act as applying to payments and suspensions on the part of the employer.

108. A consideration of the Scheme wholly confirms that interpretation. Part II of the Scheme deals with stage payments. Paragraphs 5, 6 and 7 provide for when various stage payments and indeed final payments should be made. The usual régime is for payments to be made 30 days following completion of the work or "the *making of a claim by the payee*". The latter is defined as *"a written notice given by the party carrying out work under a construction contract"*. Therefore, it seems to me that neither of those two trigger dates can apply to a claim by the employer, who is *not* carrying out any work at all.

109. Therefore, I conclude that neither the Act nor the Scheme applies to claims by employers for liquidated damages. It seems that that must also be the view of the JCT because, although the standard form has been amended so as to ensure that the provisions dealing with interim and final payments to the contractor, withholding notices and the like, comply with the Act and Scheme, there are no similar amendments to clause 24.

G3.4 Clause 24

110. For the reasons that I have given, I reject the submission that the payment of withholding notice provisions of the scheme apply to clause 24 of the JCT Standard Form. But that is not the end of the debate, because Mr Bowdery then reverts to the first point noted in paragraph 103 above to the effect that, since the employer's agent has fixed the completion dates, there can be no argument but that the sums in the letter of 28th October which rely on those dates are due as a debt. In this regard, Mr Bowdery relies on the fact that it is very common for employers to deduct liquidated damages calculated in this way from sums that would otherwise be due to the contractor. He says that, in those circumstances, for the contractor it is a case of *'pay now and adjudicate later'*. He also says that

it would be wrong and unfair if an employer's entitlement to liquidated damages was met at the last minute by a claim for an extension of time.

111. On the face of it, this is an argument with some attraction. Employers do habitually deduct liquidated damages in the circumstances that he has described. Moreover, clause 24 expressly makes use of the word *"debt"*, which might suggest some form of immediate payment. But it seems to me that, on analysis, if the completion dates fixed by the employer's agent are matters which are the subject of a bona fide dispute, then it cannot be said that the employer is entitled to summary judgment for liquidated damages calculated in reliance upon those (disputed) dates. Contrary to Mr Bowdery's submission, in such circumstances, clause 24 was not a requirement that Balfour Beatty pay, as he put it, "*on demand*".

112. The definition of the *"completion date*" in the contract is "*the date fixed by the contract as extended (if appropriate) by the employer's agent"*. The employer's agent's fixture of the relevant date or dates is an important part of the operation of the contractual machinery. But it seems to me that the dates so fixed cannot automatically be regarded as binding for the purposes of CPR Part 24. That would depend on whether or not the contractor had a genuine claim for an extension of time which had at least a realistic prospect of success. There is nothing in the contract which would support the proposition that, notwithstanding disputes as a matter of fact relating to extensions of time, the employer would be entitled to recover sums by way of liquidated damages as if those disputes did not exist. Neither is there any authority to support that proposition. It seems to me that it would be contrary to the ordinary rules applicable to CPR Part 24. Absent any particular requirements of the 1996 Act and the Scheme (and on this basis, of course, neither are applicable), the only issue is whether, on the evidence, there is a dispute between the parties as to extensions of time (and therefore liquidated damages) on which Balfour Beatty have at least a realistic prospect of success.

113. When analysed in that way, the answer to the problem becomes clear. As I have set out in paragraphs 90 to 101 above, I have concluded that there are bona fide disputes in respect of extensions of time (and therefore liquidated damages) on which Balfour Beatty have a realistic prospect of success. That therefore means that Modus are not entitled to summary judgment under CPR Part 24 on their counterclaim for liquidated damages.

G3.5 Other Matters

114. On the basis of my analysis, it is unnecessary for me to consider in any detail the other matters raised by Mr Furst in defence of the liquidated damages claim. It is sufficient to say that, in my judgment, there are arguable issues under these heads. They are:
    (a) The existence of some sections of work for which extensions of time have been granted, which superseded previous certificates of non-completion and for which no new certificates have been issued. The absence of such new certificates is fatal to these claim: see most recently ***Reinwood v L Brown & Sons Ltd*** [2008] BLR 219.
    (b) The non-service of a number of certificates of non-completion, possibly relating to as many of 10 of the sections.
    (c) Sections 34 to 37, for which a claim is made in the letter of 28th October but which were apparently not recognised by the contract itself.
    (d) Claims for some sections have been rounded up, i.e., 5.2 weeks has become 6 weeks when, according to the contract, the liquidated damages have to be pro rata'd.
    (e) The claim in respect of at least one section was accepted by Mr Parr as being erroneous.

115. It does not appear that these various issues could give rise to a defence to the entirety of the £2 million-odd. They are issues which, had I formed a view favourable to Modus on the point of principle arising out of the counterclaim, I might have required the parties to go away and consider further, so as to identify what, if anything, survived the arguability of those points. However, since I have found against Modus on the point of principle, it is sufficient for me simply to identify that the matters I have listed above do give rise to arguable issues, the quantum of which is unclear.

G3.6 Summary on the Counterclaim

116. For the reasons set out above, I conclude that there are triable issues in respect of the counterclaim and that it would not be appropriate to grant summary judgment. I am not persuaded that the issues would take particularly long to try out and, therefore, it would be for the parties to decide whether they wanted a stay of proceedings so as to mediate or adjudicate on those issues, or for the Court to go on to give directions for a relatively prompt trial.

H. SUMMARY

117. For the reasons set out at Section E above, the Adjudicator's decision should be enforced. I, therefore, give summary judgment to Balfour Beatty in the sum of £183,492, including interest.

118. For the reasons set out at Section F above, the sum valued and certified by the employer's agents in valuation/certificate number 29 should be paid forthwith. I, therefore, give summary judgment to Balfour Beatty in the sum of £994,988, including interest. That makes a total of **£1,178,480.**

119. For the reasons set out at Section G above, I consider that the claim for liquidated damages is the subject of a bona fide dispute on which Balfour Beatty have a realistic prospect of success. There is no contractual or other reason why or how the Court should or could ignore that dispute and give summary judgment on the sum claimed. It will be for the parties to decide whether they want that dispute to be dealt with by way of mediation, adjudication or litigation.

Mr Stephen Furst QC and Mr Piers Stansfield (instructed by McGrigors) for the Claimant.
Mr Martin Bowdery QC (instructed by DWF) for the Defendant.