Neutral Citation Number: [2022] EWCA Civ 153

Case No: A1/2021/1454

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT
MR ROGER TER HAAR QC (Sitting as Deputy High Court Judge)
[201] EWHC 1337 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2022

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE COULSON
and
LORD JUSTICE ARNOLD

- -

Between :

Steve Ward Services (UK) Limited	**Appellant**
- and -	
Davies & Davies Associates Limited	**Respondent**

- -
- -

James Bowling (instructed by **Costigan King**) for the **Appellant**
Nigel Davies appeared in person for the **Respondent**

Hearing Date : 25 January 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII and the National Archives. The date and time for hand-down is deemed to be 10.30am on 14 February 2022

LORD JUSTICE COULSON :

1. INTRODUCTION AND PRELIMINARY PROCEDURAL MATTERS

1. The principal issue raised by this appeal concerns the entitlement of an adjudicator to his or her fees, in circumstances where they have resigned from the Referral because they did not consider that they had the necessary jurisdiction to decide the dispute. There is very limited authority on that point, and it has been 8 years since this court last considered an adjudicator's entitlement to fees in circumstances where the Referral did not go as anticipated.

2. Sitting as a deputy high court judge, Mr Roger Ter Haar QC ("the judge") concluded that the adjudicator was entitled to recover his fees of £4,290 plus VAT and interest because he acted honestly and diligently and not in bad faith, and because that was the effect of his terms of appointment, which did not fall foul of the Unfair Contract Terms Act 1977 ("UCTA"). There is no dispute that, under those terms, the claiming party in the adjudication, Steve Ward Services (UK) Limited ("SWS"), was jointly and severally liable to pay any fees found due. That explains their presence in these proceedings as the defendant/appellant.

3. SWS now seek to appeal against the judge's principal conclusions. The adjudicator, Mr Davies (whose firm is the claimant in the proceedings and the respondent to this appeal) represented himself both before the judge and before this court. His Respondent's Notice seeks to challenge the one finding made against him by the judge, namely that his reasons for resignation were "erroneous" and that, in so acting, he went beyond his powers.

4. There were a number of preliminary procedural disputes. In particular, Mr Davies contended that, when the judge gave SWS permission to appeal, he did so on a limited basis and that certain issues now raised by Mr Bowling on behalf of SWS were not encompassed by the permission to appeal that the judge had granted. On behalf of SWS, Mr Bowling submitted that it was quite plain that the permission granted by the judge was not limited, and covered all the matters subsequently raised in his Appellant's Notice.

5. It is an unhappy fact of life that, when the judge below grants permission to appeal (rather than this court), there will often be a dispute about the scope of the appeal for which permission has been granted: see most recently *TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558, at [75]. It is important that, in any order made by the first instance judge granting permission to appeal, the issues on which permission is being granted are expressly spelt out. That is even more important where, as here, there is a cross-appeal and one of the parties is, to all intents and purposes, a litigant in person.

6. That said, it is plain that the judge intended to grant SWS permission to appeal in respect of all the principal issues on which they had lost. Although it is right to say that, in his short judgment granting permission, the judge expressly referred only to the construction of the adjudication agreement and its application to the facts of this case, it is plain that he was not intending to limit the permission to just those points. If he was, he would have said so. Moreover, the order granting permission to appeal was

not limited in any way. Accordingly, I deal below with all the issues raised in the skeleton arguments by both sides, without qualification.

7. In addition, there were separate disputes about the documents to which this court could have regard in deciding this appeal and cross-appeal. I ruled on 17 September 2021 that certain documents could not be relied on by Mr Davies, because they were not before the judge. But all the other disputed documents were before him, and were therefore properly admissible on the appeal. I note, however, that some of those documents went to support an entirely new argument, concerned with the construction of Mr Davies' terms of appointment, which Mr Bowling had not advanced before the judge or in his skeleton argument, and which he candidly admitted had occurred to him "last week".

8. In Section 2 below, I set out the relevant facts, including the terms of the contract between SWS and Mr Davies. In Section 3, I identify the judge's main conclusions, and set out the six issues which arise on this appeal. Thereafter, in Sections 4 – 9, I address each of those issues by reference to the detailed findings of the judge, the relevant law and my analysis of the competing submissions. There is a short summary of my conclusions in Section 10. I regret that the numerous arguments raised by SWS in support of their defence to this modest claim for fees by Mr Davies have made this a longer judgment than I would have wished.

2. THE FACTS

2.1 The Background

9. In late 2019/early 2020, SWS carried out construction works at a restaurant called 'Funky Brownz' in Stanmore in Middlesex ("the property"). Although there was no concluded written contract governing these works, there was a proposed set of contract documents, drawn up in late 2019, on which, at various times, all sides have relied. They referred to "the Client" as Vaishali Patel and "The Contractor" as SWS. Pursuant to clause 1 of the proposed contract:

> "The Client hereby agrees to engage the Contractor to provide the Client with the following services…"

Those services were described as "design, supply and build of Funky Brownz…internal decorations".

10. At the end of the contract where the signature spaces were, the client was described as 'Funky Brownz' and its owner/proprietor was "Miss Vaishali Patel".

11. There was no mention anywhere in the proposed contract of a company called Bhavishya Investment Limited ("BIL"). Their precise relationship with Ms Patel and with Funky Brownz is a little obscure although it appears that, at least in late 2019/early 2020, Ms Patel was a director and the majority shareholder in BIL. It was subsequently said that BIL owned the premises in Stanmore. In any event, invoices for the works were addressed by SWS to BIL and paid by BIL.

12. In 2020, SWS claimed an unpaid balance of £35,974.29 in respect of the works. There was a dispute about defects and then a dispute about access being granted to allow

SWS to rectify any defects notified. The monies remained unpaid and a dispute arose. In April 2020, SWS served a Statutory Demand on BIL, but that was subsequently withdrawn.

13. In September 2020, SWS's solicitors, Costigan King, sought to commence adjudication proceedings against BIL in respect of the unpaid amount of £36,000 odd. Mr Davies was nominated to act as the adjudicator by the RICS and his terms of appointment were sent to both parties. Neither objected to those terms. However, BIL disputed that Mr Davies had the necessary jurisdiction, on the ground that the request for nomination had been made to the RICS before the notice of adjudication ("the Referral") had been issued to BIL. In consequence of that technical objection, Mr Davies resigned as the adjudicator. Mr Davies sent an invoice for fees referrable to the time that he had spent on the adjudication prior to resignation. SWS paid without objection.

14. On 21 September 2020, Costigan King issued BIL with a second notice of adjudication. The Referral was in the same terms as before, and alleged a contract in writing between SWS and BIL. The following day, 22 September, Costigan King made a second request to the RICS for nomination of an adjudicator. On 23 September 2020, Mr Davies was again nominated by the RICS to act as adjudicator. Again, Mr Davies wrote to the parties, by post and by email on 23 September 2020, enclosing the same terms of appointment he had sent the week before. Again, there was no objection to them.

2.2 The Terms of Mr Davies' Appointment

15. Mr Davies' contract of appointment, for what should have been a simple and straightforward adjudication, was made up of four separate documents. They were: i) His letter of 23 September to the parties; ii) His own terms of appointment; iii) The CIC Low Value Dispute Model Adjudication Procedure (1st Edition)("the MAP"); and iv) The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 649), as amended ("the Scheme").

16. What was the position if Mr Davies' letter or his own terms and conditions differed from or contradicted the provisions of the MAP or the Scheme? It seemed to me that, in those circumstances, and subject to UCTA, Mr Davies' letter and his own terms and conditions would take precedence, because they were bespoke terms applicable to this particular adjudication, and so would prevail over the general provisions of the Scheme: for a recent example of the particular overriding the general as a matter of contract construction, see *Towergate Financial (Group) Limited v Hopkinson* [2020] EWHC 984 (Com), and the detailed discussion of this topic in the 7th edition of *'The Interpretation of Contracts'* by Sir Kim Lewison, at 7.46-7.52. Mr Bowling accepted that proposition. He said that, by the same process, the MAP would prevail over the Scheme, although he maintained, rather optimistically, that all the applicable terms said the same thing.

17. Mr Davies' letter of 23 September 2020 confirmed his acceptance of the RICS' nomination to act as the MAP Adjudicator. It referred to his terms of appointment which were attached. The only particular passage in the letter to which our attention was drawn was the first paragraph on the second page which said:

> "The adjudicator is proceeding in accordance with the CIC LVD MAP current as at the date of this letter unless either Party objects in writing within 48 hours of receipt of this letter, in the event of which the said CIC LVD MAP will not apply on an *ab initio* basis (i.e. from the date of the RICS's nomination)."

As I have said, there was no such objection.

18. The terms set out in the Schedule attached to the letter included the following:

> "**Basis of Charge**
>
> "Time related for hours expended working or travelling in connection with the Adjudication including all time up to settlement of any Fee Invoice, which, for the avoidance of doubt, may include any time including Court time, spent securing payment of any fees, expenses and disbursements due.
>
> **Amount of Charge**
>
> The Adjudicator's (Nigel J. Davies) fee shall be charged in accordance with the CIC LVD MAP current as at the date of this letter as set out in Schedule 1 thereto. Should the said CIC LVD MAP cease to apply then the amount of charge for the Adjudicator shall be £325 per hour applied on an *ab initio* basis, i.e. it will be applied from the date of the Adjudicator's nomination by the RICS.
>
> In any event the CIC LVD MAP shall no longer apply from the point at which a CIC LVD MAP Decision is delivered and thereafter the £325 per hour charge shall apply, e.g. in relation to securing unpaid fees, expenses and disbursements due.…
>
> **Frequency of Charge**
>
> A Fee Invoice will be raised and is due for payment 7 days thereafter.
>
> *In the event of the Adjudication ceasing for any reason whatsoever prior to a Decision being reached, a Fee Invoice will be raised immediately and is due for payment 7 days after the date of the Invoice.*
>
> In the event of any invoice not being settled as stated an additional charge may be raised for interest charges, which charges will be calculated at the rate of 2.5% per calendar month or pro-rata any part thereof, for the period between the date of invoice and the date of payment in full of that invoice.
>
> **Miscellaneous Provisions:**
>
> 1. *The Parties agree jointly and severally to pay the Adjudicator's fees and expenses as set out in this Schedule. Save for any act of bad faith by the Adjudicator, the Adjudicator shall also be entitled to payment of his fees and expenses in the event that the Decision is not delivered and/or proves unenforceable.…*
>
> 3. The Parties acknowledge that the Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator (whether in negligence or otherwise) unless the act or

> omission is in bad faith, and any employee or agent of the Adjudicator shall be similarly protected from liability.
>
> 4. The Adjudicator is appointed to determine the dispute or disputes between the Parties and his decision may not be relied upon by third parties, to whom he shall owe no duty of care…."
>
> (Emphasis supplied)

19. Mr Bowling spent some time on the provisions of the MAP, in order to found his new argument about the construction of Clause 1 of Mr Davies' terms and conditions, highlighted in the previous paragraph. The MAP sets out a streamlined adjudication procedure for low value disputes, linking the fee to the amount claimed. The rates were set out in paragraph 45 of the MAP: for a claim such as this, for between £25,000 to £50,000, the fixed fee was £6,000. There were additional fees for meetings and site visits. Paragraph 45 and following do not address the fee position where, as here, there is a counterclaim.

20. The particular provisions of the MAP on which Mr Bowling relied for his new submission were paragraphs 31-33, which provided as follows:

> "31. The Adjudicator may resign at any time on giving notice in writing to the Parties.
>
> **The Decision**
>
> 32. The Adjudicator shall reach their decision within the time limits in paragraph 21 above and issue the decision as soon as possible after that. The Adjudicator shall be required to give reasons unless both Parties agree at any time that the Adjudicator shall not be required to give reasons.
>
> 33. If the Adjudicator fails to reach or issue a decision in accordance with paragraph 32 above, the Adjudicator shall not be entitled to any fees or expenses."

21. Finally, there is the Scheme which also regulated Mr Davies' rights and liabilities as adjudicator, although only to the extent that its paragraphs did not clash with his own terms and the MAP. The relevant paragraphs of the Scheme included the following:

> (a) Paragraph 9:
>
> > "(1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.
> >
> > (2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.
> >
> > (3) Where an adjudicator ceases to act under paragraph 9(1) –
> >
> > (a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and

(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

(4) Where an adjudicator resigns in the circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. Subject to any contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination."

(b) Paragraph 11:

"(1) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him. Subject to any contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination.

(2) Where the revocation of the appointment is due to the default or misconduct of the adjudicator, the parties shall not be liable to pay the adjudicator's fees and expenses."

(c) Paragraph 12:

"The adjudicator shall –

(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and

(b) avoid incurring unnecessary expense."

(d) Paragraph 13:

"The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication….."

(e) Paragraph 20:

"The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the

> contract which he considers are necessarily connected with the dispute …."

(f) Paragraph 25:

> "The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. Subject to any contractual provision pursuant to section 108A(2) of the Act, the adjudicator may determine how the payment is to be apportioned and the parties are jointly and severally liable for any sum which remains outstanding following the making of any such determination."

(g) Paragraph 26:

> "The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as an adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability."

2.3 The Resignation of Mr Davies

22. Mr Davies had written to the parties providing directions. In accordance with those directions, BIL provided their Response to the Referral on 8 October 2020 and SWS provided their Reply on 15 October 2020. BIL's Response included a counterclaim for £82,000 odd. SWS took a jurisdictional objection to the counterclaim, to the effect that it was not within the scope of the adjudication referred to Mr Davies. That jurisdictional challenge remained unresolved at the time of Mr Davies' resignation.

23. Separately, it became apparent that Mr Davies was concerned about the entire basis of the adjudication. He noted that, whilst the Referral alleged that SWS and BIL had entered into an agreement in writing, not only was there no such written contract, but the unsigned contract was in fact between SWS and Ms Patel, not BIL.

24. Accordingly, on 15 October 2020 at 14.59, Mr Davies emailed the representatives of each side (Ms King for SWS and Mr Longden for BIL) in the following terms:

> "Please could you explain to me why this adjudication is being commenced against Bhavishya Investment Limited? Why does the Referral paragraph 3 identified it as the "Employer" under the contract, which document is identified at Referral paragraph 4 and 5 in addition to Referral tab 1?
>
> The document at Referral tab 2 identifies the client as Vaishali Patel, so why commence an adjudication against Bhavishya investment Limited?"

25. Within half an hour, at 15.27, Ms King on behalf of SWS had replied to say that "the inclusion of Vaishali Patel's name was as the appropriate representative of the contracting entity, as opposed to being the contracting entity". She suggested that "Vaishalli Patel is a director of Bhavishya Investment Limited and at all times held

herself out as acting on behalf of Bhavishaya investment Limited as a director of it and not in her personal capacity". Ms King also said BIL were the owners of the property and had received and paid the earlier invoices. The express purpose of her response was to support SWS' case that BIL was the correct contracting party, which remained their primary position before the judge.

26. Mr Davies was not satisfied with that response. At 5.21pm on 15 October, he made a whole series of points to Ms King, some of which were in the form of further questions. He pointed out that Ms Patel ceased to be a director of BIL on 6 July 2020. He wondered how addressing an invoice to a third party was determinative of the identity of the contracting parties, again given the contents of the contract itself. Amongst other things, he asked:

    a) "On what documented, pre-contract basis do you assert that Vaishali Patel held herself out as acting on behalf of BIL?"

       He sought documents showing that Ms Patel acted not in her personal capacity but on behalf of BIL, "in circumstances where the contract on which SWS relied to bring the adjudication does not refer to BIL".

    b) "Even if BIL were the owners of the property, how was that relevant or determinative of the identity of the contracting parties?"

    c) "How does the fact that the point has been missed by at least the Responding party's representative change the stated identity of the contracting parties?"

27. Ms King replied on 16 October at 15.40. Again, her primary submission was that BIL were the relevant contracting party. She also made the point that BIL had never objected to the making of the claim against them. Ms King was plainly aware that the adjudicator's concerns went to jurisdiction; she expressly said so in the last paragraph of this email.

28. In response to Mr Davies' original email (paragraph 24 above), Mr Longden's initial response on behalf of BIL, sent at 20.38 on 15 October, was singularly unhelpful. He referred to and attached an earlier email which did not address Mr Davies' questions at all. Unsurprisingly, therefore, the adjudicator was not satisfied, and on 16 October, at 9.18, he emailed Mr Longden again to ask him to "confirm by return on what documented contractual basis BIL has participated in this adjudication". The reply, sent at 17.25 on 16 October, simply said this:

    > "We can confirm that Bhavishya Investment Limited are the landlords who commissioned the works"."

    That again did not answer any of the adjudicator's questions, and did not tell him anything he did not already know.

29. It does not appear that Mr Davies considered this second unhelpful response before sending his resignation email at 17.59 on 16 October 2020. That email set out the questions from his second email of 15 October 2020 (paragraph 26 above) and then identified Ms King's responses and his conclusions. He did not make any express

reference to either of Mr Longden's emails noted in paragraph 28 above. However, since they added nothing whatsoever, that does not seem to me to be a point of any significance.

30. In his resignation email, Mr Davies said that he had not received satisfactory answers to his questions. In short, without repeating all his original questions, responses and Ms King's further replies (all of which Mr Davies set out in full), he concluded that the adjudication had been started pursuant to a contract to which BIL was not a party, and he could not see how he had any jurisdiction to address the claim which SWS had made against them. He therefore resigned as adjudicator.

31. Thereafter, on 19 October 20202, Mr Davies prepared and sent an email claiming fees up to the date of resignation of £4,290, calculated by reference to his hourly rate of £325. That claim was made to SWS in accordance with Mr Davies' terms. SWS refused to pay and Mr Davies issued proceedings in the TCC to recover the sum due.

3. THE JUDGMENT AND THE ISSUES ON APPEAL

32. The judgment is at [2021] EWHC 1337 (TCC). The judge first considered whether there was a threshold jurisdictional issue. He found there was, noting at [55] that the adjudicator was entitled to conclude that SWS' contract was with Ms Patel, not BIL. As to the fall-back suggestion that, if that was right, BIL had waived any threshold jurisdictional point, the judge found at [57] that it was "probably the case" that, if there had been a debate following any decision, "BIL would be held to have waived the right to pursue such a jurisdictional argument".

33. On behalf of SWS, Mr Bowling had submitted to the judge that, in resigning as a result of the jurisdictional issue, Mr Davies had gone beyond the powers set out in paragraph 13 of the Scheme (paragraph 21(d) above). The judge said at [59] that he did not find this an easy point. He said at [60] that "it would have been wiser for the adjudicator not only to enquire as to the parties' position as to who were the contracting parties, but also to enquire in terms as to whether both parties accepted that he had jurisdiction". He concluded at [62] that Mr Davies' conduct (in investigating something which the parties had not themselves raised) was outside the ambit of paragraph 13 of the Scheme, so that his reasoning in deciding to resign was "erroneous" ([63]). However, the judge went on to say at [66] that this did not mean, as Mr Bowling had submitted, that Mr Davies had abandoned his appointment, or that he had "deliberately and impermissibly refused to provide a decision". He noted at [67] that, pursuant to paragraph 9 of the Scheme, he was entitled to resign on notice in any event.

34. The next debate concerned the proper construction of Mr Davies' terms and conditions, because the real issue was whether he was entitled to be paid for the work he had done up to his resignation. As a matter of construction, the judge concluded at [73] that Clause 1 of the Miscellaneous Provisions in Mr Davies' terms of appointment (paragraph 18 above) meant that "in addition to being paid for producing a Decision (which is the normal event upon the occurrence of which an adjudicator is entitled to payment) the adjudicator is entitled to be paid his fees for work done unless there has been an act of bad faith on the adjudicator's part". As to whether there had been bad faith on the part of Mr Davies, the judge rejected that submission at [79] and [80], finding instead that Mr Davies had acted "diligently and honestly".

35. Finally, the judge considered the arguments in relation to UCTA. His conclusions were that he doubted whether UCTA applied at all but that, even if it did, Mr Davies' terms and conditions were reasonable. In relation to the argument as to the fees claimed, the judge concluded at [88] that they were not excessive. That last point is not in issue on the appeal; instead Mr Bowling complains that, in his subsequent judgment on costs, the judge was wrong to find that the respondent's costs fell to be assessed at Mr Davies' stated hourly rate of £325.

36. As noted at paragraph 6 above, the effect of the permission to appeal granted by the judge is that each of the principal elements of his overall decision are in issue before this court. This includes the issue raised by Mr Davies in his cross appeal, to the effect that, contrary to the judge's conclusion, what he did was not beyond the ambit of paragraph 13 of the Scheme and/or was not erroneous.

37. I have slightly revamped the issues which seem to me to arise on this appeal, in order to deal with them in a logical sequence. In my view, they are as follows:

    a) Issue 1: Was there a jurisdictional issue in the adjudication? (Section 4 below);

    b) Issue 2: Was Mr Davies entitled to decline jurisdiction and resign in consequence? (Section 5 below);

    c) Issue 3: Subject to bad faith, was Mr Davies entitled to be paid for the work done prior to his resignation? (Section 6 below);

    d) Issue 4: Was Mr Davies guilty of bad faith? (Section 7 below);

    e) Issue 5: Were Mr Davies' own terms of appointment contrary to UCTA? (Section 8 below);

    f) Issue 6: Should this court interfere with the judge's costs order? (Section 9 below).

38. In the following sections of this judgment I deal with each of those issues. I do so by first identifying the relevant parts of the judgment; setting out the relevant law; and then analysing the arguments and reaching a conclusion on the issue.

4 ISSUE 1: WAS THERE A JURISDICTIONAL ISSUE IN THE ADJUDICATION?

4.1 The Judgment

39. This issue is dealt with at [51]-[57] of the judgment. At [54] the judge rejected SWS's first submission that the preponderance of the evidence showed that BIL, rather than Ms Patel, was the contracting party. The judge said that, whilst the proposed contract was unsigned, it clearly envisaged that the contract would be between SWS and Ms Patel. The judge noted that the defence in these proceedings provided by SWS did not contend that the construction contract was with BIL. The judge concluded at [55] that "at the lowest the adjudicator was entitled to conclude that the contract was with Ms Patel not BIL."

40. SWS's fall-back argument was rather different. As the judge noted at [56], they argued that, if they were wrong about the parties to the contract, BIL had in any event submitted to the adjudicator's jurisdiction. Mr Bowling submitted that the Referral contained a clear allegation that the construction contract was with BIL and that this was not disputed in the Response. He therefore said that there had been a clear waiver of any threshold jurisdictional point. At [57], the judge thought it was "probably the case" that, if there had been an enforcement challenge on this basis, the waiver argument would have been successful.

4.2 The Law

41. An adjudicator has no jurisdiction if it is arguable that there is no contract at all (see *Dacy Building Services v IDM Properties* [2017] BLR 114; *M Hart Construction v Ideal Response Group* (2018) 117 Con LR 228), or where there is a non-qualifying construction contract: see *The Project Consultancy Group v The Trustees of the Gray Trust* [1999] BLR 377.

42. If a defendant can demonstrate a reasonably arguable case that either he or the claimant were not a party to the construction contract, the adjudicator has no jurisdiction to make any decision, and it will not be enforced against him: see *Thomas-Frederic's (Construction) Limited v Keith Wilson* [2003] EWCA Civ 1494; [2004] BLR 23. There have been a number of subsequent cases in which an adjudicator's decision was not enforced because of doubts as to the proper parties to the contract: for a case where the claimant was arguably not a party to the construction contract so the decision was not enforced, see *ROK Build Limited v Harris Wolf Developments Co. Limited* [2006] EWHC 3573 (TCC)); for a case where the defendant was arguably not a party to the construction contract so the decision was not enforced, see *Estor Limited v Multifit (UK) Limited* [2009] EWHC 2108 (TCC); [2009] 126 Con LR 40.)

43. As this court acknowledged in *Thomas-Frederic's,* a defendant who has agreed to be bound by the adjudicator's decision will not be able to resist enforcement, even if that defendant was not a party to the contract. Whether or not the defendant has agreed will depend on the evidence, in particular as to whether the defendant had reserved its position in respect of jurisdiction (see *Thomas-Frederic's* and *Brims v A2M* [2013] EWHC 3262 (TCC) at [33]), or had otherwise waived any such objection (see *Aedifice Partnership Ltd v Shah* [2010] EWHC 2106 (TCC); [2010] CILL 2905 at paragraph 21(e)). If two parties have unequivocally agreed to adjudication, even if one of them is not a party to the construction contract, then they have agreed to ad-hoc adjudication and the resulting decision can be enforced: see, by way of example, the decision in *Nordot Engineering Services Ltd v Siemens PLC* (SF00901 TCC16/00) dated 14 April 2000; CILL September 2001, approved in *Thomas-Frederic's*.

4.3 Discussion

44. For the reasons set out below, I consider that there was a real jurisdictional issue in this case and that, not only was SWS' fall-back argument as to waiver not straightforward but also, since it was never put to him in those terms, it was not something with which Mr Davies was obliged to engage in any event.

45. First, as the judge found, the best evidence of the contract (namely the proposed written contract which, although it was never signed, had been referred to throughout by both parties) was in the names of SWS and Ms Patel. There was no mention of BIL anywhere. There was nothing to indicate any agency on the part of Ms Patel. Moreover, she ceased to be a director of BIL long before the dispute was referred to adjudication. On the face of it, therefore, there was a plain and obvious jurisdictional issue as per the principles in *Thomas-Frederic's* and the other cases noted at paragraph 42 above.

46. As he made clear in his oral submissions, Mr Bowling does not now seek to challenge that conclusion. That means that SWS' solicitors endlessly restated arguments to Mr Davies in the correspondence to the effect that BIL were the contracting party (see paragraphs 23-30 above) are now accepted as being wrong. In my view, Costigan King should have appreciated that plain fact from the outset, and not wasted Mr Davies' time by arguing (as their principal submission) something that was unsustainable.

47. Of course, it was always open to BIL expressly to indicate that, although they were not a party to the construction contract, they accepted the ad-hoc jurisdiction of Mr Davies as the adjudicator (as per *Nordot*) and/or that they waived any right to take a jurisdictional point subsequently. However, they did neither. It should have been quite clear to them no later than 15 October 2020, when Mr Davies was raising the issue that (contrary to the Referral) BIL were not a party to the contract, that the jurisdictional basis for the adjudication was being questioned. Ms King understood that expressly. So, if this was their position, BIL could have stated in unequivocal terms that, whatever the contract said, they accepted Mr Davies' ad-hoc jurisdiction and would be bound by his decision. They failed to do so. On one view, Mr Longden's answers to Mr Davies' questions were deliberately evasive.

48. This failure meant that SWS' fall-back submission to the judge – that on enforcement, BIL would have been taken to waive any objection – was never clear-cut. Whilst I can see that SWS may have had a reasonable argument on enforcement that BIL had waived any objection to the jurisdiction of Mr Davies, I think that the judge may have put it too high when he said that the waiver argument would "probably" have been successful. Who knows? After all, BIL had already taken one technical point to deny Mr Davies jurisdiction in the first adjudication. Now, when he had himself raised the question of the contractual basis of the adjudication (and therefore his own jurisdiction), BIL had chosen not to answer his questions and had manifestly provided no unqualified statement that they accepted his jurisdiction and/or would be bound by his decision.

49. Furthermore, it is important to put oneself in the position of Mr Davies. He correctly saw that, despite Ms King's best efforts, there was a clear and obvious jurisdictional problem. The most obvious way round it could have been provided by BIL, but it was not. In those circumstances, what could or might have been argued by either party down the line on enforcement was not primarily a matter for Mr Davies. Having worked out that the stated basis of the Referral was wrong, and having received no assistance from the most affected party (BIL), he had no obligation to go on and evaluate the likelihood of success - at some later hearing over which he had no control, and which would turn on evidence he had not necessarily seen - of possible

arguments as to waiver, reservation of position and ad hoc jurisdiction, which arguments had never even been articulated.

50. In my view, Mr Davies was entitled to conclude that BIL were not a party to the contract; to take into account the fact that the parties had not satisfactorily answered his questions on that topic; to take into account BIL's previous technical objection to his jurisdiction and SWS' current objection to the counterclaim on another jurisdictional ground; and to take into account the absence of any unqualified acceptance of his jurisdiction by BIL on an ad hoc basis. He did not need to go further and estimate SWS' possible chances of success on enforcement, and base his decision on whether to continue with the adjudication on that estimation. In the absence of proper assistance from the parties, it was not a matter for him.

51. Accordingly I conclude that, not only was there a real jurisdictional issue in this case which Mr Davies was obliged to address, but SWS' fall-back argument does not help them on this appeal. The reservation/waiver arguments were not clear-cut, for the reasons I have given. More importantly, in the circumstances that had arisen, Mr Davies was not obliged to consider such contingent issues.

5. ISSUE 2: WAS MR DAVIES ENTITLED TO DECLINE JURISDICTION AND RESIGN IN CONSEQUENCE?

5.1 The Judgment

52. This is dealt with at [56]-[68] of the judgment. Although the judge said at [59] that he had not found this an easy point, he thought it would have been wiser for the adjudicator to ask both parties whether they accepted that he had jurisdiction ([60]), and went on to say:

> "61. The effect of what the Adjudicator did was to deprive the parties of an answer to their differences as to what sum was payable (either by Ms Patel or by BIL) in respect of the project. However it is fair to say that BIL never showed any enthusiasm for this dispute to be aired.
>
> 62. The conclusion to which I have come is that the route which the Adjudicator took was outside the ambit of paragraph 13 of the Scheme: that paragraph entitles the Adjudicator to investigate matters "necessary to determine the dispute", which necessarily involves the question, what is the dispute? At the time when the Adjudicator resigned, there was no dispute either as to the identity of the contracting parties or as to his jurisdiction.
>
> 63. Accordingly, in my view the Adjudicator's reasoning in deciding to resign on the basis that he had no jurisdiction when that was not an issue which the parties had referred to him was erroneous."

53. However, the judge did not consider that this error was significant. Addressing SWS's argument that Mr Davies' decision to resign "represented abandonment of his appointment and a deliberate and impermissible refusal to provide a Decision", the judge said:

> "66. I do not accept that characterisation of what the Adjudicator did. Far from "abandoning his appointment", the Adjudicator acted in accordance with what he regarded as being his duty. Far from there being a "deliberate and impermissible refusal to provide a Decision", the Adjudicator resigned upon the basis that it was not open to him to reach a Decision in a dispute between the Defendant and BIL of the rights and obligations of a contract between the Defendant and Ms Patel. That is very far from being a "deliberate and impermissible refusal to provide a Decision"."

It appears that SWS' characterisation of Mr Davies' conduct, which the judge here rejected, was linked to an earlier assertion in the Costigan King correspondence that Mr Davies had wrongfully repudiated his contract of appointment. That particular assertion was not maintained on appeal. It was plainly wrong given Mr Davies' unqualified right to resign (paragraph 56 below).

5.2 The Law

54. This issue is a matter of fact, not law.

5.3 Discussion

55. In my view, Mr Davies was entitled to decline jurisdiction and resign in consequence. There are a number of reasons for that.

56. The first is that, as the judge noted at [67], the adjudicator was entitled to resign in any event pursuant to paragraph 9(1) of the Scheme. Paragraph 31 of the MAP gave him the same entitlement. Neither paragraph requires the resignation to be for good cause. Since there was an unqualified entitlement on the part of Mr Davies to resign, it is impossible to say that he could not do just that. But paragraph 9(1) of the Scheme and paragraph 31 of the MAP are both silent about any entitlement to fees, and I accept that such an entitlement following resignation may well turn on two matters; why the adjudicator resigned and the terms of their contract of appointment.

57. As to the first, I am in no doubt that, in the circumstances of this case, the adjudicator was entitled to decline jurisdiction and resign: in other words, he had good cause to do what he did. In those circumstances, I find myself in respectful disagreement with some elements of the judge's analysis set out above.

58. The starting point is that there was a real issue as to jurisdiction which was not 'saved' by SWS's submission as to waiver: see the analysis in Section 4 above. SWS were therefore obliged to submit to the judge that, despite the fact that there was a real jurisdictional issue, the adjudicator should have ignored it because neither party had raised it with him. In this way, it was said that it was not a matter "necessary to determine the dispute" under paragraph 13 of the Scheme. The judge agreed with that submission at [62].

59. I consider that, on a proper analysis, that conclusion is unsustainable. Can it sensibly be suggested that, where there is a real jurisdictional issue, which the adjudicator has spotted and which goes to the viability of the entire adjudication, the adjudicator should say nothing about it, and instead proceed solemnly to the end of the process,

leaving the point to any disputed enforcement hearing? In my view, that is not the law and would be contrary to common sense.

60. Under paragraph 13 of the Scheme, the adjudicator has to investigate the matters "necessary to determine the dispute". If an adjudicator considers that it is necessary to work out if he or she has the jurisdiction to determine the dispute in the first place, then they are duty bound to consider and determine that issue. That in turn means that they should raise that issue with the parties before coming to their own conclusion. In *Primus Build Ltd v Pompey Centre Ltd and another* [2009] EWHC 1487 (TCC); [2009] BLR 437, the adjudicator spotted a point of significance (in that case, various figures in one party's accounts, rather than a potentially fatal jurisdiction issue) which neither party had addressed. Although it was not disputed that the adjudicator was entitled to consider those figures, the court found that fairness required him to raise the point with the parties before reaching a decision based on those figures. In my view, Paragraph 13 of the Scheme gave Mr Davies the express power to do just that: to consider and raise with the parties a point which they had not raised but which he thought was important.

61. That is also the answer dictated by practical common sense. Anyone who has glanced at TCC adjudication enforcement judgments in the last decade or so will know that the majority of points taken by the unsuccessful party go, in one way or another, to the jurisdiction of the adjudicator. It would strike at the heart of an efficient system of adjudication and adjudication enforcement if adjudicators were encouraged to believe that they must stay silent when they spot a potential jurisdictional problem, and wait for the parties to raise it before considering it themselves. In my view, it would be when an adjudicator took this 'ostrich' option, and the jurisdictional challenge was subsequently successful such that enforcement was refused, that an unsuccessful claimant would have a better argument that the adjudicator should not recover his or her fees, because they should have pointed out the jurisdictional problem when they first spotted it.

62. During the course of his oral submissions at the appeal hearing, Mr Bowling accepted that Mr Davies was entitled to raise his jurisdictional concern with the parties. Although he suggested that this arose under Mr Davies' general case management powers as an adjudicator, rather than under paragraph 13 of the Scheme, that seemed to me be a distinction without a difference. In any event, I disagree for the reasons I have given. Either way, it means that the judge's conclusion at [62] cannot stand.

63. This matters, because the judge's subsequent conclusion at [63] (that Mr Davies' reasoning in deciding to resign was "erroneous") was directly linked back to his finding that, because jurisdiction was not an issue which the parties had referred to him, he should not have considered it. That is what the judge said in terms at [63]. But if, as I find, Mr Davies was entitled to raise the issue in any event, irrespective of the parties, then that criticism of him falls away entirely. On the face of the judgment, therefore, the judge was wrong to say that the adjudicator's reasoning was erroneous. In my view, for the reasons that I have given, it was not. That is material to the subsequent issue concerned with bad faith.

64. By the time of the appeal, Mr Bowling's principal criticism was not that Mr Davies had been wrong to investigate the point, but that he had not expressly raised the issue as a matter of jurisdiction and had given no warning prior to his resignation. As to the

first point, there can be nothing in that, since SWS's solicitors expressly acknowledged to Mr Davies (copied to BIL's representatives) that the questions raised in his emails went to the issue of his jurisdiction. Mr Davies did not need to spell it out further.

65. There is more force in the final criticism, that Mr Davies should have given the parties a final warning that, unless there was an unequivocal acceptance of his jurisdiction and the binding nature of any decision that he produced, he would resign. That is what the judge found at [60]. That is always good practice when an adjudicator is preparing to do something draconian, such as resigning. Whether such an omission amounted to bad faith, I consider in Section 7 below.

66. I also note that at [66], the judge rejected the suggestion that the adjudicator "abandoned his appointment and impermissibly refused to provide a decision", and later found at [79] that Mr Davies had acted with "diligence and honesty". For the reasons I have given, I agree with both those conclusions. Although Mr Bowling appeared to suggest otherwise, Mr Davies' diligence and honesty were palpable. Those conclusions are also relevant to any consideration of bad faith.

67. For those reasons, I conclude that the adjudicator was entitled to decline jurisdiction pursuant to paragraph 13 of the Scheme. He had reasonable cause to resign in all the circumstances of this case.

6. ISSUE 3: SUBJECT TO BAD FAITH, WAS MR DAVIES ENTITLED TO BE PAID FOR THE WORK DONE PRIOR TO RESIGNATION?

6.1 The Judgment

68. The judge construed Clause 1 of Mr Davies' terms and conditions to mean that he was entitled to be paid fees for the work he had done, unless there had been an act of bad faith on his part:

> "72. Mr Bowling draws attention to the word "also" in the second sentence of this Clause. He distinguishes this case from cases such as those where an Adjudicator issues an unenforceable decision or produces a decision but fails to deliver it in time. Here, he says, the Adjudicator at one and the same time managed to abdicate his responsibility, exceeded his jurisdiction and failed to exhaust it. He says that this is a situation or a congeries of situations to which Clause 1 does not apply.
>
> 73. I do not agree with this submission: in my judgment the Clause means that in addition to being paid for producing a Decision (which is the normal event upon the occurrence of which an Adjudicator is entitled to payment) the Adjudicator is entitled to be paid his fees for work done unless there has been an act of bad faith on the Adjudicator's part."

69. That construction of the terms and conditions was challenged on appeal, principally by reference to the new argument advanced for the first time at the appeal hearing itself.

6.2 The Law

70. The principles of contract construction have been set out in three recent Supreme Court cases: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 at [14] –[30]; *Arnold v Britton* [2015] UKSC 36 at [14] – [22-; and *Woods v Capita Insurance Services Ltd* [2017] UKSC 24 at [8] – [15]. They are well-known and it is unnecessary to summarise those principles here.

71. There is no binding authority on an adjudicator's entitlement to fees when he or she resigns. For what it is worth, by analogy with paragraph 9(4) of the Scheme, I have previously suggested (at paragraph 10-27 of the 4th edition of *Coulson on Construction Adjudication*) that there may well be such an entitlement. In *Paul Jensen Ltd v Staveley Industries PLC*, 27 September 2001 (unreported but cited in that paragraph), District Judge Donnelly said that it did not matter whether the adjudicator had been right or wrong to resign because of a jurisdiction issue and that, because there was no suggestion of default or misconduct on the adjudicator's part, the adjudicator was entitled to the fees incurred prior to his resignation.

72. The leading case on an adjudicator's entitlement to fees when the adjudication does not go as expected is *PC Harrington Contractors Ltd v Systech International Ltd* [2012] EWCA Civ 1371; [2013] BUSLR 970; [2013] BLR 1. On the facts of that case, the adjudicator awarded sums to Tyroddy but he failed to deal with the principal element of PCH's defence, which was that they had already overpaid Tyroddy on their final account. As a result of this breach of natural justice, the adjudicator's decision was not enforced. His claim for fees was disputed.

73. At first instance, Akenhead J found that there had not been a total failure of consideration and the fees were payable. This court came to a different view, largely by reason of the operation of the Scheme. Dyson LJ (as he then was) said:

> "26. But the terms of engagement must be read together with the terms of the Scheme. The significance of the Scheme is that it contains important provisions which deal with the question of remuneration in the event that the adjudicator does *not* reach a decision in various circumstances. Para 8(4) provides that, where an adjudicator ceases to act because a dispute is to be adjudicated by another person, he is entitled to payment of his fees and expenses in accordance with para 25. Para 9(1) provides that an adjudicator may resign at any time on notice. Para 9(2) provides that an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication. Para 9(4) provides that where an adjudicator resigns in the circumstances referred to in para 9(2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, he is entitled to payment of reasonable fees and expenses. It is significant that, if the adjudicator resigns by giving notice under para 9(1), he is not entitled to any remuneration. This shows that the adjudicator is entitled to fees and expenses where he does not complete his engagement by making a decision, but only in carefully defined circumstances. The contrast between the treatment of a resignation under para 9(1) and 9(2) is striking.

> 27. A similar contrast is made at para 11 in relation to the adjudicator's remuneration in the event of a revocation of his appointment. Para 11(1) provides that the parties may at any time agree to revoke the appointment for any reason. In that event, the adjudicator is entitled to payment of reasonable fees and expenses. But if the revocation is due to "the default or misconduct of the adjudicator", para 11(2) provides that there is no entitlement to fees or expenses…
>
> 31. None of the circumstances mentioned in para 8(4), 9(2) or 11(1) existed in this case. It follows that the adjudicator had no discrete entitlement to his fees and expenses for the ancillary and anterior functions that he performed. I should add that I accept the submission of Mr Bowling that these functions, which included making directions, considering the papers and so on, had no discrete value to the parties. Even the adjudicator's decision on the jurisdiction issue to which I referred at para 3 above was of no value in itself. It did not produce a decision which was binding in any future adjudication: it is well established that an adjudicator does not have inherent power to decide his own jurisdiction: see *Coulson, Construction Adjudication* (2nd edition) at para 7.09…
>
> 33. Para 11(2) of the Scheme provides powerful support for PCH's case. If the adjudicator's appointment is revoked due to his default or misconduct, he is not entitled to any fees. It can hardly be disputed that the making of a decision which is unenforceable by reason of a breach of the rules of natural justice is a "default" or "misconduct" on the part of the adjudicator. It is a serious failure to conduct the adjudication in a lawful manner. If during the course of an adjudication, the adjudicator indicates that he intends to act in breach of natural justice (for example, by making it clear that he intends to make a decision without considering an important defence), the parties can agree to revoke his appointment. In that event, the adjudicator is not entitled to any remuneration. It makes no sense for the parties to agree that the adjudicator is not entitled to be paid if his appointment is revoked for default or misconduct *before* he makes his purported decision, but to agree that he is entitled to full remuneration if the same default or misconduct first becomes manifest in the decision itself. I would not construe the agreement as having that nonsensical effect unless compelled to do so by express words or by necessary implication. I can find no words which yield such a meaning either expressly or by necessary implication."

74. Davis LJ reached the same conclusion, but his focus was on what the adjudicator in that case might have been able to do in order to improve his commercial position. At [46] Davis LJ said:

> "46. I doubt if the present decision should have any very great ramifications. Prior to this case, I personally had had little acquaintance with the adjudication Scheme under the 1996 Act. It appears, from what we were told, generally to be working very well indeed – and not least, I suspect, because of the short prescribed time limits and the splendid "pay now, argue later" approach, which is thoroughly to be commended. At all events in the fifteen years or so since the scheme has been operating this particular kind of dispute

> about fees seems, as we were told, not previously to have surfaced in the courts. In any case, if this decision does give rise to concerns on the part of adjudicators then the solution is in the market-place: to incorporate into their Terms of Engagement (if the parties to the adjudication are prepared to agree) a provision covering payment of their fees and expenses in the event of a decision not being delivered or proving to be unenforceable. It is of course a consequence of this court's conclusion that it is for the adjudicator to stipulate for such a term: not for the parties to the adjudication to stipulate to the contrary."

75. In short, in *PC Harrington,* the adjudicator had misconducted the adjudication by acting in such a way that the decision was unenforceable and, on a proper construction of the adjudicator's terms of engagement, he was not entitled to recover any fees.

76. Drawing those strands together, therefore, I would summarise the applicable principles as follows:

a) Under the provisions of the Scheme, an adjudicator is entitled to resign. No reason is required.

b) Whether or not the adjudicator is entitled to fees following any such resignation will depend on i) the precise terms of his or her appointment, and ii) the conduct of the adjudicator.

c) The court's consideration of conduct may involve asking why the adjudicator resigned, so it may matter whether the adjudicator was right or wrong to resign. To that extent, I disagree with the learned district judge in *Paul Jensen*, although he was quite right in the result because of the absence in that case of any allegation of default or misconduct.

d) A finding that the resignation involved or was the result of default/misconduct or bad faith, depending on the terms of appointment, will - in accordance with the general approach in *PC Harrington* - usually be sufficient to disentitle the adjudicator from recovering fees. Conversely, absent such a finding, there will usually be an entitlement to the fees incurred prior to resignation.

6.3 Discussion

77. The judge concluded that Clause 1 meant that, absent bad faith, the adjudicator was entitled to be paid his fees, because his resignation meant that the decision had not been delivered. On the face of it, that looks a straightforward and common sense interpretation of Clause 1, in accordance with the principles of construction referred to in paragraph 70 above.

78. Mr Bowling complained about this conclusion. His alternative interpretation was based on the premise that Clause 1 applied where "there may be justifiable reasons why the Adjudicator is prevented from determining the dispute referred to him through no fault (or default) of his own (e.g. illness, technical mishap, or the parties withdrawing the dispute from him)": paragraph 22 of his Skeleton Argument.

79. I reject that submission. Clause 1 does not differentiate between the myriad different circumstances which could have resulted in the dispute not being determined by Mr Davies (and thus no decision being delivered). The clause addresses the fact of there being no decision, not the reasons why there was no decision, much less differentiating between those reasons. To read such distinctions into Clause 1 would be to rewrite the term in the way prohibited by Lord Clarke in *Rainy Sky* at [23]: "where the parties have used unambiguous language, the court must apply it". Or, applying the test from Lord Hodge's judgment in *Arnold v Britton* at [77], "there is no basis in the words used or the factual matrix for identifying a rival meaning".

80. Moreover, there is no commercial unreality about such an interpretation. On the contrary, it makes complete commercial sense for an adjudicator to say: "My entitlement to fees should not depend on the uncertainties of the enforcement process, over which I have no control. I am entitled to resign. I am also entitled to my fees for the work done up to my resignation, unless I have acted in bad faith." What is more, read in this way, Clause 1 sits easily with paragraph 26 of the Scheme, which exculpates the adjudicator for liability for all acts or omissions save where there is bad faith (see paragraph 21(g) above).

81. The principal thrust of Mr Bowling's new argument, by reference to the provisions in the MAP, was even narrower than that set out in his Skeleton. He submitted that Clause 1 was limited to circumstances where the decision itself had been reached, but was then not physically delivered. He pointed out that the Scheme drew a distinction between the adjudicator 'reaching' his decision, on the one hand, and 'delivering' a copy of that decision on the other; see paragraph 19 of the Scheme. He said that a similar distinction was drawn in the MAP at paragraph 32 (albeit it is there expressed as 'reaching' and 'issuing' the decision). Mr Bowling said that both these provisions assumed that delivery could only occur after a decision had been reached, so that, looking back at Clause 1, it envisaged fees being recoverable only where a decision had been reached but then not delivered for what he called "technical reasons".

82. I reject that submission for a variety of reasons. First it is contrary to Mr Bowling's argument as set out in his Skeleton, which at least accepted that fees would be payable, in certain circumstances, long before any decision had been reached (for example, where there was illness, or where the dispute was withdrawn from Mr Davies by the parties during the adjudication). Indeed, it is worth noting that that was precisely what happened in the first adjudication (paragraph 13 above). If Mr Bowling's new argument was right, SWS should not have paid those fees.

83. Secondly, the new submission suffers from all the same difficulties to which I have referred at paragraphs 79 and 80. There is nothing in the wording of Clause 1, or in any of his other terms, that provided that it was only when the decision was not delivered in one set of circumstances that Mr Davies was entitled to recover his fees, and that in another set of circumstances, the non-delivery of the decision would prevent that entitlement.

84. Thirdly, I consider that both Mr Bowling's arguments, old and new, ignore the term under *'Frequency of Charge'* (highlighted in paragraph 18 above) which provided that "in the event of the Adjudication ceasing for any reason whatsoever prior to a Decision being reached, a Fee Invoice will be raised immediately and is due for payment…". I shall call this "the cessation provision". That made it clear that fees

would be due if the adjudication ceased prior to a decision being reached "for any reason whatsoever". The cessation provision was therefore contrary to Mr Bowling's submissions in two ways. It made it clear that the entitlement to fees did not depend on a decision being reached: on the contrary, it expressly assumed that a decision had *not* been reached, but provided an entitlement to fees nonetheless. In addition, on its face, the cessation provision made clear that the reasons why a decision was not reached did not determine whether or not a fee was paid: instead, it provided that a fee was due if no decision was delivered "for any reason whatsoever".

85. Although the judge was right to think that, in one sense, the cessation provision proved too much (because it made no reference to the entitlement to fees depending on the lack of bad faith, for example), he did not analyse the ways in which it could be read together with, and thereby confirmed his interpretation of, Clause 1. That may be because Mr Bowling's new submission was never made to him. In my view, the cessation provision was not just concerned with timing or, as Mr Bowling put it, "was simply mechanical". If it did not add anything to Clause 1, that is only because it is consistent with and supportive of the judge's (and my) interpretation of Clause 1. If SWS' interpretation of Clause 1 was even arguably right, the cessation provision would matter, because it was completely at odds with the limited/qualified reading of Clause 1 advanced by SWS.

86. Finally, there is the point that Clause 1, and to that extent the cessation provision too, were designed to ensure that the potential constraint on recovery of fees created by *PC Harrington* did not apply unless there was bad faith. It might be said that Clause 1 takes up the invitation in Davis LJ's short concurring judgment. Mr Bowling sought to argue that Davis LJ's wording was deliberately designed to apply only where a decision had been reached but not delivered for mechanical reasons. I profoundly disagree with that. It is quite clear that Davis LJ was dealing with the wider commercial position, not the narrow one-in-a-thousand chance that, late on Day 28, something went wrong with the adjudicator's email and the decision was not 'delivered' in time: see *Cubitt Building and Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC); (2006) 110 Con LR 36.

87. For completeness I should also deal with the final element of Mr Bowling's new submission, which sought to suggest that Mr Davies had no entitlement to fees based on an hourly rate at all, because he was only ever entitled to the fixed fee under the MAP. I disagree because, under '*Amount of Charge'*, the adjudicator's terms of appointment said that, should the MAP cease to apply, then the amount of charge would be based on the rate of £325 per hour. The non-application of the MAP was not, as Mr Bowling submitted, restricted to the situation where the parties rejected it in the first 48 hours after Mr Davies' appointment (paragraph 17 above). In that situation, the MAP never applied at all. Once the adjudication was up and running, the MAP applied throughout, unless an event occurred which brought the adjudication to a premature end, in which case the MAP would cease to apply. That is what happened. Once Mr Davies had resigned, the MAP no longer applied and, in accordance with this provision, he was entitled to charge his stated hourly rate for all the work he had done prior to resignation.

88. Accordingly, subject to the question of bad faith (which I address next), I find that the judge's construction of Clause 1 was correct, albeit that I consider that, for the reasons I have given, that construction was confirmed by the cessation provision.

7. ISSUE 4: WAS MR DAVIES GUILTY OF BAD FAITH ?

7.1 The Judgment

89. The judge dealt with the criticisms of the adjudicator by reference to the concept of bad faith at [79] – [80], where he said:

> "79. I do not think it desirable in this case, where I have heard argument limited to the facts of this particular case, to discuss at any length the limits of "bad faith" in construing a clause such as Clause 1. It is sufficient for me to say that a situation such as this where an Adjudicator acting with diligence and honesty comes to the conclusion that the proper course is for him to exercise his right under Paragraph 9(1) of the Scheme to resign is not a situation within the expression "bad faith".
>
> 80. Accordingly, my conclusion is that on the true construction of his terms and conditions, the Adjudicator was entitled to be paid for the work done by him, subject to the application of the Unfair Contract Terms Act 1977 ("UCTA"), to which I refer below."

7.2 The Law

90. In the recent Supreme Court decision on the topic, it was made plain that, depending on the circumstances of the case, an act of bad faith will usually require some measure of dishonesty or unconscionability: see *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40; [2021] 3 W.L.R. 727.

91. Despite the plethora of authorities on this topic, Mr Bowling essentially relied on just one case, the decision of Leggatt J (as he then was) in *Yam Seng PTE Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB); [2013] 1 Lloyd's LR526. That was concerned with the question of good faith in commercial contracts, so in my view it was not directly applicable to the issue here. The particular passages from the judgment on which Mr Bowling relied were:

> "138. In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable".
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> 139. Another aspect of good faith which overlaps with the first is what may be described as fidelity to the parties' bargain. The central idea here is that contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract. That principle is well established in the modern English case law on the interpretation of contracts: see e.g. Rainy Sky SA v Kookmin

> Bank [2011] 1 WLR 2900; Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc [2013] UKSC 3 at [23], [45] and [54]. It also underlies and explains, for example, the body of cases in which terms requiring cooperation in the performance of the contract have been implied: see Mackay v Dick (1881) 6 App Cas 251, 263; and the cases referred to in Chitty on Contracts (31st Ed), Vol 1 at paras 13-012 – 13-014…
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> 144. Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. The standard is thus similar to that described by Lord Nicholls in a different context in his seminal speech in Royal Brunei Airlines v Tan [1995] 2 AC 378 at pp.389-390. This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had."

7.3 Discussion

92. The first issue is whether or not there is a material difference between default or misconduct (an expression used in the Scheme), on the one hand, and bad faith (as per Clause 1 of Mr Davies' terms) on the other. I consider that, as a matter of principle, there is plainly a difference: for the purposes of Clause 1 of this contract, a finding of bad faith must involve some form of unconscionable or deliberately unacceptable conduct on the part of the adjudicator (see paragraphs 90 and 91 above). It is more serious than simple default. An adjudicator may be guilty of default or misconduct because, as in *PC Harrington*, he conducts the adjudication in such a way that the parties end up with an unenforceable decision. But that default or misconduct may have been wholly inadvertent on his part: there was no suggestion in *PC Harrington* that the adjudicator had deliberately misconducted himself or was guilty of acting in bad faith.

93. The qualitative difference between the two is also reflected in paragraph 26 of the Scheme (paragraph 21(g) above). There, liability for the adjudicator's acts or omissions is excluded, *unless* there is also bad faith. That makes it plain that bad faith is more serious than simple default or misconduct, and therefore there is a higher threshold before it can be established. This difference also explains why, in the present case, Mr Davies drafted a clause which sought to ameliorate the result in *PC Harrington*, so the parties could not avoid the payment of his fees on the basis of an inadvertent mistake on his part.

94. Mr Bowling suggested that bad faith meant no more than "commercially unacceptable conduct which failed to show fidelity to the parties' bargain". He said that bad faith could be established if the adjudicator had departed from what he called "normative conduct". I think he was suggesting that this test would be made out even if there was

no default or misconduct. I disagree for the reasons that I have given, and would in any event baulk at seeking to impose such an ill-defined test.

95. Having drawn this distinction between default/misconduct, on the one hand, and bad faith, on the other, I should stress that, for the reasons set out below, I consider that Mr Davies was not guilty of default/misconduct, much less bad faith (even as interpreted by Mr Bowling).

96. The adjudicator had raised a real issue as to jurisdiction; he had not received what he quite reasonably considered proper answers; and in the circumstances, in the judge's words, he had acted with 'diligence and honesty' in coming to the conclusion that the proper course was for him to resign. I have found that he did not exceed the ambit of paragraph 13 of the Scheme. The analysis in Sections 4 and 5 above comprise a complete answer to any suggestion of default/misconduct, much less bad faith.

97. As noted in paragraph 65 above, the only criticism of Mr Davies' conduct that I accept was his failure to give the parties a final warning prior to resigning. But was that unconscionable conduct on his part? Did it fall outside the commercial norms to be expected of an adjudicator in these circumstances? In my view, given the circumstances of this case, these questions only need to be asked for the negative answers to become apparent. There was nothing unconscionable about what Mr Davies did. He had done his best to get answers to his questions and had failed. Although I consider that he should have given the parties one final warning prior to resigning, his failure to do so cannot by any stretch of the imagination be described as "bad faith".

98. Even taking Mr Bowling's definition of bad faith at its woolliest, I am confident that Mr Davies did not depart from "normative conduct" or act in a way that was contrary to his bargain with the parties. Indeed, it might be said that, in trying to work out a fundamental issue which they had missed, Mr Davies was more faithful to that bargain than they were: he had at least identified a real point. SWS spent most of their time in their correspondence with him arguing something that was unsustainable (paragraph 46 above) and BIL provided him with no help at all (paragraph 47 above).

99. The crucial underlying point in *PC Harrington* was that, however one might label it, the adjudicator was guilty of misconduct. He had ignored PCH's primary defence, with the inevitable consequence that the decision which he produced was not enforced. So in *PC Harrington*, the claimant showed that the adjudicator's conduct cleared the lower bar of misconduct; here, for the reasons that I have given, SWS have failed to show that Mr Davies' conduct got anywhere close to the higher bar of bad faith. Subject to UCTA, therefore, Mr Davies was entitled to his fees.

100. More widely, I consider that this result is in accordance with the general principles which I have set out at paragraph 76 above.

8. ISSUE 5: WAS CLAUSE 1 CONTRARY TO UCTA?

8.1 The Judgment

101. The judge's conclusions were:

"84. I have considerable doubt whether Clause 1 is caught by Section 3 of UCTA. Clause 1 is simply concerned with payment of the Adjudicator's fees. It says nothing about what contractual performance the Adjudicator is expected to perform. In any event, paragraph 9(1) of the Statutory Scheme gives the Adjudicator an unfettered right to resign which is relevant to the contractual performance that the Adjudicator is expected to perform

85. If I am wrong as to the application of section 3, I have no hesitation in holding that Clause 1 satisfied the requirement of reasonableness in UCTA:

(1) The provision was drafted with the judgment of Davis L.J. in mind and therefore in accordance with terms which the Court of Appeal regarded as being capable of being commercially acceptable – I put it that way because ultimately what is acceptable is a matter for the contracting parties;

(2) On Mr Bowling's submissions, the Adjudicator's terms are terms commonly found;

(3) There was no inequality of bargaining power;

(4) The Defendant could have rejected the terms (and sought a different adjudicator), but instead accepted them not once but twice: on each occasion the Defendant was represented by solicitors with enormous experience and expertise in respect of adjudications."

8.2 The Law

102. Section 3 of UCTA provides:

"**Liability arising in contract.**

(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled—

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

103. The primary issue is whether or not Clause 1 went to Mr Davies' contractual performance. In this regard, we were referred to *Paragon Finance PLC v Nash* [2001] EWCA Civ 1466; [2002] 1WLR 685. One of the issues in that case was whether a mortgagee's right to charge a variable interest rate was subject to UCTA. This court

said it was not, because the fixing of such interest rates did not alter the contractual performance of the mortgagee.

104. In his judgment, Dyson LJ said:

> "75. …Here, there is no relevant obligation on the Claimant, and therefore nothing that can qualify as "contractual performance" for the purposes of section 3(2)(b)(i). Even if that is wrong, by fixing the rate of interest at a particular level the Claimant is not altering the performance of any obligation assumed by it under the contract. Rather, it is altering the performance required of the appellants.
>
> 76. There appears to be no authority in which the application of section 3(2)(b)(i) to a situation similar to that which exists in this case has been considered. The editors of *Chitty on Contracts (28th edition)* offer this view at paragraph 14-071:
>
> > "Nevertheless it seems unlikely that a contract term entitling one party to terminate the contract in the event of a material breach by the other (e.g. failure to pay by the due date) would fall within paragraph (b), or, if it did so, would be adjudged not to satisfy the requirement of reasonableness. Nor, it is submitted, would that provision extend to a contract term which entitled one party, not to alter the performance expected of himself, but to alter the performance required of the other party (e.g. a term by which a seller of goods is entitled to increase the price payable by the buyer to the price ruling at the date of delivery, or a term by which a person advancing a loan is entitled to vary the interest payable by the borrower on the loan)."
>
> 77. In my judgment, this passage accurately states the law. The contract term must be one which has an effect (indeed a substantial effect) on the contractual performance reasonably expected of the party who relies on the term. The key word is "performance". A good example of what would come within the scope of the statute is given at paragraph 14-070 of *Chitty*. The editors postulate a person dealing as a consumer with a holiday tour operator who agrees to provide a holiday at a certain hotel at a certain resort, but who claims to be entitled, by reference to a term of the contract to that effect, to be able to accommodate the consumer at a different hotel, or to change the resort, or to cancel the holiday in whole or in part. In that example, the operator has an obligation to provide a holiday. The provision of the holiday is the "contractual performance". But that does not apply here."

8.3 Discussion

105. I am in no doubt that section 3 of UCTA did not apply to Clause 1. That clause did not mean that Mr Davies rendered a contractual performance substantially different from that which was reasonably expected of him, or render no performance at all. He had an unqualified right to resign, which he exercised. Parties to an adjudication governed by the Scheme, and indeed other forms of adjudication, must envisage that the adjudicator may resign. Clause 1 simply regulated the circumstances in which, if that happened, Mr Davies was entitled to be paid for the work he had done. To that

extent, therefore, I consider that this case is similar to *Paragon Finance*. There the fixing of variable rates of interest did not go to the performance of the mortgagee; here, the basis on which Mr Davies would be paid in circumstances where he resigned did not go to the performance of his contractual obligations as adjudicator.

106. Further and in any event, even if Clause 1 was caught by section 3 of UCTA, like the judge, I am in no doubt that it was reasonable. A term such as this was expressly envisaged by Davis LJ in *PC Harrington.* It was conceded below that such terms are commonly found: certainly in my experience, clauses like this are ubiquitous. There was no inequality of bargaining power, and both sides were represented when the contract was made. Most importantly of all, as explained in paragraph 80 above, Clause 1 made complete commercial sense and fitted easily with other terms of the contract.

107. In those circumstances, I consider that UCTA is of no application to the present case.

9 ISSUE 6: SHOULD THIS COURT INTERFERE WITH THE JUDGE'S COSTS ORDER?

108. This can be taken shortly. In his second judgment at [2021] EWHC 1874 (TCC) the judge summarily assessed the respondent's costs in the sum of £26,328. That was based on the time that Mr Davies had spent on the case. The judge rejected the submission that he could have engaged a para-legal to do much of that work. He also rejected the submission that the hours claimed were excessive. Each of those conclusions were matters for the judge's assessment and the exercise of his discretion, and there is no basis on which this court would or should interfere with them.

109. The primary point raised in the appellant's notice is that the £325 was not a reasonable or appropriate rate to be applied to the hours claimed. That does not appear to have been a point taken before the judge. In any event, I reject it. Mr Davies had done the work himself in relation to his claim for fees, doubtless because the sum claimed was too small to justify engaging anyone to help him. He was therefore entitled to be compensated at his hourly rate. That rate was not only objectively reasonable but it was a rate that had been advertised to, and accepted by, SWS at the outset of the adjudication.

110. Finally, I cannot help but note that Mr Davies' claim for fees of £4,000 odd plus VAT was about 10% of the costs incurred by SWS just on this appeal. Taken together with both sides' costs below, which SWS were also ordered to pay, it means that their costs of this litigation have been wildly disproportionate to the modest sum at stake.

10. CONCLUSIONS

111. If my Lords agree, I would allow Mr Davies' cross-appeal, in that I consider that he did not go outside the ambit of paragraph 13 of the Scheme and his reasons for resigning were not erroneous. I would dismiss each element of SWS' appeal. The ultimate effect will be to uphold the judge's order.

LORD JUSTICE ARNOLD

112. I agree.

LORD JUSTICE MOYLAN

113. I also agree.