Neutral Citation Number: [2009] EWHC 729 (TCC)

Case No: HT 09 72 & HT 09 106

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 April 2009

Before:

THE HONOURABLE MR JUSTICE AKENHEAD

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Between :

HS WORKS LIMITED	**Claimant**
- and -	
ENTERPRISE MANAGED SERVICES LIMITED	**Defendant**

- -
- -

Steven Walker (instructed by **Donald Pugh**) for the **Claimant**
Simon Lofthouse QC (instructed by **HBJ Gateley Wareing LLP**) for the **Defendant**

Hearing dates: 27 March 2009

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE AKENHEAD:

Introduction

1. HS Works Limited ("HSW") is a civil engineering company carrying out construction works in the utilities sector. Enterprise Managed Services Ltd ("Enterprise") is a utilities contractor which was retained by Thames Water in March 2004 to carry out clean water and network repair and maintenance services; this contract was known as Lot 8. By a written sub contract dated 1 February 2006 ("the Sub-Contract"), HSW was employed by Enterprise to carry out construction work which involved repair, reinstatement and re- surfacing of highways ("the Sub-Contract Works") at various locations in and around Greater London.

2. Following completion of the Sub-Contract Works or the termination of the Sub-Contract in late 2007 or early 2008, issues arose between the parties in relation to the evaluation of the final account and to a number of contra-charges said to be due to Enterprise. There have been two adjudications involving two different adjudicators who produced two decisions in February and March 2009.

3. In the first decision, the adjudicator decided that £1,835,252.26 interest plus VAT and the adjudicator's fees should be paid by Enterprise. In the second decision the adjudicator decided and declared that the proper valuation of the Sub Contract Works allowing for contra charges was £23, 253, 931.09. The effect of this second decision could mean that all or part of the sum decided to be due under the first decision should be repaid, if paid at all. Each party argues that the decision which was adverse to its interests was an invalid decision on the grounds of jurisdiction or natural justice.

The Sub-Contract

4. The Sub-Contract contains the following material terms:

> "31.1.1 The Sub-Contractor is entitled to payment for work undertaken properly and fully completed to permanent reinstatement stage and following the submission and validation of a job pack for each work order...
>
> 31.2 ...The Sub-Contractor shall make an application to payment in accordance with Table 1... Prior to the date on which each payment becomes due. The application shall be in such a form and contain such particulars as the contractor may from time to time direct...
>
> 31.3 Under no circumstances shall the sum stated in an application for payment from the Sub-Contractor necessarily be considered as the sum due to be paid under the provisions of this clause.
>
> 31.4 Not later than the date identified by Table 1...the Contractor shall calculate the value of the Sub-Contractor's works and shall issue a payment certificate to the Sub-Contractor specifying the said value and the basis upon which the value is calculated.... The payment certificate shall further indicate the amount of retention to be withheld (or released as the case may be)...

> 31.5 Subject to clause 31.6, the Contractor shall make payment of the amount proposed to be paid under clause 31.4 not later than the final date for payment identified by column D of Table 1.
>
> 31.6 Notwithstanding the notice referred to in clause 31.4, if the Contractor intends to withhold payment, in whole or in part, after the final date for payment referred to in clause 31.5, the Contractor shall give notice to that effect not later than the date identified by Column E of Table 1. Such a notice shall state the amount proposed to be withheld and the grounds for withholding payment or, if there is more than one ground, each ground and the amount attributable to it. Without prejudice to the generality of this clause, the Contractor shall (subject to the notice) be entitled to withhold payment from monies otherwise payable under this Sub-Contract, for monies due and owing by the Sub-Contractor to the Contractor under or in connection with other Sub-Contracts...
>
> 31.7.5 …the Sub-Contractor shall, within [a specified period] submit to the Contractor a final application for payment setting out all items and amounts to which the Sub-Contractor considers he is entitled under or in connection with the Sub-Contract…
>
> 31.7.6 Any amount to be paid in relation to the final application for payment referred to in clause 31.7.5 above shall become due on the date identified by Column G of Table 1…The provisions of clauses 31.4, 31.5 and 31.6 shall thereafter apply.
>
> 37.4 Either party may decide…to refer the Dispute at any time to adjudication…"

The General History

5. The Lot 8 Sub-Contract Works proceeded over several years albeit that it seems (and I make no finding about this) works ceased in late 2007. There may have been agreed changes to the rates and prices at some stage prior to that. The nature of the work involved work being executed at numerous different locations, involving mostly excavation and reinstatement in the carriageway coupled with repairs to existing water mains. Works varied in value from a few hundred pounds to six figure sums. Enterprise, at least generally, would send to HSW orders, usually electronically, and each order had a Work Record ("WR") number.

6. Although the Lot 8 accounting seems at some stage to have become combined with one or more other sub-contract between the parties, HSW submitted what they considered was their final account for Lot 8 to Enterprise on 14 May 2008. This was sent in electronic format. The total was £30,963,763.25. Identified on the face at least of a summary page was a reference to there having been a deduction for contra charges in the sum of £1,862,197.92 by Enterprise.

7. There then followed a period of discussions and negotiation between the parties. It is abundantly clear that there were disputes between the parties both as to the proper value of HSW's works as well as the contra charges.

8. There was no dispute before me that Enterprise served any relevant withholding notice pursuant to Clause 31.6 on HSW after 14 May 2008. An issue arose between the parties as to whether any further notices were required.

9. By 16 October 2008, Enterprise set out in an email to HSW on a spreadsheet an "updated summary" of what was its view as to what was due to HSW for Lot 8. The total of the "Agreed" column, reflecting what Enterprise was then indicating it agreed, was as follows:

"Contract Value Sub-Total	£24,707,783.92
Lot 8 Charged Contras	(£1,835,252.26)
Outstanding Contra Charges Lot 8	(£42,651.35)
Lot 8 (Unsettled) Insurance Claims…	(£56,702.56)
Contra Charge Total	(£1,934,606.17)
Retention Held Lot 8	(£250,000.00)
Grand Total	(£22,809,259.49)

10. On 18 November 2008, HSW wrote to Enterprise saying:

> "It is our intention to commence adjudication proceedings in the very near future against [Enterprise] with regards the dispute in relation to the Lot 8 contra-charges of which HSW dispute circa £1.2m of the £1.8m levied against the account in relation to this element…"

On 16 December 2008, HSW gave Notice of Adjudication ("the First Adjudication"). Mr Peter Cousins, a Chartered Engineer, was nominated as adjudicator on 18 December 2008 and the Referral was served on 22 December 2008. After various challenges and two extensions, he issued his decision on 2 February 2009, requiring Enterprise to pay an amount equivalent to the Lot 8 Charged Contras, £1,835,252.26 and additional relief. I will return to the relevant events and the decision in that adjudication below.

11. On 12 January 2009, Enterprise e-mailed to HSW a "summary document" recording "the current Lot 8 position based on the various documents that the parties have exchanged". This revealed identical total figures for what Enterprise agreed, that is a gross of £24,707,783.92 and contra charges of £1,934,606.17. It indicated a total figure paid of £22,809,259.49. On 13 January 2009, HSW responded to the effect that:

> "HSW's position on the final account values has not changed and…we maintain that on the Lot 8 contract alone a final account value of £29,017,687.72 is applicable for which Enterprise has previously certified £24,894,511.75 but paid £22,809,259.79 as contra-charge deductions of £1,835,252.26 have wrongly been made…"

12. On 2 February 2009, Enterprise gave Notice of Adjudication ("the Second Adjudication"). Mr Don Smith, a Quantity Surveyor, was duly nominated as adjudicator and the Referral was served on 6 February 2009. After various challenges and one extension, he issued his decision on 12 March 2009; he declared that the value of the Final Account allowing for contra charges was £23,253,931.09. I will return to the Second Adjudication later.

These Proceedings

13. HSW issued its claim, HT 09 72, to enforce the First Adjudication decision on 20 February 2009. Enterprise issued its claim, HT 09 106, to enforce the Second Adjudication decision, on 16 March 2009. Both have issued summary judgment applications. Mr Justice Ramsey gave directions so that the hearing of both applications was heard at one hearing on 27 March 2009.

14. The issues are in simple terms:

> (a) In the First Adjudication, did the Adjudicator exceed or fail to fulfil his jurisdiction in failing to address the merits and quantum of the contra charges? Did he in that respect fail to comply with natural justice? How, if at all, should the decision in the Second Adjudication impact on the First Adjudication decision?
>
> (b) In the Second Adjudication, did the Adjudicator have jurisdiction to issue his decision? Did the Adjudicator fail to apply the rules of natural justice?
>
> (c) If both decisions are valid, how should they be given effect to?
>
> (d) Should the Court decide the substantive issue as to whether new withholding notices needed to be issued by Enterprise after the submission of the Final Account, and, if so, what is the answer to that issue?

The First Adjudication

15. HWS' Solicitor sent to Enterprise on 16 December 2008 HWS' "Notice of Intention to Refer a Difference and a Dispute to Adjudication". There is no suggestion that the dispute which is there summarised had not crystallised. Material parts of the Notice are:

> "The difference and the dispute
>
> (1) The matter in dispute is the deduction by the Contractor of the amounts described by the Contractor as "contra charges"
>
> (2) The Sub-Contractor has, as it is required to do under clause 31.7.5 of the Sub-Contract, provided to the Contractor its final application for payment for each of the discrete projects undertaken on instruction from the Contractor. The Sub-Contractor's final account was submitted…in final form under cover of a letter dated 14 May 2008…
>
> (4) Clause 31.7.6 provided…

(5) Clause 31.6 provides that if the Contractor intends withholding any payment after the final date for payment the Contractor is required to:

> (a) give notice to the Sub-Contractor of its intention to withhold payment after the final date of payment referred to in clause 31.7.6…
>
> (b) state the amount proposed to be withheld; and,
>
> (c) state the ground and/or each ground for the withholding and the amount attributable to it.

The Contractor has failed to give such notices under the Sub-Contract, and specifically in respect of the withholding of monies categorised by the Contractor as "contra charges" stated in its letter dated 10 July 2008 that: "With regards to the contra charges disputed, an analysis is being carried out on your reasons for disputing the contra charges and this will be returned to you along with other final account items on or before the 6th August 2008..." Despite the Contractor's assurances that it would provide an analysis by the due date the Contractor failed to do so.

(6) The Sub-Contractor's final application dated 14/05/08 confirms the Sub-Contractor's gross application for payment in the sum of £32,265,014.72 [in respect of all contracts]. Against the gross amount applied for by the Sub-Contractor, the Contractor has certified an amount for payment of £27,393,970.43…

(8)(a) The sum that the Sub-Contractor has deducted in connection with Lot 8 is £1,835,252.26. For the reason that that the Contractor has failed to comply with the requirements of clause 31.6 of the Sub-Contract (specifically, to give any notice of withholding within the prescribed period) the Contractor has no contractual or lawful right to withhold the amount of £1,835,252.26 and the Sub-Contractor claims payment of the whole of that sum with interest.

(b) Alternatively, if the Adjudicator should find that the Contractor has given notice within the prescribed period the Sub-Contractor will contend that the Contractor has failed to comply with the requirements of clause 31.6 by failing to state the amount to be withheld in respect of each discrete works order and/or for such other reasons as are stated in the Referral and therefore the Contractor has no contractual or lawful right to withhold an amount greater than £92,964.50 and the Sub-Contractor claims payment of the balance of £1,742,287.76 with interest

The redress sought

The Adjudicator will be requested to decide and declare that:

(i) The Contractor has no right to withhold payment of monies as "contra charges" in respect of work undertaken by the Sub-Contractor in connection with the work stream known as Lot 8; and, that the Sub-Contractor is entitled to payment under the terms of the Sub-Contract of:

£1,835,252.26 (plus VAT as applicable); alternatively,

> £1,742.287.76 (plus VAT as applicable) or such other amount as the Adjudicator shall decide; or, in the further alternative,
>
> that the Sub-Contractor is entitled to payment of damages for the Respondent's failure to make payment".

16. There was a substantial exchange of correspondence between the parties during the First Adjudication none of which is relevant to what remains in issue before the Court. The Referral made it clear that HSW's "primary contention" was that, since there were no withholding notices after the submission of its final account on 14 May 2008:

> "…[Enterprise] is liable forthwith to make payment of £1,833,077.26 (plus VAT) wrongfully withheld as "contra charges"…"

The sum referred to is slightly less than that referred to as having been deducted earlier but nothing turns on this apparent discrepancy. The alternative case was that, apart from some £93,000's worth, the contra charges were unjustified.

17. Enterprise's Response to the Referral was a substantial document which took a number of points, some of which are immaterial to these applications. Enterprise responded in detail to HSW's primary and alternative contentions. There was, it contended, no need to serve a withholding notice as the contra charges had already been deducted from interim payments. Part of its argument was that HSW needed to demonstrate that there was a sum due against which the contra charges were deducted. There was detailed argument as to why the contra charges were justified in fact and in terms of quantum; this was supported by evidence, in particular a statement by a Mr Cleminson. Enterprise sought declarations that it was entitled to deduct £1,835,252.26.

18. The Adjudicators' decision materially stated:

> "13. HSW's dispute as to these contra charges are put in two alternative ways. Their primary case... is that no valid withholding notice was given within the prescribed period set out in the contract. Their alternative case, should I find against them on their primary case, is that any withholding notice that was given was invalid because it did not give amounts and/or reasons for withholding...As part of this alternative case, HSW also say that there are other reasons for objections "as stated in the Referral". Those reasons include whether or not the contra charges are, in any event, justified.
>
> 14. It is therefore important to note that my jurisdiction is very limited. It only refers to contra-charges made against the application dated 14 May 2008, and I agree with Enterprise when they say... that I cannot decide whether effective withholding notices were given for previous applications. It only refers to those contra charges made for Lot 8 work, and I cannot look at any of the other work. And finally I only have jurisdiction to decide HSW's alternative case if, and to the extent that, I find against them on their primary case. In practical terms, if I were to find for HSW on their primary case, it would be unnecessary to look at their alternative case because a lack of a valid withholding notice would prevent any monies being withheld from the application for contra charges in any event.

15. Enterprise has said that I have the jurisdiction to, and must, consider what the "actual dispute" is between the parties. They say that [the] actual dispute is whether or not they were actually entitled to levy the contra charges they did, as opposed to what they described as "*the artificially narrow grounds"* of them failing to issue a withholding notice, and that I must consider that... I reject that submission... at any one point in time there may be many disputes that exist between the parties but an adjudicator only has jurisdiction to decide that part (or parts) of those disputes that the Referring Party chooses to refer to him. Therefore the law clearly allows disputes to be limited to what Enterprise calls *"artificially narrow grounds"*. As I have stated above, I have jurisdiction to decide HSW's primary case, but I only have jurisdiction to decide their secondary case, including whether or not the contra charges were justified, if I find against them on their primary case. Even if that were not the case if I were to find that no withholding notice had been issued then Enterprise would not be able to withhold the sums against the 14 May application, whether or not they may be otherwise "entitled" to do so. The lack of what the Act considers to be a valid withholding notice for a payment is fatal to any attempt to with hold monies against that payment, whether that attempt is justified or not.

57. For these reasons I decided that the 14 May application was a valid submission under clause 31.7.5 of the contract.

63. I therefore find that for a withholding notice to be effective it must have been issued by 9 July 2008..

68. Enterprise's next reason is that the amounts were withheld from previous amounts and that therefore I have no jurisdiction to look at those previous amounts. They also argue that the sums have already been deducted on an interim basis. I have to decide what, if any amounts were withheld against the 14 May application, which was for a final account. The fact that those amounts had been withheld from a previous application does not mean they are not also withheld against this application, as I have explained at the beginning of this issue. And if they were withheld against this application they need a withholding notice for that. I therefore reject this reason, although I accept that I have no jurisdiction to decide if those previous withholding notices were validly given against past applications or payments...

77. For the above reasons I decide that a valid withholding notice was not issued for the 14 May application and the effect is that no sums may be withheld from the amount due.

78. As I have previously set out Enterprise's case is that, since I have not been told what the amount due is, I am unable to ascertain what was withheld from the application. Do I have to look at what was due in order to ascertain this? I think in this case the answer is clearly "no". There is simply no dispute between the parties as to what was withheld from the 14 May application. Paragraph 8(a) of the Notice of Adjudication says it was £1,835,252.26. The Referral says it was the same amount. Enterprise agrees with this figure in their Response. Mr Cleminson agrees it at paragraph 66 of his witness statement, and confirms that it has remained constant throughout the final account negotiations. And finally Enterprise's own payment diary for 23 September 2008 confirms it. All of the

evidence is that this is the amount that was withheld and I have no hesitation in deciding so.

79… given the lack of evidence I think it inherently unlikely that the amount due for the 15 May application was less [than] the amount that they had previously decided was due.

81. For the above reasons I decided that the sum of £1,835,252.26 should be repaid to HSW

82. From the above decision it is apparent that I have upheld HSW's primary case. Therefore I have no jurisdiction to decide their secondary case. Even if I did and decided that the contra charges were justified that could not have any practical effect because the lack of a withholding notice would be fateful [sic] in any event…"

19. In summary, he decided as follows:

(a) Enterprise should pay £1,835,252.26 plus VAT if applicable.

(b) Interest of £59,281.17 and £175.98 per day after the decision.

(c) Enterprise was to pay the Adjudicator's fees.

20. Part only of the first sum has been paid, belatedly, and none of the other sums. HSW seeks recovery of them in the claim brought by it.

The Second Adjudication

21. In its notice of Adjudication, dated 2 February 2009, Enterprise asserted as follows:

"2.1 On 14 May 2008, HSW submitted what is alleged to be its final application for payment under clause 31.7.5 of the Sub-Contract. This was incorrect…

2.3 On 16 October 2008, [Enterprise] submitted its valuation of HSW's final application (including its valuation of the work HSW claimed it had carried out on other sub contracts between the parties). This showed a sum due to [Enterprise] from HSW of £647,390.16.

2.4 Thereafter the parties engaged in a series of both open and without prejudice discussions to attempt to agree HSW's final application. On 12 January 2009, [Enterprise] sent HSW an e-mail attaching the overall valuation position in relation to the Sub-Contract alone. This showed a sum due to [Enterprise] of £286,081.74. On 13 January 2009, HSW responded refuting that on a proper analysis of HSW's Final Application (in so far as it related to the Sub-Contract) a sum was due to [Enterprise] from HSW. HSW reasserted that it claims a balance from [Enterprise] of £5,477,162.08.

2.5 A dispute therefore exists between the parties as to the proper valuation of HSW's works carried out under the Sub-Contract.

3.1 [Enterprise] seeks the following redress:

> 3.1.1 A declaration as to the proper valuation of the works carried out by HSW under the Sub-Contract;
>
> 3.1.2 A declaration as to the sum payable by HSW to Enterprise…"

22. In its Referral Notice, Enterprise referred to the general background and to the Sub-Contract and largely reiterated the dispute as set out in the Notice of Adjudication. In the "Executive Summary", Enterprise identified that its assessment of the total value of the Sub-Contract works was £24,320,964.15, from which, it asserted, fell to be deducted contra charges in the sum of £1,891,051.60, leaving a gross total (excluding retention) of £22,429,912.55. At Paragraph 6.1, Enterprise relied upon and referred the adjudicator to four witness statements (Messrs Cleminson, Baxter, Qadri and Hind) and:

> "the expert witness report of Mark Gordon of Ridge and Partners "

This report at least had not been served in any form prior thereto; it reviewed, albeit at some length, the methodology used by Enterprise and did spot checks to verify the figures. A large number of other documents were provided with the Referral or had been provided beforehand to the Adjudicator, totalling some 34 files. There was analysis of what Enterprise said was its "Final Account Assessment of 16 January 2009". So far as the contra charges were concerned, Enterprise identified that £1,891,051.60 was claimed, albeit that Mr Gordon's "assessment" was £2,429,827.96.

23. The "redress" sought was as follows:

> "12.1.1 A declaration as to the proper valuation of the works carried out by HSW under the Sub-Contract; [Enterprise] submits that this declaration should be in the sum of £22,429,912.54 or such other sum the Adjudicator shall deem fit
>
> 12.1.2 a declaration as to the sum payable by HSW to [Enterprise]. [Enterprise] submits that the declaration should be in the sum of £379,346.95 or such other sum the Adjudicator deems fit…
>
> 12.1.4 An award that HSW shall pay the fees and expenses of the Adjudicator and the nomination fee of the nominating body..."

24. HSW's solicitor objected in writing to the jurisdiction of the Adjudicator, reasons being advanced in written submissions dated 9 February 2009. So far as is material, the grounds advanced included:

> (a) the lack of a crystallised dispute;
>
> (b) the Referral and the redress sought was said to be in breach of natural justice.

This latter ground reflected a complaint by HSW about the belated provision of Mr Gordon's report and the fact that it would not be possible for them, in the requisite period allowed for the adjudication, to defend itself, or the adjudicator "to make the necessary contractual ascertainment of" the final account.

25. It is possible at least that this objection followed on from the adjudicator's letter of 6 February 2009 directing Enterprise to deliver its Response by 13 February 2009. By

e-mail dated 9 February 2009, Enterprise's solicitors responded to the jurisdictional challenges; in relation to the natural justice complaint, they wrote:

> "There is no breach of natural justice in [Enterprise] adducing the report of Mr Gordon. There will be ample time for HSW to respond to this in this reference. It is also important to note the type of report Mr Gordon is offering. He only adduces evidence to verify the quantum already submitted by [Enterprise]. This approach is to be distinguished for example from an expert report in an extension of time claim where an expert's report will deal with cause and effect. This is not the case here.
>
> We do not understand paragraph 25 of HSW's submissions. If HSW alleges this dispute is too substantial to be considered within the 28 day timetable then we would respectfully disagree. Parliament has dictated that any dispute or difference can be referred to adjudication for decision within the 28 day period. Adjudication is an interim measure and should HSW or [Enterprise] be ultimately dissatisfied with the Adjudicator's decision, this can be revisited by way of litigation."

26. On 10 February 2009, the adjudicator resolved that he could and should continue to act as adjudicator. On the 11 February 2009, HSW's solicitor referred to the fact that Mr Gordon referred to "the volume of hard and soft copy information". He asked the adjudicator to:

> "direct that [Enterprise] forthwith discloses copies of the further documents... and provides electronic copies of the schedules etc to allow the efficient and fair conduct of the Adjudication"

On 11 February 2009, Enterprise's solicitors, wrote that they had "served the documentation on which we intend to rely". They argued that there was therefore no "requirement for a further direction".

27. On 11 February 2009, the Adjudicator wrote to the parties in these terms:

> "…reference is made to certain documents and electronic schedules, which have been taken into account by Mr Gordon in preparing his report, but which apparently have not been included within the referral. If this is in fact the case, in the interest of natural justice, I direct that copies of such documents and schedules are provided to the responding party and myself, as soon as possible."

He also asked if Enterprise would consent to an extension of up to 14 days for the making of his decision.

28. Enterprise's solicitors' response was on the same day:

> "In relation to your direction that [Enterprise] provide copies of documents that Mr Gordon has seen in preparing his report, Mr Gordon has seen only those documents appended to the Referral and has had an opportunity to observe the systems set out in his report and Mr Cleminson's witness statement. Such an

> opportunity will be afforded to you and HSW at the meetings we have requested...
>
> As for electronic copies of documents in the Referral, please can Mr Pugh let us have a list (including references to tabs and page/file numbers) and we will take instructions as to whether these are available electronically.
>
> Finally,[Enterprise] is not at this stage prepared to grant you an extension of 14 days in reaching your Decision. This is due to HSW having obtained an Adjudicator's Decision in an earlier adjudication between the parties. That adjudication resulted in substantial sums being payable to HSW on a technicality. Although we are awaiting instructions as to whether [Enterprise] will be paying those sums on 16 February 2009 as directed, if Mr Pugh could confirm HSW will not enforce that Decision until you have issued your decision in this adjudication, [Enterprise] would be minded (although we would have to confirm) to grant you an extension of time of 14 days."

29. On 12 February 2009, HSW's solicitor wrote to the adjudicator, indicating that Enterprise intended to provide no further documents either in a hard or electronic form. He also stated:

> "Also, in your letter, you state that the reason for your direction is "in the interest of natural justice". Mr Gordon in his report refers at paragraph 1.4.6 to there being "around 51,000 work requests". HSW has raised in its written submissions on jurisdiction its concerns specifically on this point... Furthermore, and regarding the inclusion of Mr Gordon's report, [Enterprise's solicitors] suggest in their e-mail of 9 February that "there will be plenty of time for HSW to respond to this in this reference". As things presently stand, HSW are seriously and unfairly disadvantaged-which, no doubt, was the intention of [Enterprise] when choosing to serve Mr Gordon's report without any prior notification to HSW.
>
> HSW considers that you are correct to raise the issue of natural justice and for that reason alone HSW would invite you to reconsider your decision to continue to act as adjudicator in this matter. However, coupled with [Enterprise's] confirmation that they are not going to provide any electronic copies of documents, despite your direction, in HSW's view, puts beyond any doubt the question as to whether you can fulfil your duties within the 28 day period of this reference. That, with respect, is simply an impossible task and in such circumstances the correct course of action is to you to resign."

30. Enterprise's solicitors responded on the same day:

> "[Enterprise] has stated that the documents appended to the Referral are the documents upon which it intends to rely in this reference.Those documents are derived from systems which are available for inspection during the course of meetings with you and HSW (in so far as an inspection is necessary). We will take instructions on whether documents appended to the Referral are available electronically if Mr Pugh provides a list of what he requires in an electronic format. "

Also on that day Enterprise's solicitors told the adjudicator that they had heard from HSW's solicitor that it would not stay enforcement of the Adjudicator's decision in the first adjudication and therefore they were unable to grant him an extension of time to reach his decision.

31. On 13 February 2009, HSW served its Response. It was a 52 page document and it was accompanied by four files. There are numerous references to Enterprise's documents which had accompanied the Referral. It addressed the contra charges in some detail. At least one statement, from Mr Stuart Martin, was served which addressed in some detail the report of Mr Gordon. The Response reserved HWS' position so far as jurisdiction and natural justice were concerned. At Paragraph 120, the redress sought included the following:

> "HSW, for the afore-noted reasons, denies that the sum to be declared as the proper valuation of its works is £22,429,912.54; the Adjudicator is charged with deciding (in default of [Enterprise] what is the proper valuation of HSW's works and in the absence of any payment certificate or notice of withholding that amount should properly be the amount of HSW's final application dated 14 May 2008 (less previous payments and retentions properly withheld)."

32. On 16 February 2009, Enterprise's solicitors e-mailed to say that they had always been willing to take instructions in relation to what documents appended to the Referral were available electronically. However, Enterprise had arranged for a copy of its valuation of the final account to be put onto a CD which was to be sent to the adjudicator and to HSW. That had been sent and received by 17 February 2009.

33. On 18 February 2009, a meeting was held between the parties and the adjudicator. There was a discussion again about the CD supplied the day before. Mr Pugh said that, if the adjudicator admitted it, then his client would want time to review the information on the discs and to apply that information against its May 2008 final account. He handed back the CD to Enterprise's solicitors. There was a review during this meeting of Enterprise's electronic recording systems and its links to the Thames Water computer system. Specific works requests were traced through the system. At the meeting, each party was afforded the opportunity to present its case, question the other party and answer questions from the adjudicator. It is accepted that HWS had its own electronic information which it used during that hearing.

34. A Reply was sent by Enterprise on 19 February 2009. HSW's solicitor responded in some detail on 20 February 2009. The adjudicator granted HSW a right to serve a Rejoinder by 24 February 2009. The Rejoinder was served on 24 February 2009 together with at least two witness statements. There were various other exchanges. It was agreed that the adjudicator should have an additional week in which to issue his decision. He has not suggested that he needed any more time.

The Decision in the Second Adjudication

35. The adjudicator issued his decision on 12 March 2009. The decision runs to some 55 pages. It is not suggested that it was insufficiently reasoned. At Paragraphs 11 to 13, he recorded the jurisdictional challenge which had been made and the view which he had formed that nonetheless he should continue to act as adjudicator. Under a heading "Generally", he set out how he had approached reaching his decision:

> "14. The matters referred to me in this adjudication were of a complicated nature and during the course of the reference, I have been provided with a total of 38 large lever arch files and a number of smaller files. In addition, I have been provided with three compact disks of data. The task of making this decision has been particularly onerous, taking into account the volume of documentation provided and the fact that from the meeting on 18/02/09 to the date of this Decision, I had 17 working days.
>
> 15. It is therefore appropriate that I make some general comments in relation to the methods used by me to reach my Decision.
>
> 16. The dispute concerns the total of some 51,000 separate jobs not all of which are disputed. The Parties had conveniently sub-divided the disputed items into categories, where one principle applies to a number of like disputed items. This has been extremely helpful.
>
> 17. In respect of each separate category, I have taken into account the Parties' representations and depending on the volume of the supporting documentation, either checked all the information, or in the case of a large disputed item, carried out a series of spot checks, to verify the sums claimed.
>
> 18. During the course of the Sub-Contract the Parties developed a system of electronic communication, which, due to the volume of paper which would otherwise have been generated, was essential. Each Party had its own systems and each Party had access to the Thames Water system. At a meeting in [Enterprise's] office in Cockfosters on 18/02/09, a demonstration of the software was given and specific examples, some chosen by each Party, were demonstrated on the system. I am satisfied that the demonstration showed that there was in fact a proper system in place for the administration of the Sub-Contract.
>
> 19. Due to the method chosen by the parties, of electronic accounting, there clearly is a large risk of human error e.g. inputing [sic] a wrong WR number etc, and I am sure that many of the disputed items are as, a result of such errors. However, that is one of the pitfalls of the Parties chosen method of working and until all such errors are discovered and rectified, the Parties will have to live with the consequences.
>
> 20. In dealing with the disputed items, I have allocated the time available to me in proportion to the time available i.e. a high-value item will attract more of my time than a low value item. By so doing I feel that I have spent my time as efficiently as was possible.
>
> 21. Due to the fact that I was unable to verify the valuation of each individual job, I formed a view based upon the checks carried out, that on the balance of probability the checks carried out by me, were representative of the entire section of the account."

36. He then went on to deal with the "Measured Items", which were essentially in relation to the measurement of works executed by HSW and to miscellaneous items. These had been split into various sections 1(A) to 1(M) and other heads and each category had been addressed in written and oral submissions by the parties. For some items, he

simply accepted the evidence of one side or the other. I will not set out every item addressed by the adjudicator over some 30 pages of his decision but will set out that relating to works said to have been "over applied" which was the example used by the parties in argument before me:

> "26.1 This category of jobs relates to WR's where [Enterprise] is of the view that HSW has overpriced, as a result of using an incorrect code from the Schedule of Rates, or where a correct code has been used, but an incorrect rate has been used. There are a total of 698 jobs in this category and HSW has claimed a total of £406,186 91 against [Enterprise's] valuation of £211,989.17.
>
> 26.2 At the meeting on 18/02/09...WR71TMGL was investigated and the procedure was demonstrated on the computer. I have checked this example on the paper documentation provided to me. The procedure is relatively simple in that on file 7 tab 1C, there is a spreadsheet of all the jobs under this heading. The code and the value applied for by HSW is shown and the code and the value certified is given. At file 10, the job pack can be found, which gives a description of the operations carried out on site. The code for the work described in the job pack can be checked with the description on the "Highways Schedule of Rates."
>
> 26.3 A code 4 repair was claimed by HSW which is described as "*Mains Repairs Size (A-B)*," while the wording on the front sheet of the job pack states, "*Dug round valve and exchanged bolts in both flanges*." The code has been changed by [Enterprise] to 20a, which is described as, "*Sluice Valve Repairs (mains size A-F)-Body Bolt etc*". I am therefore satisfied that the code 20a, allocated to the job by [Enterprise], more correctly represents the description on the front page of the job pack, than the code applied for by HSW.
>
> 26.4 I did spot checks on a further 5 WR's and in each case I preferred the code allocated by [Enterprise] to that of HSW, as more accurately reflecting the description of the work carried out and entered on the front page of the job pack.
>
> 26.5. At the meeting on 18/02/09, HSW commented that we had only looked at one example and could not comment further. I have not received any evidence from HSW to rebut the documentary evidence provided by [Enterprise].
>
> 26.6 I therefore find, on the balance of probability, that the value of this head of claim is £211,989 17."

37. The adjudicator then addressed the contra charges in some detail over some 18 pages of his decision. In the final paragraphs of the decision, the adjudicator, materially, stated as follows:

> "135. I declare that the proper valuation of the works carried out by HSW under the Sub-Contract is £23,253,931.09…
>
> 136. I declare that no sums payable by HSW to EMS…
>
> 139. Each party shall be responsible for the payment of my fee and expenses which I determined in the total sum of £24,823.38, inclusive of VAT in the sum of £3,237.83 (i.e. each party shall pay a total of £12,411.69)"

It is clear from Summaries forming part of the decision that the total valuation was decided by the adjudicator to be £24,816,445 76 as the value of work done by HSW less the value of the contra charges of £1,562,514.67.

The Law

38. The first area of contention is how if at all the Court deals simultaneously with two adjudication enforcements which decide different things but which might or do impact on each other. There are first of all the cases in which one or other of the other decisions is invalid on jurisdictional or natural justice grounds. This class of case gives rise to no problem as an unenforceable decision can be ignored for all practical purposes in connection with the enforcement of a valid decision. Included in this class are those cases in which the second or later adjudicator has decided something which has already been decided in an earlier valid and enforceable decision; the later adjudication is to that extent unenforceable.

39. The more difficult case arises when there are two enforceable decisions which might or do impact on each other. In **YCMS Ltd v Grabiner** [2009] EWHC 127 (TCC), the Court addressed this issue, drawing on the earlier decision of Mr Justice Jackson (as he then was) in **Interserve**:

> " 51. So far as the possibility of setting off one adjudicator's decision against another, this was considered by Jackson J (as he then was) in **Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd** [2006] EWHC 741 (TCC). Having reviewed the authorities, he said at paragraph 43:
>
> > "… Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues. I reach this conclusion both from the express terms of the Act, and also from the line of authority referred to earlier in this judgment."
>
> 63. Finally, I turn to the Third Decision. These Courts have from 1998 onwards taken the view that Adjudicators' Decisions are to be enforced summarily and expeditiously unless there is a valid jurisdictional or natural justice ground which renders enforcement inappropriate. There is, perhaps unfortunately, nothing in the HGCRA which legislates for setting off one adjudicator's decision against another. It is in those circumstances that the dictum of Jackson J in the **Interserve** case is so apposite. It is not accepted by YCMS that the Third Decision is enforceable. Because the decision has only relatively recently been issued, YCMS reserve their position so far as enforceability is concerned. It took a jurisdictional objection during the Third Adjudication and it may seek to rely on that in any enforcement proceedings in relation to the Third Decision.
>
> 64. It follows from my views above that YCMS have established that the First Decision should be enforced. I see no good reason to depart from the approach adumbrated by Jackson J in the **Interserve** case. I do not consider that the fact that a Third Decision has been reached which on its face allows to the Defendants a

> net recovery is a special circumstance which justifies departing from the general rule that valid adjudicators' decisions should be enforced promptly. Things might be different if there were effectively simultaneous adjudications and decisions. There is no suggestion that YCMS or the Defendants are in financial difficulties and will not be able to pay the sums said to be due on the First Decision or said to be due the other way on the Third Decision. There is no prejudice to the Defendants in having to honour the First Decision, which should have been honoured some 14 months ago, albeit I accept it was not the Defendants' fault as such that proceedings for enforcement were delayed against them."

In **Interserve**, the sum due under the later adjudication had not fallen due for payment albeit that the later decision had been issued during the course of the proceedings for the enforcement of the earlier decision. In **YCMS**, a similar situation arose with the added complication that it was unclear whether the later decision was valid or likely to be challenged as invalid. In neither case had the defendant sought to enforce the later decision by separate proceedings.

40. In my view, these steps need to be considered before one can consider whether in effect or in actually to permit a set off of one decision against another:

> (a) First, it is necessary to determine at the time when the Court is considering the issue whether both decisions are valid; if not or if it can not be determined whether each is valid, it is unnecessary to consider the next steps;
>
> (b) If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.
>
> (c) If it is clear that both are so capable, the Court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The Court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.
>
> (d) How each decision is enforced is a matter for the Court. It may be wholly inappropriate to permit a set off of a second financial decision as such in circumstances where the first decision was predicated upon a basis that there could be no set off.

41. The next legal area to consider is how and when a dispute crystallises. This has been fully reviewed by the Court of Appeal in **Amec Civil Engineering Ltd v Secretary of State for Transport** [2005] BLR 227:

> 29. From his review of the authorities, the judge [at first instance] derived the following propositions:
>
> > "1. The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
> >
> > 2. Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular

situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

3. The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

30. In *Collins (Contractors) Limited v Baltic Quay Management (1994) Limited* [2004] EWCA Civ 1757, Clarke LJ at paragraph 68 quoted Jackson J's seven propositions and said of them:

> "63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been

concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so.

64. It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J."

31. Each of the parties has accepted in this court that the judge's propositions correctly state the law. I am broadly content to do so also, but with certain further observations, as follows:

1. Clause 66 refers, not only to a "dispute", but also to a "difference". "Dispute or difference" seems to me to be less hard-edged than "dispute" alone. This accords with the view of Danckwerts LJ in *F & G Sykes v. Fine Fare* [1967] 1 LLR 53 at 60 where he contrasted a difference, being a failure to agree, with a dispute.

2. In many instances, it will be quite clear that there is a dispute. In many of these, it may be sensible to suppose that the parties may not expect to challenge the Engineer's decision in subsequent arbitration proceedings. But major claims by either party are likely to be contested and arbitration may well be probable and necessary. Commercial good sense does not suggest that the clause should be construed with legalistic rigidity so as to impede the parties from starting timely arbitration proceedings. The whole clause should be read in this light. This leads me to lean in favour of an inclusive interpretation of what amounts to a dispute or difference.

3. The main circumstances in which it may matter whether there was a dispute or difference which has been referred to and settled by the Engineer include (a) where one party contends that this has occurred without due reference to arbitration, so that the Engineer's decision has become final and binding; and (b) where, as in the present case, one party wishes to contend that arbitration proceedings have not been started within a statutory period of limitation.

4. If the due operation of the mechanism of clause 66 really is to be seen as a condition precedent to the ability to start arbitration proceedings within a period of limitation, the parties cannot have intended to afford one another opportunistic technical obstacles to achieving this beyond those which the clause necessarily requires.

5. I agree with the judge that, insofar as the existence of a dispute may involve affording a party a reasonable time to respond to a claim, what may constitute a reasonable time depends on the facts of the case and the relevant contractual structure. The facts of the case here included that:

(a) Major defects in very substantial works emerged relatively shortly before the perceived end of the limitation period. These required detailed investigation. In consequence, the formulation of a precisely detailed claim was impossible within a short period.

(b) Liability for the defects was bound to be highly contentious, but Amec were bound to be a first candidate for responsibility.

(c) Amec (and others) were inevitably going to resist liability well beyond the perceived end of the limitation period."

42. The Court also reviewed the **Amec** case in **Cantillon Ltd v Urvasco Ltd** [2008] EWHC 282 (TCC):

"55. There has been substantial authority, both in arbitration and adjudication, about what the meaning of the expression "dispute" is and what disputes or differences may arise on the facts of any given case. Cases such as **Amec Civil Engineering Ltd -v- Secretary of State for Transport** [2005] BLR 227 and **Collins (Contractors) Ltd -v- Baltic Quay Management (1994) Ltd** [2004] EWCA (Civ) 1757 address how and when a dispute can arise. I draw from such cases as those the following propositions:

(a) Courts (and indeed adjudicators and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is.

(b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is.

(c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration.

(d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.

It will follow from the above that I do not follow the judgment of HHJ Seymour, QC, in **Edmund Nuttall Ltd -v- RG Carter Ltd** [2002] BLR 312 where the learned judge said at paragraph 36:

"However, where a party has an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a "dispute" between the parties is not only a "claim" which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side".

In my view, one should look at the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds upon which that it has been rejected or not accepted. Thus, it is open to any defendant to raise any

> defence to the claim when it is referred to adjudication or arbitration. Similarly, the claiming party is not limited to the arguments, contentions and evidence put forward by it before the dispute crystallised. The adjudicator or arbitrator must then resolve the referred dispute, which is essentially the challenged claim or assertion but can consider any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute."

There is nothing further I can add to this which would be of assistance in this case.

43. The parties also sought to address the Court on what, in the context of the First Adjudication, the adjudicator should have addressed having declined to decide upon the alternative case advanced by HSW on the merits of the contra charge claims. In **Cantillon v Urvasco**, the Court considered that the ambit of the reference to adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration. That however does not mean that, if the adjudicator decides that as a matter of law the defence is a bad one, he or she must go on to address the facts which go to support that bad defence and make some sort of declaration; the adjudicator's jurisdiction is originally described and defined by what dispute is referred to him or her albeit that each defence must be considered, whether good or bad. Either there needs be no decision beyond a rejection of the defence or the decision needs to reflect the acceptance of the defence in principle.

44. Reliance was placed on **Quartzelec Ltd v Honeywell Control Systems** [2008] EWHC 3315 (TCC), a decision of Judge Davies in the TCC in Manchester. Paragraph 2 set out the relevant facts:

> "(1) The Claimant considered that the Defendant had been wrong to exclude from certain interim valuations certain sums claimed in respect of a particular change to the scope of the works ('the scope change'). (2) The Claimant submitted that dispute to adjudication. (3) One defence ('the omission defence') raised for the first time before the adjudicator was that the interim valuations had, in error, not included a deduction for cost savings due to a separate variation omitting part of the works, and that this amount (which the Defendant contended was worth approximately £35,000) should be deducted from any amount due to the Claimant in respect of the scope change. (4) The Claimant protested that the adjudicator had no jurisdiction to consider the omission defence, because it had not been raised at any time previously and, hence, did not form any part of the dispute referred to the adjudicator. (5) In his decision the adjudicator, so submits the Defendant, accepted this submission and considered that he had no jurisdiction to consider the omission defence. (6) He determined the dispute relating to the scope change and decided that a sum of approximately £135,000 was due to the Claimant in respect of the scope change… (7) The Defendant refused to comply with this decision and, hence, the present enforcement proceedings were issued and the instant application for summary judgment made."

45. He then went on to address the law and adopt the **Cantillon** decision. He said at Paragraph 30:

> "…Where the dispute referred to adjudication by a claimant is one which involves a claim to be paid money, it is difficult to see why a respondent should

> not be entitled to raise any defence open to him to defend himself against that claim, regardless of whether or not it was raised as a discrete ground of defence in the run-up to the adjudication, and subject to any considerations of natural justice. The adjudicator has jurisdiction to, and should, consider any such defence. That may result in him accepting or rejecting the defence, in whole or in part. It may be the case that one ground for rejecting a defence not previously raised is that it cannot properly be advanced in the absence of a withholding notice. It may be the case that another ground for rejecting a defence not previously raised is that the failure to raise it at an earlier stage is fatal to the adjudicator's assessment of the genuineness of that defence. But it does not seem to me that a decision to either such effect is a decision by the adjudicator as to his jurisdiction to consider the defence; instead it is a decision within his jurisdiction about the merits of that defence."

He concluded at Paragraph 33 that on the facts of that case:

> "…in this case the adjudicator did make a significant jurisdictional error and that he did not act in accordance with the requirements of natural justice in refusing to consider the omissions defence. It was a defence which was open to Honeywell to advance as a defence to Quartzelec's money claim, and it should have been considered by the adjudicator on its merits."

46. It is of some interest that Judge Davies then proceeded to decide finally one of the substantive issues in the case, whether a withholding notice had to be served in relation to the "omissions" point. If a substantive issue can be decided by the Court with no or no significant extra expense or delay and it is otherwise just to do so, the overriding objective would suggest that the Court can and should address it, subject of course to there being no arbitration agreement or to any other good reason. It may well be that, even if the substantive issue goes against the party seeking to enforce the award, that party should be entitled at least to the consequential relief (interest and adjudicator's fees) ordered by the adjudicator in its favour, on the basis that the enforceable decision should have been honoured.

47. The next legal issue is what the approach should be to what have been called "kitchen sink" adjudications, which are essentially where the dispute is so extensive that an adjudicator or the defending party can not readily or easily deal with it in the standard 28 day period for adjudications. In **CIB Properties Ltd v Birse Construction** [2005] BLR 173, a case in which the parties had agreed to extend time for the adjudication to three months, HHJ Toulmin CMG QC said at Paragraph 199:

> "I have already considered the question of whether there are some disputes, including this one, which are so complex that they are not suitable for adjudication. I conclude that this issue is governed by the Act. There is a general right under section 108(1) for a party to a construction contract to refer a dispute or difference to adjudication. There is a duty on the Adjudicator to reach a decision provided that the conditions in section 108(2) are met. This means that the Adjudicator must be able to discharge his duty to reach a decision impartially and fairly within the time limit stipulated in section 108(2)(c) and (d). A defendant is not bound to agree to extend time beyond the time limits laid down in the Act even if such a refusal renders the task of the Adjudicator to be impossible."

48. In **William Verry (Glazing Systems) Ltd v Furlong Homes Ltd** [2005] EWHC 138 (TCC), HHJ Coulson (as he then was) said:

> "11. It is important to note two things about this Notice of Adjudication. First, it referred to adjudication the entirety of the dispute about the Verry final account figure. This meant that Furlong wanted the adjudicator, during the statutory twenty-eight days, to reach decisions about disputed variations, extensions of time, loss expense and liquidated damages. In other words, all the potential disputes which can arise under a Building Contract were here being referred to adjudication. There was no express limitation or qualification on the range of matters for decision. It was, to use the vernacular, a 'kitchen sink' final account adjudication. Whilst such adjudications are not expressly prohibited by the Housing Grants, Construction and Regeneration Act 1997 as it presently stands, there is little doubt that composite and complex disputes such as this cannot easily be accommodated within the summary procedure of adjudication. A referring party should think very carefully before using the adjudication process to try and obtain some sort of perceived tactical advantage in final account negotiations and, in so doing, squeezing a wide-ranging final account dispute into a procedure for which it is fundamentally unsuited."
>
> 57. Mr Bingham next contended that if an adjudicator runs out of time and cannot produce a fair decision within the statutory time limit he should say so, and not go on to reach an unfair Decision. I accept that proposition, and to that extent, therefore, I would agree not only with Mr Bingham but with the analysis of His Honour Judge Toulmin QC in *CIB –v- Birse* (above). In both that case and this, despite the mass of material, the adjudicator felt that he was able to come to a proper decision on the matters raised before him. I have seen nothing to suggest that Mr Sims' decision in this case was, or even might have been, unfair. On the contrary, it seems to me that the adjudicator in this case produced a detailed and painstaking decision which properly reflected all the material with which he had been provided. I reject any suggestion that the Decision, or the way it was arrived at, was or even might have been unfair."

49. I have been referred to no case however (and can find none) in which this approach has ever been applied to refuse enforcement of an otherwise enforceable adjudication. What can be had regard to is the following:

> (a) A most important factor in the consideration by the Court is whether and if so upon what basis the adjudicator felt able to reach his decision in the time available.
>
> (b) In terms of the opportunity available to the defending party in an adjudication, the Court can and should look at the opportunities available to that party before the adjudication started to address the subject matter of the adjudication and at what that party was able to and did do in the time available in the adjudication to address the material provided to it and the adjudicator.

50. Finally in reviewing the question of natural justice in adjudication, the following from the judgment in the **Cantillon** case is apposite:

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

(a) It must first be established that the Adjudicator failed to apply the rules of natural justice;

(b) Any breach of the rules must be more than peripheral; they must be material breaches;

(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of **Balfour Beatty Construction Company Ltd -v- The London Borough of Lambeth** was concerned comes into play . It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

Discussion

51. I will address, first, the First Adjudication. In essence, Enterprise argues that the decision is unenforceable because the adjudicator failed to address the merits and make findings in relation to the contra charges which it had put forward. That is put upon two grounds, first that the adjudicator was bound jurisdictionally to address the alternative case put by HSW in its Referral and put forward by Enterprise in its response to the effect that the contra charges claim was to a greater or lesser extent a good or bad one, respectively. Secondly, it is said that the adjudicator failed to follow the rules of natural justice to deal with the contra charges claim on its merits. In my judgment, these objections are simply not made out:

(a) The adjudicator's jurisdiction was defined in effect by the Notice of Adjudication and the nature of the dispute referred to him.

(b) That dispute involved a primary assertion that, as there were no or no effective withholding notices from Enterprise, the amount withheld for the contra charges was not properly withheld and was payable by Enterprise to HSW. As a matter of logic, if that primary case was upheld, there was no need for the

adjudicator to consider the alternative case. This was exactly the view expressed by the adjudicator at Paragraph 14 of his decision.

(c) It cannot be incumbent upon an adjudicator, at least generally, to include in his or her decision a commentary let alone findings upon every issue which arises in the reference, save to the extent that it is necessary to provide reasons and explanations for what he or she does decide.

(d) It was suggested by Mr Lofthouse QC for Enterprise that, as a matter of fairness, the adjudicator should have reviewed and made findings about each of the contra charges because, if he had done so, he might have taken a different view about the merits of the arguments relating to the need for withholding notices. It is clear that the adjudicator considered that point at Paragraph 14 and formed the view that it would make no difference to the effective decision on the primary case which he was going to make. In my view, it is fanciful to speculate that the adjudicator, having formed the view that in principle the primary case should succeed, would have played some form of mental gymnastics to reach an opposite view having considered the merits of the contra charges.

(e) Even if one could (and I do not) classify what the adjudicator did as lacking in jurisdiction or as a failure to apply the rules of natural justice, the complaint would be wholly immaterial given what he did find.

52. It follows that the First Adjudication decision should be enforced. The decision should have been honoured by Enterprise within 14 days of its issue, namely by 16 February 2009.

53. I now turn to consider the enforceability of the Second Adjudication decision. The first sub-issue relates to whether the dispute which was referred to adjudication had crystallised beforehand. I have little doubt that it had crystallised:

(a) By the time that HSW submitted its final account in May 2008, it was already clear that the parties were in dispute on the final account in that by that stage HSW was saying that it was entitled to over £30m whilst Enterprise was saying the sum due, before contra charges, was about £24m. Correspondence which follows up to mid October 2008 shows that the dispute lines between the parties were that HSW was saying that the Lot 8 works value was £29,004,630.52 and Enterprise was making it clear that its value of such works was £24,707,783.92, less contra charges in the sum of just over £1.9m. Indeed, Enterprise was asserting at that stage that, allowing for retention, HSW owed it just under £300,000.

(b) There can be no doubt that the parties were and remained in dispute before and throughout the First Adjudication in respect of the contra charges. Indeed, in the First Adjudication detailed arguments and evidence were deployed on this issue.

(c) The figures on the final account in the same figures as highlighted on or by 16 October 2008 were re-presented by Enterprise to HSW on 12 January 2009 and effectively rejected by HSW on 13 January 2009.

(d) Thus, by the time that the Notice of Adjudication was served on 2 February 2009, there was a clear dispute between the parties both as to the value of the final account for the Lot 8 works and as to the contra charges.

(e) The dispute which the Referring Party, Enterprise, referred to adjudication and for which the adjudicator had jurisdiction was the dispute as to the value of the final account as it had crystallised up to that point.

(f) The fact that Enterprise served with their Referral Notice Mr Gordon's report does not in logic impact upon what dispute had crystallised beforehand. In any event and at most, that report could merely support Enterprise's claim in the adjudication.

(g) Mr Gordon's report, which I have not quoted from, supports and indeed goes further than Enterprise's claim but his views on the contra charges valuing them at some £550,000 higher than Enterprise valued them at were simply supportive of that lower claim. As the Court said in **Cantillon**, Courts should not adopt an over legalistic analysis of what the dispute between the parties is; one needs to determine broadly what the disputed claim or assertion is and the disputed claim is not necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication.

(h) It is true that the Referral Notice identified a lower gross assessed sum due to HSW but the redress sought was a "declaration as the proper valuation of the works carried out by HSW under the Sub-Contract", albeit that Enterprise submitted that the declaration should be in the lower sum. There were detailed disputes as to the proper valuation which ranged between some £29m on the one hand and some £24m on the other together with the contra charges.

(i) In the result, the adjudicator found that the gross sum due to HSW was £24,816,445 76 and the value of the contra charges of £1,562,514.67; both these values were respectively more than the sum put forward by Enterprise as the overall value both in the Referral and in the pre-Notice of adjudication stage and less than that put forward by Mr Gordon as the value of the contra charges.

54. Next, there is the question of whether or not the adjudicator failed to act fairly or apply the rules of natural justice in effect by not resigning and by continuing to issue his decision. I have formed the view that no such failure has been established, my reasons being as follows:

(a) It is clear that the adjudicator himself did not, ultimately, consider that he needed more time in which to produce his decision. Although in his decision he averts to the fact that his job had been onerous, he was aware that HSW had made the point that he should consider resigning. He was given a week's extension of time and did not ask for more. He was an experienced adjudicator and there is no hint or suggestion in his decision or in any other evidence that he thought that he could not act fairly in producing the decision which he did. He clearly did a thorough and conscientious job in reading up for the adjudication, seeking to understand what the parties' various contentions and evidence were and in producing what was and is by adjudication standards an extensive and reasoned decision.

(b) I do not consider that he can be considered to have acted unfairly for not resigning. HSW's position in the adjudication must be looked at in the light of the history particularly since May 2008 when it submitted its final account, which it accepted was accompanied by two electronic disks. It obviously had access to its own electronic data and records because otherwise it could not have prepared its final account. It clearly had more than enough information, to hand, to discuss and negotiate on the final account between May 2008 and January 2009. There is no suggestion that the files received with the Referral were wholly new or contained information which HSW had not had to a very large extent beforehand. The fact that the adjudicator was able to cope with very large amounts of information provided to him suggests that HSW could have coped with information which was very largely not fresh to it. HSW, in the adjudication, did accommodate and respond in detail to the information filed by Enterprise.

(c) It is said that HSW could not adequately respond to the information provided with the Referral because it differed from what had been provided before. I do not consider that that is credible in the light of the above. The difference was 1.5% in value and the material was material with which HSW was very familiar. HSW clearly knew from the pre-adjudication phase where and why the main differences arose. What HSW could have done with relative ease, and to some extent at least did, was to put forward its own positive case as to what it said the value of its final account was.

(d) As for Mr Gordon's report, it was evidence which went to support Enterprise's case but did not obviously contain information which was radically different from what must have been apparent beforehand.

(e) The complaint that HSW did not have electronic information from Enterprise and therefore could not readily identify differences and other matter is not made out. HSW had its own electronic information, including material which it actually used in the adjudication, in particular at the hearing. It was provided with Enterprise's electronic version of the final account on 17 February 2009 but did not want it or use it apparently. It was unwilling to take up the offer made by Enterprise to provide an electronic version of the documents accompanying the Referral.

(f) I do not consider that this is one of those exceptionally rare cases in which the adjudicator can only have acted fairly by resigning.

55. It is then argued by HSW that the adjudicator did not address each and every difference in the accounting position between the parties in his reasoning or otherwise in his decision; it is said that, by simply doing spot checks, the adjudicator was not ruling on what had been referred to him. It is put on a jurisdictional and fairness basis. This is a flawed argument:

(a) One needs to analyse what the adjudicator actually did and what he was presented with.

(b) What he was provided with was extensive evidence and argument by each party by which each asserted in summary that its valuation of the final account and contra charges was right. He records that the parties had conveniently sub-

divided the disputed items into categories, where one principle applied to a number of like a disputed items; he had described this as extremely helpful, as it obviously was.

(c) In respect of each separate category, he took into account the parties' representations and depending on the volume of the supporting documentation, either checked all the information, or in the case of a large disputed item, carried out a series of spot checks, to verify the sums claimed.

(d) I set out at Paragraph 35 above a partly representative section of his decision which dealt with one aspect of the disputed final account. He clearly relies upon spot checks to see how credible each party's underlying evidence is. Six spot checks in that example went one way, supporting Enterprise's overall evidence on that head of claim. Accordingly he found in favour of Enterprise's valuation.

(e) There may arguably be a distinction to be drawn between using spot checks to verify the overall credibility of some evidence and using spot checks to prove or disprove a claim in full. The former approach is commonly used by auditing accountants and quantity surveyors and is even deployed by judges; it is an acceptable approach to check credibility. If spot checks reveal that one side's quantum on a specific head of claim is unjustified, that undermines the credibility of that side's position on that particular claim. That can lead legitimately to the conclusion that one side's evidence on that head of claim is to be preferred. It was this approach which the adjudicator deployed at places in the decision. It can not be said to have been unfair or to have amounted to his failing to address the dispute referred to him.

(f) He can not be criticised for preferring the evidence of Enterprise where he did prefer it. Many items were dealt with on that basis. The fact that HSW had not provided any or much evidence on a given topic did not mean that he could be criticised for preferring the evidence from Enterprise.

56. I also bear in mind, in considering these last two topics, that one should remember that this 28 day adjudication period called for in statute, and provided for here contractually by the parties, provides a tight timescale for disputes. Parliament provided for "any" relevant dispute to be referable to adjudication and must have envisaged that there would be simple as well as the immensely detailed and complex disputes which can arise on a construction contract. It is often said, with some justification, that construction adjudications provide in many cases only "rough" justice but Parliament and the contractual parties here have expressly legislated for the potential for such justice. One should not equate necessarily an adjudicator's approach over 28 days with that of a judge or arbitrator who tries the final version of the dispute after exchange of pleadings, evidence and reports over a period of often 6 to 18 months. One has to judge what an adjudicator does against the context of the period provided by the statute or the contract.

57. I conclude that the decision in the Second Adjudication was valid and enforceable.

58. However, one then needs to consider what the impact of the Second Adjudication is and what effect can be given to it in circumstances in which the adjudicator only

made a declaration as to the net value of the final account. He did not make a directive decision to the effect that HSW must pay any balance back to Enterprise.

59. Procedurally, Enterprise in its claim sought to enforce Mr Smith's decision by way of a declaration that the value of the works carried out by HSW was £23,253,931.09. It issued a Part 24 application for summary judgement to that effect. It did not as such seek a money judgement. However it was clear in argument that Enterprise seek summarily either a set off against the enforcement of the First Adjudication decision or, if no set off is available, a financial judgement. I made it clear to Mr Walker for HSW that if he needed time to consider how to address that I would adjourn matters for a few days. He declined as he was, clearly, in a position to deal with this argument.

60. Section 108 of the Housing Grants Construction and Regeneration Act 1996 expressly requires parties to construction contracts to provide for reference of disputes to adjudication. Sub-section 3 states:

> "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

This is reflected in the Scheme for Construction Contracts (SI 649) at Paragraph 23 (2):

> "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined..."

61. By necessary implication, the Sub-Contract between the parties must therefore be read as requiring the parties to comply with and abide by the valid decision of any adjudicator. Thus, where, as here, the adjudicator's decision is declaratory, it must still be complied with by the parties, who must abide by it. For example, if an adjudicator decided that a 10 week extension of time was due, the parties would have to abide by the decision so that the employer could not deduct liquidated damages for that 10 week period, at least until a final decision was reached by court or arbitrator as the case may be. There might still be argument between the parties on that example as to what, if any, compensation was payable with regard to such period.

62. In my judgement, the parties must abide by and otherwise comply with, for the time being, the decision in the Second Adjudication. It might have been open to HSW to raise additional claims, by way of set off, diminution or otherwise, which had not been addressed in the dispute referred to Mr Smith. However, it has not done so. It follows that, if the parties are to give effect to Mr Smith's decision, as they are required to do contractually, as soon as the sum payable pursuant to Mr Cousin's decision is paid, a balance will then be due back to Enterprise.

63. It follows from the above:

> (a) Both adjudicators' decisions are valid and enforceable.
>
> (b) The parties and the Court are required to give effect to both decisions.

(c) This necessarily involves bearing in mind that each decision should have been given effect to and complied with by the parties upon receipt of the respective decisions. Thus, Enterprise should have paid the sum of £1,835,252.26, VAT thereon, interest of £59,281.17 up to 2 February 2009 and the adjudicator's fees of £13,127.10 (inclusive of VAT) within 14 days of 2 February 2009. Similarly, each party should have paid half of Mr Smith's fees, totalling £24,823.38.

64. The court is left in a difficult position as to how to deal procedurally with what has happened. On the one hand, Enterprise in breach of contract has failed to pay without set off or at all what it should have done by 16 February 2009. On the other hand, as from 12 March 2009, Enterprise would have been entitled to the return of money since there would have been an overpayment (based on what the two adjudicators decided) if it had paid what was due pursuant to the First Adjudication decision.

65. The Court has a discretion however as to how any order or orders on judgement should be drawn. On balance in this case, I consider that the orders should be drawn to reflect the net effect of this judgement. Put another way, the orders should reflect the facts that HSW was entitled to be paid that which Mr Cousins directed should be paid together with continuing interest (as directed by him), at the rate of £175.98 per day from 2 February 2009 to 12 March 2009, that HSW was bound to pay £12,411.69 towards Mr Smith's fees as from 12 March 2009, that shortly before the Court hearing Enterprise paid some money to HSW to reflect what it considered was the balancing effect between the two decisions and that, assuming that both decisions were to be given effect to, apart from that belated payment, there would have been a balance due to HWS. I exercise this discretion upon the pragmatic basis that it would be pointless, at least administratively, for Enterprise to hand over the net sum (allowing for the belated payment) due pursuant to the First Adjudication decision to be followed by HSW having to hand back all or the bulk of what had just been paid to it to Enterprise. This is not a case in which there is any suggestion that either side is in any financial difficulties.

66. I will hear the parties on any issue as to discretionary interest and as the form of the orders to be made.

The Substantive Issue

67. As part of its argument with regard to the enforceability of the First Adjudication decision, Mr Lofthouse QC argued that the court can and should address the issue between the parties upon which the adjudicator had decided against his client. That issue, in broad terms, was whether or not fresh withholding notices had to be served by Enterprise following receipt by it of HSW's final account in May 2008. Part of this issue involved an assertion by Enterprise that HSW had waived its rights to have withholding notices served on it after May 2008 because its final account acknowledged that some £1.9m of contra charges had been deducted already. If I was to determine that issue in his client's favour, that would mean that the adjudicator in the First Adjudication was wrong as a matter of law and in those circumstances there would be a final decision which effectively overrode that decision.

68. It was said that there was no dispute on the facts as to the service of withholding notices prior to May 2008 against or in respect of interim applications for payment by HSW. No such withholding notices were put in the papers before the Court.

69. The Court neither should nor needs to avoid deciding substantive issues on adjudication enforcement applications, provided that it is in the interest of justice and the furthering of the overriding objective to decide them. Thus, if the argument on the substantive issue is purely a legal one which can be readily accommodated within the timetable for the application without delay and if a decision on the substantive issue will save expense and time, there will often be no good reason for the court to decline to deal with the issue.

70. I was inclined during the argument before me to address this issue in this judgement. Indeed, I provisionally formed the view following argument that Enterprise's position was not sustainable. On reflection, however, the issue is not necessarily as simple as I initially thought it was. The waiver argument was not one which was addressed in any detail by either Counsel and I would be reluctant to assume that there were valid earlier withholding notices, without actually seeing them. It is also unnecessary for me to reach a decision upon this issue given my judgement on the net effect of enforcing the two decisions. Subject of course to any appeal, the issue of withholding notices will in all probability be irrelevant. I therefore decline to deal with this substantive issue, interesting though it is.

Decision

71. Both the decisions in the two adjudications are to be enforced.