

Case No: HT-13-171

Neutral Citation Number: [2013] EWHC 1983 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th July 2013

Before:

MR JUSTICE AKENHEAD

Between:

ABB LIMITED
- and -
BAM NUTTALL LIMITED

Claimant

Defendant

Anneliese Day QC (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Marcus Taverner QC and Richard Coplin (instructed by **Systech Solicitors**) for the
Defendant

Hearing date: 28 June 2013

JUDGMENT

Mr Justice Akenhead:

Introduction

1. This case raises issues about the enforceability of an adjudicator's decision and in particular about alleged material breaches of the rules of natural justice. It is common ground that the adjudicator referred to a particular clause of the contract which neither party argued let alone mentioned to him and which he did not refer to the parties before issuing his decision.

The Law

2. The Law relating to the need for adjudicators to observe the basic rules of natural justice is now well established. For instance, in **Carillion Construction Ltd v Devonport Royal Dockyard Limited** [2005] EWCA 1358 Lord Justice Chadwick reviewed the judge's legal conclusions at Paragraph 52:

"Before addressing those submissions the judge set out the legal principles which he was to apply. He examined a number of authorities, including five decisions of this Court – *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2001] All ER Comm 1041, [2000] BLR 522, *C&B Scene Concept Design Limited v Isobars Limited* [2002] BLR 93, *Levolux AT Limited v Ferson Contractors Limited* [2003] EWCA Civ 11, 86 Con LR 98, *Pegram Shopfitters Limited v Tally Weijl (UK) Limited* <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1750.html> [2003] EWCA Civ 1750, <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1750.html> [2004] 1 All ER 818 and *Amec Capital Projects Limited v Whitefriars City Estates Limited* <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1418.html> [2004] EWCA Civ 1418, [2005] BLR 1. At paragraph 80 of his judgment he stated the general principles to be derived from those authorities and from two decisions in the Technology and Construction Court – *Discain Project Services Limited v Opecprime Development Limited* [2000] BLR 402 and *Balfour Beatty Construction Limited v Lambeth London Borough Council* <http://www.bailii.org/ew/cases/EWHC/TCC/2002/597.html> [2002] BLR 288:

"1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).

2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see *Bouygues*, *C&B Scene* and *Levolux*;

3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see *Discain*, *Balfour Beatty* and *Pegram Shopfitters*.

4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see *Pegram Shopfitters* and *Amec*."

We do not understand there to be any challenge to those general principles. They are fully supported by the authorities, as the judge demonstrated in his judgment.”

He went on later in his judgment to counsel caution in relation to challenges to the enforceability of adjudicators’ decisions:

“85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".

86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.”

3. In **Cantillon Ltd v Urvasco Ltd** [2008] BLR 250, this Court considered a number of the previous cases stating:

“57. 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 Camden 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.”

4. The **Cantillon** case was one in which the Court found that there was no material breach of the rules of natural justice. The TCC decision in **Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board** [2012] EWHC 84 (TCC) involved a finding that there was a material breach:

“33. In essence, and doubtless for what he believed were good and sensible reasons, the adjudicator has gone off "on a frolic of his own" in using a method of assessment which neither party argued and which he did not put to the parties. In some cases, this may not be sufficient to prevent enforcement of the decision where the "frolic" makes no material difference to the outcome of the decision. Thus, an adjudicator who refers to a legal authority which neither party relied upon, may have his or her decision enforced nonetheless if the application of that legal authority obviously makes no difference to the outcome. The breach of the rules of natural justice has to be material. Here, for the reasons indicated above, the breach is material and has or has apparently led to a very substantial financial difference in favour of HKM but necessarily against the interests of DHB.”

5. The reference in the **Cantillon** case to a breach of the rules being material where the adjudicator has not, prior to his or her decision, identified to the parties a point or issue “which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant” should not be treated as requiring statutory or contractual rules of interpretation to construe what was meant in the decision. If the adjudicator relies upon such a point or issue (either of fact or of law) and his whole decision stems from his finding on that point or issue, it will be decisive. A point or issue might well be of considerable potential importance to the outcome if it is not decisive of the whole decision but if it goes to important

parts of the decision. Even if an adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the Court can have no confidence in the fairness of the decision making process.

The Facts

6. ABB Ltd ("ABB") was a main contractor engaged by London Underground Ltd ("LUL") to carry out a major power upgrade to part of the London Underground network. By a Sub-Contract dated 8 November 2009, ABB engaged Bam Nuttall Ltd ("Bam") to carry out, amongst other things, the decommissioning and removal of redundant cables and the design and installation of new distribution cables. The Sub-Contract was substantially in the NEC3 (Option A) form, which as will be seen below adopts the present tense for many of the contractual terms.

7. Some of the most relevant clauses of the Sub-Contract were:

"10.1 The Contractor and the Subcontractor shall act as stated in the subcontract and in the spirit of mutual trust and cooperation but without prejudice to the respective rights and obligations of the parties.

11.1A No alterations or amendment may be made to this subcontract except where expressly recorded in writing by a document expressed to be supplemental to this subcontract and signed by the parties.

21.9 Notwithstanding the preceding provisions of this clause 21, the parties acknowledge that the Prices and the subcontract completion date have been agreed on the basis of the assumptions set out in this clause 21.9, and that if any such assumption is incorrect or invalid this may result in adjustments thereto. The parties shall each use their reasonable endeavours to check the accuracy of the assumption made in clause 21.9 (b) as soon as practicable and confirm in writing to each other as soon as the assumption has been checked and verified. If any of the assumptions made in this clause are incorrect or invalid and this requires or involves a change to the design or proposed design of the subcontract works and it is reasonable in all the circumstances that such change to the design or proposed design of the sub contract works should give rise to an adjustment to the Prices and/or the subcontract completion date, the Contractor notifies the Subcontractor that such change is to be treated as a compensation event, and clauses 60 to 65 then apply thereto as if the Contractor had instructed such change as a change to the Subcontract Works Information.

The following shall constitute assumptions for the purposes of this Clause 21.9...

(b) cables can be installed in accordance with the Conceptual Design Statements contained in the Subcontract Works Information, and space allocations have been granted in respect of each such cable route...

60.1 The following are compensation events, but only to the extent that they are not due to any negligence, default, unlawful act or omission or breach of or failure to comply with this subcontract by the Subcontractor...

61.1 For compensation events which arise from the Contractor giving an instruction or changing an earlier decision, the Contractor notifies the Subcontractor of the compensation event at the time of giving the instruction or changing the earlier decision. He also instructs the Subcontractor to submit quotations...The Subcontractor puts the instruction or change decision into effect and provides his quotation as soon as reasonably practicable and in any event within the period for reply [2 weeks] together with details of his assessment...

61.3 The Subcontractor notifies the Contractor of an event which has happened or which he expects to happen as a compensation event if

- the Subcontractor believes that the event is a compensation event and
- the Contractor has not notified the event to the Subcontractor.

If the Subcontractor does not notify a compensation event three (3) weeks of when he becomes aware, or ought reasonably to have become aware of the event, he is not entitled to a change in the Prices or the subcontract completion date. The Contractor may in his absolute discretion assess a change to the subcontract completion date (but not a change to the Prices) notwithstanding that the Subcontractor has failed to notify a compensation event within three (3) weeks of when he became aware, or ought reasonably to have become aware, of the event.

62.1 After discussing with the Subcontractor different ways of dealing with the compensation event which are practicable, the Contractor may instruct the Subcontractor to submit alternative quotations. The Subcontractor submits the required quotations to the Contractor and may submit quotations for other methods of dealing with the compensation event which he considers practicable...

62.3 The Subcontractor submits quotations within two weeks of being instructed to do so by the Contractor. The Contractor replies within five weeks of the submission. His reply is

- an instruction to submit a revised quotation,
- an acceptance of a quotation,
- a notification that a proposed instruction will not be given or a proposed change decision will not be made or
- a notification that he will be making his own assessment...

62.6 If the Contractor does not reply to a quotation within the time allowed, the Subcontractor may notify the Contractor to this effect. If the Subcontractor submitted more than one quotation for the compensation event, he states in his notification which quotation he proposes is to be accepted. If the Contractor does not reply to the notification within five weeks, unless the quotation is for a proposed instruction or a proposed change, the Subcontractor's notification is treated as acceptance of the quotation by the Contractor...

66 Failure by the Contractor to exercise his rights under this subcontract does not constitute a waiver of those rights or any of them, and nor does any such failure relieve the Subcontractor from any of his obligations under this subcontract. The waiver in one instance of any rights, condition or requirement does not constitute a continuing or general waiver of that or any other right, condition or requirement."

8. Provision was made by Option W2 to the Sub-Contract for adjudication of disputes but nothing turns in this case on the Adjudicator's express powers, rights or obligations. It is worth mentioning however that under Clause W2.14 the Adjudicator had the power to "review and revise any action or inaction of the Contractor related to the dispute and alter a quotation which has been treated as having been accepted". As is almost invariably the case, the parties agreed that the parties were to be bound by the decision unless and until it was set aside or revised by the Court which was to be the final dispute resolution process.
9. The Sub-Contract contained certain Conceptual Design Statements ("CDS") which showed the conceptual design for cable routes. Bam was obliged to survey the relevant parts of the LUL network to ascertain whether or not these CDSs were viable and the Sub-Contract was priced on the assumption that they were so viable, this being referred to in Clause 21.9 (see above). It was then intended that Bam would develop detailed designs and submit those detailed designs to ABB and others for approval.
10. On 15 February 2010 Bam gave a "Notification of Compensation Event" referenced CE No: 002 notice stating that:

"We consider that the assumption that the cables works required by our subcontract could be installed in accordance with the conceptual design statements contained within the Subcontract Works Information has now proved to be invalid...we therefore notify ABB of a Compensation Event in accordance with Clause 63.1 of the subcontract".
11. It was common ground that thereafter it was agreed that Bam would re-survey the route network and present their findings in documents called Survey Design Solutions ("SDS") and that both parties would then meet to discuss the SDS and seek to agree these documents in principle. This seems to have happened and between about October 2010 and early January 2011 Bam had developed much of the detailed design and submitted it for approval along with other documents called Compliance Statements ("CPS"). A CPS was a LUL requirement to certify that the design was complete and met all of LUL's standards.
12. On 22 October 2010, Bam provided a quotation first for the surveying work (labelled CE002.1) and secondly for the detailed design works (labelled CE002.2) in the sums of £1,394,339.85 and £773,708.43 respectively. It was then common ground in the adjudication that there was a meeting on 19 November 2010 at which a figure of £1.5 million for survey and design costs was discussed, although there was disagreement in the adjudication whether Bam actually then offered such a sum.
13. There was no disagreement between the parties in the adjudication that there was a meeting between Mr Morrison of Bam and Ms Fletcher of ABB on 3 December 2010.

It was common ground in the adjudication that they reached an agreement on the price of £1.5m for the survey and design work in relation to CE002.1 and CE002.2 but there was disagreement in the adjudication about what the scope or extent of the agreement was:

(a) Mr Morrison and Bam said that the £1.5m was to relate only to all work done up to 31 January 2011 but that Bam was to be paid for any further work thereafter.

(b) Ms Fletcher and ABB said that the £1.5m was to relate to all the survey and design work but that Bam was to be paid only for further such work after 31 January 2011 to the extent that it was required for reasons beyond Bam's control. This reflected concerns that some of the design work might have been necessary due to some default on the part of Bam.

Neither version of the agreement was recorded in writing or a least no such documentation was put before the adjudicator.

14. On 10 March 2011 ABB wrote to Bam expressly about "CE002 Additional Cable Surveys":

"In accordance with clause 64.1 we hereby notify you of our assessment of this event. The work under this CE includes for Survey Works, Detailed design, CE's for Frustrated Access (up to end of January 2011), and Space Allocation Engineer.

Background Information

The survey and detailed design changes have been developed during a process of site works and weekly meetings to validate the proposed routes and when necessary incorporate changes into the route and/or the enabling works. The work includes the preparation of SDS and CPS documents and the submission of space applications in addition to the changes to the work to be installed.

The work under this CE has been divided into four sections as follows

2.1 Survey Works

2.2 Detailed Design

2.3 Installation

2.4 Prolongation...

Cost Assessment

Following reviews of the cost submissions and detailed discussions carried out during the implementation of the works the cost has been agreed at £1,500,000...This is the direct cost for the cable service, SDS production, Space Allocations changes to the detailed design works, and the Frustrated Access up to the end of January 2011. It does not include any changes to the prices or

Completion Date regarding Compensation Events covered by CE002.3 and CE002.4...”

15. On 6 May 2011, Bam responded drawing "ABB's attention to the following confirmation of what is acceptable to [Bam] as being closed under ABB's proposed £1.5 million assessment" and in a table which followed its comment was that CE2.1 and 2.2 were "agreed" and adding at the end of the letter:

“Please be advised that design work both at a concept and detail level has been required beyond January 2011 and this will require further discussions and dialogue, respecting ABB's current proposed cut off date for assessment of 31st January 2011.”

16. On 4 October 2011, ABB wrote to Bam in relation to CE002:

“To formalise this process and in accordance with clause 62.3 we instruct a revised quotation for CE002 including sections 2.3, 2.4, 2.5, 2.6 and 2.7....

There has been a continual issue with Bam Nuttall not providing quotations within the period for reply as defined in the sub-contract, which is further demonstrated by the recent proposed schedule of planned submissions for CE002. In the interests of progressing the compensation event ABB will accept reasonable durations for resubmissions, and if extensions to the period for reply are required, we request that this is notified in accordance with the sub-contract.”

17. There was no apparent let alone early response to that letter but on 12 April 2012 Bam wrote to ABB referring to "Compensation Events 2.2B (Additional Design Time to March 30th), 2.6 Prolongation, 2.7 Thickening". The letter explains that:

“Compensation Event 2.2 was for additional design time to the end of January 2011 (including thickening)". Our quotation for 2.2B allows for additional design time from February 2011 to March 30th 2012...

Total Quotation based on Defined Costs for 2.2B

£977,088.88...”

There were other quotations given for other alleged events or sub-events.

18. On 19 April 2012, Bam sent to ABB what was said to be supporting documentation for the previously issued quotations with the overall CE002 quotation broken down into 14 different components including CE2.1, CE2.2 and CE2.2B and totalling £13,090,286.83.

19. On 30 April 2012, ABB responded:

“We are in receipt of your cost submission for the installation and enabling works for CE002 and are in the process of reviewing. This is taking longer than foreseen in the contract due to the format and timing of the submission from yourselves however we have noted some points that you need addressing...

We will revert to you with our comments assessment when our review is complete"

20. Nothing much seems to have happened, at least correspondence-wise, until Bam's letter of 31 May 2012 relating to "Compensation Event Quotation 002":

"Further to our letter of reference...dated 19 April 2012, the Contractor has not replied to the following Compensation Event Quotation in accordance with 62.3:

- Compensation Event Quotation 002

We hereby give notification in accordance with clause 62.6..."

21. On 22 June 2012, ABB wrote to Bam:

"We acknowledge receipt of your quotation dated 12 [April] 2012, and in accordance with clause 62.3 hereby notify you that we will be making our own assessment in due course."

22. There was said in the adjudication to have been a "senior management meeting" on 17 July 2012 in respect of which it was recorded (by someone) that:

"ABB agree this item [CE2.2B] in principle, i.e. that the survey and design works carried post-Jan 11 are not covered by the £1.5m agreement and are to be fully reimbursed through CE2.2b where items for such reimbursement are demonstrated to be direct costs plus fee (appropriately incurred and expended) associated with this CE as agreed between both parties. Quantum using 'records' for the post-Jan 11 survey and design work to be established."

23. Some further correspondence was exchanged in June, July and August 2012 with Bam saying that its quotation in April 2012 was to be treated by the Sub- Contract as having been accepted because there had been no effective response within the contractually agreed time. On 7 September 2012, ABB wrote to Bam which was said to be an assessment of CE002.2B and made a payment, said to be a "commercial gesture of good faith", in the sum of £3,636 was made by it to Bam.

The Adjudication

24. On 25 February 2013, Bam served its "Notice of Intention to Refer a Dispute to Adjudication" which identified a dispute that had arisen as concerning "unpaid design costs and fees relating to additional concept and detailed design works carried out in respect of the cabling works and which the parties referred to as compensation event CE002.2B". Paragraph 4.1.2 stated that for the period up to January 2011 Bam "contends that the sum of £1.5 million was agreed between the parties in respect of survey and design work." Going on, it said:

"4.1.3 During 2011, the parties focused on attempting to agree other aspects of CE002 and in particular the revised installation and enabling work. During this period the design costs continued to be incurred.

4.1.4 However, no agreement was reached on the remaining parts of CE002 and it was decided, by both parties, to revert back to the contractual mechanism for

dealing with quotations. As a consequence [Bam] was instructed to resubmit the quotation for CE002.

4.1.5 The consolidated CE002 quotation was issued in April 2012. The CE002.2B element of that quotation for design costs February 2011 to March 2012 amounted to £977,088.88.

4.1.6 Thereafter ABB was required to deal with the CE 002 quotation in accordance with the provisions of clause 62 and/or 64 but patently did not. Consequently, [Bam] contends that it is entitled to treat CE002 and/or its [constituent] parts (including CE002.2B), as accepted by operation of clause 62.6 and/or clause 64.4...

4.1.8 For the record ABB now purports [sic] that the sum due to [Bam] is £3,656.70. ABB also argues that [Bam] agreed to complete the design for the £1.5m already paid. This is evidently not the case which appears to have been acknowledged by ABB who now appear to have dropped this argument. However, for the avoidance of doubt [Bam] will seek a declaration on this point."

The relief claimed included alternative declarations that the "parties agreed a lump sum in the amount of £1.5 million for additional survey, design and space allocation works, including frustrated access, up to end of January 2011 only" or that they "did not reach a binding agreement on the scope of the £1.5 million lump sum". On the basis of the deemed acceptance of the April 2012 quotation, £977,088.88 less the £3,656.70 previously paid was claimed.

25. That was followed by a more detailed Referral a few days later in which Bam referred to the meeting of 3 December 2010 between Mr Morrison and Ms Fletcher as having given rise to an "Agreement" albeit that the £1.5 million related to design costs up to January 2011 but not beyond. The Referral followed the appointment of a solicitor, Mr H, who is well-known to the TCC as being experienced over many years in adjudication and in particular the enforcement of adjudicators' decisions.
26. ABB served its Response on 18 March 2013. Paragraph 6 addressed the "Agreed Settlement of CE002.1 and CE002.2" and asserted that the agreement reached on 3 December 2010 related the £1.5 million figure to all the design work, save only to the extent that further design work was required which was for reasons beyond the control of Bam. ABB went on to say that there was never any agreement to vary the Compensation Event procedure and, if further events occurred which entitled Bam to claim, that it was required to make the contractual notifications within the requisite periods albeit that it acknowledged (in Paragraph 7.2) that there was a "recognition" on both parties' part that respectively they were not "likely to be able to submit and review quotations within the timeframes agreed under the Contract". This was apparently referred to in witness statements as an "un-written rule". It argued that if there was any entitlement at all in relation to CE002.2B it had to be treated as a separate Compensation Event and Bam was required to notify and provide quotations within the requisite contract periods. It then went on to challenge the quantum in any event and ask the adjudicator to declare that its case on the agreement of 3 December 2010 was correct.

27. On 28 March 2013, Bam put in its Reply to this Response. It argued that Mr Morrison's evidence was to be preferred although it did accept in Paragraph 6.5 "that both parties believe an agreement was reached between Linda Fletcher of ABB and John Morrison of [Bam] on 3 December 2010" although "given the agreement was verbal, not recorded in writing and the parties now disagree over the terms of that agreement the Adjudicator must clearly give consideration to whether or not an agreement was actually reached as there does not appear to be evidence of one.". It said that there was essentially only one Compensation Event which had been accepted in principle by ABB. It was denied that there was any "unwritten rule" which entitled ABB in effect to respond to quotations outside the contractual time limit and that there was in effect any waiver on the part of Bam to this effect.
28. This was followed on 9 April 2013 by a Rejoinder from ABB which asserted that CE002.2B was never notified to ABB and that no quotation in respect of it was provided, either within the contractual two-week period or within a reasonable period. There was no "overarching CE002" which covered other aspects of the work other than those specifically notified in early 2010; CE002.2B was, if a Compensation Event at all, a separate one.
29. Not to be outdone, Bam produced a Surrejoinder on 12 April 2013 which reiterated a number of points already made but also asserted that, given what it said was agreement on 17 July 2012, ABB could "not argue that [Bam] is prevented from recovering survey and design costs post-Jan 11 as the parties expressly agreed that they were not covered by the £1.5m agreement". Although it might have been thought that "all good things must come to an end", ABB responded on 16 April 2013 with a Rebutter again somewhat repetitive at over 26 pages of prose but, at Paragraph 6.1.1, making it clear that it was not suggesting "that the £1.5 million agreement covers survey and design work carried out post-January 2011 where this was caused by matters beyond [Bam's] control"; it was saying however that where Bam had carried out further work after January 2011 by carrying out further surveys and rectifying its previously faulty designs it should bear those costs themselves.
30. It is common ground both that neither party mentioned to the adjudicator Clause 11.1A in any of these written submissions or indeed in any exchanges and that the adjudicator did not raise with the parties expressly or by implication such clauses or their possible impact on the dispute between the parties. Clause 66 was mentioned by ABB but only in a different context to the adjudicator's reference to it.
31. Mr H produced his decision on 23 April 2013. Compared with the flurry of written exchanges between the parties, his decision runs to a modest 19 pages. Material parts are as follows:

"5. The dispute referred to me concerns [Bam's] claim for unpaid design costs and fees for the period February 2011 to March 2012 in relation to a compensation event under the Subcontract. The parties have referred to this as CE002.2B, which I decide is an element of an overreaching compensation event CE002. [Bam] claims the sum of £977,088.88 plus interest and vat. ABB has paid the sum of £3,656.70 plus vat.

8. [Bam] asks me to decide and declare as follows:

a. That the parties agreed a lump sum in the amount of £1.5 million for additional survey, design and space allocation works, including frustrated access, up to the end of January 2011 or that the parties did not reach a binding agreement on the scope of the £1.5 million lump sum...

[10-15 He sets out some of the history from March to November 2010]

16. The parties agree that a meeting took place on 3 December 2010 between John Morrison and Linda Fletcher of ABB at which agreement was reached as to the assessment of CE002.1 and CE002.2 in the sum of £1.5m. Mr Morrison's evidence is that the assessment was agreed to include for costs up to the end of January 2011 only. In her statement... Linda Fletcher gives evidence that the agreement of 3 December 2010 was "*not a payment for the work [Bam] had only done up to the date of the agreement or the work [Bam] had done up to 31 January 2011, but a payment to cover all of the work done to the date of the agreement together with the work not yet done but required to complete those compensation events.*" Her evidence is that this agreement "*closed out the additional detailed design work occasioned by the fact that the CDS had been flawed*" and that an unforeseen requirement for further design work would require a new compensation event to be raised.

17. [The contents of the letter dated 10 March 2011 are set out]

18. Plainly ABB viewed works associated with Survey Works, Detail Design, Installation and Prolongation to be one compensation event numbered CE002...

Assessment of CE 002 at May 2011

20. Applying the Subcontract terms to the circumstances up to May 2011 is not straightforward. Both parties are bound by the terms they have agreed, subject to variation of the Subcontract (supported by consideration) or some other legal restraint such as estoppel. [Bam] suggests that the parties decided to "*re-engage the contractual machinery for CE002*" after January 2011 [footnote: Referral at 5.6.3] suggesting that a finding of a binding agreement for payment of CE002 at the end of January 2011 requires a finding of an extra-contractual arrangement or an estoppel by which the parties were "*stepping outside the contractual machinery*" [footnote: Referral at 5.5.2]. ABB states that "*there has never been any agreement to vary or change the terms of the contract between ABB and [Bam] relating to notifications of compensation events*" [footnote: Response 7.2].

21. However, ABB also contends for a binding agreement in the sum of £1.5 million for CE002.1 and CE002.2 to include for "*all of the additional surveys and Detail Design work up to submission of the CPS together with any work arising out of the subsequent commenting and approval period.*"

22. Further, clauses 11.1A and 66 of the Subcontract provide that:

[Terms set out as above]

23. Given these provisions of the Subcontract, the fact that the Subcontract does not appear to provide a mechanism for the agreement alleged and the

disagreement between the parties as to the facts of the alleged binding agreement suggesting that they were never “*ad idem*”, I accept [Bam’s] alternative submission that the parties did not reach a binding agreement on the scope of the £1.5 million lump sum. Such an agreement would be contrary to the provisions of clause 11.1A. I find that there was never more than an assessment by ABB under the terms of the Subcontract of CE002.1/002.1.1, 002.2, 008...and 059 in the sum of £1,500,000.

24. However, I am satisfied that the parties did waive certain requirements of the Subcontract in relation to submission/delivery of quotations and assessments...

26. On 4 October 2011 ABB wrote to [Bam] to formalise the process of completing the assessment of CE002 and "*in accordance with clause 62.3*" to instruct the submission of "*a revised quotation for CE002 including sections 2.3, 2.4, 2.5, 2.6 and 2.7*"...

28. I find that this instruction, stated expressly to be under clause 62.3, related to the entirety of CE002 and reject ABB’s submission that CE002 is to be subdivided into a series of separate compensation events. This omission is not in accordance with the parties’ actions and objective intentions...

31. Bam submitted its revised quotation in part on 12 April 2012... and for the remainder of CE002 on 19 April 2012. I have no conclusive evidence as to why the quotation was not submitted within two weeks as required by clause 62.3. There does not appear to have been an agreement to extend time under clause 62.6. However, the remedy for failure to submit a quotation in the time required is under clause 64.1 by which:

“The Contractor assesses a compensation event if the Subcontractor has not submitted a quotation... within the time allowed.”

32. ABB did not make its own assessment at that time I decide that, on the assumption that there was no agreement to extend, ABB waived the two-week requirement of clause 62.3 by accepting the quotation...

34. ...I also find that ABB’s letter of 22 June 2012 [set out earlier in this judgment] was an effective response under clause 62.3 by which ABB accepted the quotation and, by such acceptance and by not rejecting the quotation, waived (in so far as it was necessary for it to do so) compliance with the first sentence of clause 62.3 and notified Bam that it would make its own assessment...

37. ABB accepts that under clause 64.3 the period for the Contractor to give the Subcontractor its assessment is two weeks on the day that the need for the Contractor’s assessment becomes apparent. I accept ABB’s submission that the start date is 22 June 2012 so that ABB’s assessment was due on or by 7 July 2012.

38. Following [Bam’s] notice of 27 July 2012 that...CE002 had not been assessed within the time allowed for by the Subcontract, under clause 64.4 ABB had four weeks to reply to the notice (i.e. until 25 August 2012) by notification of his assessment giving details of it (as required by clause 64.3).

39. ABB submits that its letter 31 July 2012 was the required reply under clause 64.4. I do not accept this submission. This letter is as follows...

40. I find that the letter does not constitute an assessment of CE002 (or indeed an assessment of any part of that compensation event) in response to the quotation delivered on 12 and 19 April 2012 and does not give details of such an assessment...

41. I am satisfied that at this stage both parties had stated that they required compliance with the terms of the [Subcontract]. Certainly there is no evidence that any waiver of those terms was contemplated or could be relied on by ABB...

43. I therefore decide that [Bam's] notification of 27 July 2012 is to be treated as acceptance by ABB of [Bam's] quotation of 12 and 19 April 2012 under clause 64.4 in relation to compensation event CE002.

44. I reject ABB's submission that there was an "un-written agreement" to the effect that ABB was not bound by the contract terms in relation to [Bam's] quotation. Such an agreement is contrary to clause 11.1A of the Subcontract and is not supported by the evidence, particularly the correspondence.

45. I am also not satisfied that there was a continuing waiver by [Bam] in response to ABB's waiver as claimed in paragraph 2.8 of the Response, particularly in relation to the quotation of 12 and 19 April 2012 in circumstances where [Bam] had given clear notice that it required compliance with the terms of the Subcontract.

46. In its evidence ABB has referred to the fact that it took [Bam] more than six months to reply to a request for a quotation when the subcontract allows two weeks. However, I am bound to make my decision in accordance with the terms of a Subcontract in circumstances where:

...b. The drafting of the NEC3 form of contract is intended to achieve certainty in certain circumstances by imposing time limits after which contractual rights may be lost both by Contractor and Sub-Contractor.

c. [Bam's] revised quotation for CE002 was instructed by ABB.

d. The quotation was requested for the entirety of CE002.

e. ABB did not make its own assessment under clause 64.1 when the quotation was late.

f. The quotation was not rejected as being out of time when it did arrive.

g. ABB notified that it would carry out its assessment.

h. ABB had more than 4 months in total to assess CE002 before it became treated as acceptance.

i. ABB's failure to assess CE002 was notified by [Bam] in writing in accordance with the Subcontract before it became treated as accepted.

47. I have considered the other evidence and documents to which I have been referred and have concluded that, in the light of this decision and my findings on the application of and effect of clause 64.4, much of the submissions and evidence submitted to me in this adjudication is not relevant to deciding the dispute referred to me. It is not therefore necessary for me to refer to all the matters I have considered including reasons.

48. In that regard I accept [Bam's] submission at A9 of the Reply that, following my decision that [Bam's] quotation for CE002 of 12 and 19 April 2012 is to be treated as accepted, the arguments put forward by ABB in the Response must fall away...

51. I therefore decide and declare as follows:

a. The parties did not reach a binding agreement on the scope of the £1.5 million lump sum (subject to my decision at 51d. below that [Bam's] quotation of 12 and 19 April 2012 including his sum is to be treated as accepted by ABB).

b. [Bam's] quotation of 12 and 19 April 2012 for CE002B is treated as accepted by ABB by operation of clause 64.4 of the Subcontract.

c. ABB has accepted the value of CE002B and £977,088.88 plus vat.

d. In accordance with clause 64.4 of the Subcontract, CE002B is treated as accepted by ABB as part of [Bam's] quotation of 12 and 19 April 2012 for CE002 that is itself treated as accepted by ABB..."

32. The adjudicator went on to decide that ABB should pay Bam £973,432.18 plus VAT, interest of £23,135.68 plus VAT and £84,777.96 in respect of Bam's costs and that ABB should pay the adjudicator £14,715 for the adjudicator's fees and expenses.

The Proceedings and the Argument

33. ABB issued proceedings under Part 8 for a declaration that the decision was invalid as being in breach of the principles of natural justice and was therefore unenforceable. Bam issued its own summary judgement application later to enforce the decision of the adjudicator.

34. I will simply summarise the arguments which were fully set out in comprehensive written and oral submissions from both Counsel. Ms Day QC for ABB says that there had been material breaches of the rules of natural justice because the adjudicator decided important parts of the dispute referred to him on grounds which were not put before him by either side or indeed raised by him. The primary complaint relates to his finding at Paragraph 23 (see above) of his decision that there was no binding agreement on the scope of the £1.5 million lump sum figure in reliance on Clause 11.1A which had simply never featured in the submissions in the adjudication or in the exchanges between the parties and the adjudicator. Secondly, he was indiscriminate in his use of Clause 11.1A in particular in relation to his findings about waiver in Paragraph 24 and about the acceptance by ABB of Bam's quotation of 12 and 19 April 2012 in Paragraph 32 and 34. There is complaint about his finding in Paragraph 44 by reference to Clause 11.1A. Finally there is complaint that he failed to

address many of the issues which he had been appointed to consider in particular whether there had been proper notification of CE002 as a whole or of CE002.2B (post January 2011 design fees).

35. Mr Taverner QC argues that Paragraph 23 of the decision taken in context merely demonstrates that the adjudicator found on the facts that there was no agreement about the scope of the £1.5 million lump sum and that this represented his clients expressly pleaded alternative case. He goes on to argue that, even if he is wrong about this, it was not material or sufficiently material in the light of the adjudicator's later findings that there was only one compensation event encompassed by CE002, that therefore there in effect did not need to be at later notifications as such by Bam in relation to CE002.2B, that Bam's quotation of 12 and 19 April 2012 should have been responded to, and that such quotation was not responded to effectively so that it should be treated as having been accepted. He said that in effect the later findings rendered unnecessary the earlier findings which were immaterial in the result.

Discussion

36. One must always remind oneself when considering alleged breaches of the rules of natural justice on the part of the adjudicators that simply because they may or actually have got things wrong as a matter of fact or law is immaterial in determining whether there has been a breach of those rules. Put another way, it is not to be considered as unfair that an adjudicator was wrong in fact or in law; such error will not prevent the due enforcement of a decision. What one is primarily looking at in cases of alleged breach of these rules is an actual or probable serious failure in the process on the part of the adjudicator.
37. There can be no doubt in my view that the adjudicator failed to comply with the rules of natural justice in that he clearly had regard to Clause 11.1A in circumstances in which it is common ground that this clause was not relied upon or even referred to by the parties from start to finish of the adjudication and that the adjudicator did not raise it with the parties before he published his decision. Of course, as before different tribunals including the Court, a point, fact or argument may occur to the arbitrator, judge or adjudicator which has not been argued or mentioned by anyone else. It is perfectly legitimate for the tribunal to raise this with the parties and invite comment, argument or even evidence; having done that, it will generally be perfectly fair and proper for the tribunal to rely upon that point, fact or argument in reaching the requisite judgment, award or decision. The reason is that the parties have then been given the opportunity to address the point. There is a failure in the process if this practice is not followed.
38. The next issue is to consider how much a part this reference to or reliance by the adjudicator upon a clause which had never been argued by or put to the parties played in his decision and decision making process. The Court should be slow to speculate upon what the adjudicator would, should or could have done or decided if he had not referred to or relied upon such a clause. The reasons are obvious, namely that the Court can not know or determine what the adjudicator would have done in those circumstances save by reference to the wording of the decision itself and the Court should not try to substitute its own views for what the adjudicator should have done because the parties in this case and otherwise Parliament by the Housing Grants, Construction and Regeneration Act 1996 has decided that it is adjudicators who

should be making the decision. The Court is not some appellate tribunal which can revise the decision. This is in contra-distinction to the Arbitration Act which has specific provisions enabling the Court to vary arbitral awards in certain circumstances.

39. There clearly was an issue between the parties about the agreement of 3 December 2010: was the £1.5 million sum agreed to relate to design work carried out up to 31 January 2011 (with extra payment due for any design work carried out thereafter) or to all design work whenever carried out save in so far as any design work was needed for reasons beyond Bam's control? The reality is that there was agreement between the parties to the adjudication that an agreement had been reached and there was no real argument that such an agreement could not have binding effect. The alternative case that there had been no agreement at all could be said to have flown in the face of the evidence presented by Bam and indeed by ABB. Put another way, there was no real suggestion on the evidence before the adjudicator that the parties were not "*ad idem*"; the issue related to what they were "*ad idem*" about.
40. Whilst one should not necessarily adopt a strict legalistic, contractual or statutory-type interpretation of the adjudicator's Paragraph 23, it is beyond doubt that the adjudicator specifically took Clauses 11.1A and indeed 66 into account in reaching his decision that the parties did not reach a binding agreement on the scope of the £1.5 million lump sum. The relevant sentence and finding is expressly predicated on these provisions. The sentence begins: "Given these provisions"; it goes on that there is another "given" which is that the "Subcontract does not appear to provide a mechanism for the agreement alleged". It must be the case that these two given matters form an important basis for his finding that there was no binding agreement. The third "given" in the sentence simply pointed to the disagreement "between the parties" (presumably in the adjudication) suggesting that the parties were never "*ad idem*". However, neither party had ever really suggested that on the evidence they were not "*ad idem*"; as I have said before, the evidence was that there was agreement and the issue was what was agreed. It would have been easy for the adjudicator to make his decision simply on the facts: he could have found without reference to Clauses 11.1A and 66 that there was no agreement between the parties or alternatively that one side's evidence or the other's was preferred. The very fact that he refers to and relies upon these two provisions suggests that he felt at least that he needed them to conclude his decision. If that was unclear (which it is not), the second sentence ("Such an agreement would be contrary to the provisions of clause 11.1A") makes it abundantly clear that he attached real importance to the impact of Clause 11.1A in reaching his decision. It is simply not arguable that the first sentence was simply a finding of fact that there was no agreement and that the second sentence was some sort of throw-away or *obiter* line of argument.
41. I therefore have no doubt that there was a serious breach of the rules of natural justice by the adjudicator who decided a key issue in the adjudication by reference to and in reliance upon a clause, 11.1A, which neither party had referred to or relied upon and which the adjudicator did not give the parties the opportunity to address him on. It is not for the Court to speculate why the adjudicator did what he did. ABB's Counsel suggests that he may have found himself with insufficient time to produce the decision, which is often unavoidable in what is often a 28 or 42 day process, and had to go for an easy answer which would mean less work. I have no reason to believe

that Mr H is other than conscientious. It is inferentially suggested alternatively that he might have been of the view that his finding in Paragraph 23 was tangential to the rest of his decision which might explain his oversight in relation to the Clause 11.1A point. Again, that is speculation; either his decision itself supports that view or it does not. I will address this point when materiality is considered below.

42. It was orally argued by Mr Taverner QC that Clause 11.1A does exclude in law any such agreement as the parties were putting forward. It is not really for the Court to rule on this as it should have been for the adjudicator, having raised it (which he did not before his decision) and heard argument on it to decide this type of point. I am satisfied however that there is at least a respectable and probably convincing argument that Clause 11.1A does not apply as the agreement about a price for a compensation event does not amount to a variation (amendment or alteration) of the Sub-Contract itself and in any event the parties were free to waive mutually the need for there to be a written and signed amendment. It follows that there would have been a very realistic prospect of success for ABB on the Clause 11.1A point if the adjudicator had seen fit to mention it before his decision was issued.
43. Next, he argues that the Paragraph 23 point is immaterial in the light of his findings later in his decision. Because it is clear that the adjudicator found it unnecessary to apply his mind as to which of the three options was right as a matter of fact (Mr Morrison's account, Ms Fletcher's account or no agreement at all), the Court can not substitute its view as to which was the most likely and I should not speculate as to which was the most likely. Although one could conclude, given the clear evidence on both sides that there was an agreement, that the "no agreement" option was the least likely, there were arguments on both sides as to whether Mr Morrison's or Ms Fletcher's account was likely to be correct. There was no hearing and the adjudicator therefore did not have the opportunity of testing the evidence by questioning of the witnesses. It is proper to conclude therefore that the adjudicator could realistically have decided either option on the facts.
44. In logic, one therefore moves to considering the impact of the adjudicator deciding that Ms Fletcher's account was correct and that therefore there was a binding agreement that Bam was entitled to payment for design services carried out in connection with CE002 after 31 January 2011 only if this was necessary for reasons beyond its control. Bam's quantum case was predicated upon an entitlement for all design services carried out after 31 January 2011.
45. Although one can not double-guess what the adjudicator would have done if he had accepted Ms Fletcher's account, there must have been a realistic chance that he would have said that the parties were bound by the agreement and that whatever happened thereafter was subject to the agreement. For instance, he might well have interpreted ABB's letter of 10 March 2011 in such context as supporting and being consistent with such an agreement. Similarly, he might well have interpreted the letter of 4 October 2011 in context as calling only for a quotation for the later elements of CE002 such as installation and prolongation. It certainly would not have been difficult for an adjudicator who had satisfied himself that there was a binding agreement in relation to the design services for CE002 to reach conclusions in relation to what happened thereafter that gave effect to and recognised the existence of such an agreement.

46. There are, in context, some incomprehensible parts of the adjudicator's decision. He says at Paragraph 32 that ABB "accepted" the Bam quotation(s) of 12 and 19 April 2011 and he repeats this point at Paragraph 34. Mr Taverner QC suggests that what he really meant in context was that ABB treated or received these quotations as quotations under Clause 62. I do not consider that that is, or is necessarily, correct. The adjudicator is an experienced solicitor and might well be expected to know the difference between accepting a quotation (which can give rise to a contract) and receiving a quotation and treating it as if it was a quotation under a particular contractual clause. Neither party argued that the quotations had actually been accepted by ABB. He then goes on at Paragraph 44 to deal with an "unwritten agreement" put forward by ABB to the effect that it was not bound by contract terms in relation to its reply (or failure to reply) to Bam's quotations. Again, he rejects the argument on one unexceptionable ground (that it is not supported by the evidence) and on the grounds also that such an agreement would be contrary to Clause 11.1A. If this had been the only ground of challenge to the enforceability of the decision, I would probably have decided that it was not a material breach of the rules of natural justice because it was simply an additional ground for the adjudicator in reaching his decision on that particular point. However, there can be no doubt that the repeated reliance on Clause 11.1A was another breach by the adjudicator of the rules of natural justice, given that Clause 11.1A was not relied upon or referred to by anyone in the adjudication. It demonstrates however that the adjudicator did not make a simple mistake but that he considered Clause 11.1A to be a good reason to reject some key points.
47. The adjudicator himself acknowledged that in the light of his findings it was unnecessary to consider much of the detailed submissions and evidence submitted to him because it was no longer relevant. That again would be unexceptionable if his key findings had been achieved within the application of the rules of natural justice. However, he denied himself the opportunity, if he had decided the 3 December 2010 agreement in favour of ABB, of analysing the evidence to consider how much of the post-31 January 2011 design work was necessary only for reasons beyond the control of Bam. It is likely that if he had done that exercise the quantum claimed by Bam would have been at least very substantially reduced if not eradicated.
48. This is therefore one of those relatively rare cases in which the Court must find that the reliance on by the adjudicator on Clause 11.1A was a material breach of the rules of natural justice in the circumstances which the issue to which the breach went was at least of considerable potential importance to the outcome of the resolution of the dispute and it could well have been decisive; it is certainly not peripheral or irrelevant.

Decision

49. It follows that ABB is entitled to the declaration that which it seeks and Bam's application for summary judgement must fail.