Neutral Citation Number: [2013] EWHC 1186 (TCC)

Case No: 12-449

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2013

**Before**:

**THE HON MR JUSTICE RAMSEY**

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**Between:**

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| **Farrelly (M & E) Building Services Ltd** | **Claimant** |
| **- and -** | |
| **Byrne Brothers (Formwork) Ltd** | **Defendant** |

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**Simon Lofthouse QC** (instructed by **Wright Hassall LLP**) for the **Claimant**
**Jonathan Lewis** (instructed by **Fenwick Elliott LLP**) for the **Defendant**

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**Judgment**

**Mr Justice Ramsey :**

## Introduction

1. This is an application by the Claimant ("FBS") in which they seek summary judgment against the Defendant ("Byrne") to enforce a decision of an adjudicator. Byrne seeks to defend the proceedings on the basis that the Adjudicator acted in breach of natural justice and that, in any event, FBS's entitlement to be paid should be stayed on the basis of FBS's financial position.

## Background

2. Byrne is the main contractor under a contract with London Underground Limited in respect of the refurbishment of Hammersmith Underground Station. By a subcontract dated 21 March 2011 Byrne subcontracted the mechanical and electrical work and services to FBS ("the Subcontract"). The Subcontract was in the form of a NEC3 agreement with bespoke amendments.

3. On 10 August 2012 FBS made an application for payment No 50 and, in response, Byrne made its assessment by its sub-contract payment approval form, SCPAF No 45 on 29 August 2012.

4. In September 2012 Byrne sought to terminate FBS's employment under the Subcontract. Byrne contends that it did so properly whereas FBS disputes the termination and contends that it accepted Byrne's wrongful repudiation of the Subcontract.

5. On 15 October 2012 FBS gave Notice of Adjudication to Byrne in relation to disputes arising from FBS's application No 50 and Byrne's SCPAF No 45.

6. On 25 October 2012 Mr Michael Rowlinson of Alway Associates was appointed by agreement of the parties to act as the Adjudicator. The dispute was referred to him on 25 October 2012. Byrne served its Response on 8 November 2012 and FBS served its Reply on 19 November 2012.

7. On 27 November 2012 the Adjudicator wrote to the parties in the following terms:

> "*In accordance with the second bullet point of clause W2.14 of the Subcontract I am required to make available to the Parties any information to be taken into account in reaching my Decision. I would assume that this requirement is to prevent the adjudicator from taking what has been described as a 'flight of fancy'.*
>
> *There is a statement at paragraphs 35 and 36 of the first witness statement from Paul Reeves served by the Responding Party with the Response to the effect that the method of assessing compensation events changed from being prospective to retrospective. Using my own knowledge of the NEC3 contracts (which I suspect is one of the reasons why the Parties agreed to appointment me to act as Adjudicator in this reference) I am aware that clause 63.1 of the Subcontract and the guidance for that clause contained*

*within the Guidance Notes (to the Engineering and Construction Contract which apply equally to the Subcontract) cater for this difference between prospective and retrospective. In particular I would direct you to the last three paragraphs of the guidance note.*

*Given that I would like both Parties to comment on the provisions of clause 63.1 and its guidance note and that clause W2.14 of the Subcontract gives me the power to decide on a procedure in this circumstance I direct that both Parties shall make a submission to me on the interpretation of clause 63.1 and in particular whether a compensation event should be assessed prospectively or retrospectively and if both apply when should the assessment change from prospective to retrospective.*"

8. Both parties responded to that question on 28 November 2012. FBS did so by Wright Hassall's letter dated 28 November 2012 in which it was stated:

> "*The approach of the NEC 3 Sub-Contract, and clause 63.1 is clear. It is based on prospective forecasts of time and costs. The submission is based mainly on the costs element, given that this is the context of the statement from Mr Reeves to which you refer. His comments are given in the context of the heading of "labour rate of £37.00".*"

9. Byrne's responses were provided by Fenwick Elliott in a submission dated 28 November 2012 in which, in conclusion, it was stated:

> *17. Clause 63.1 provides a 'switch date' based on the date that an instruction was issued (to provide a quotation) or should have been issued. Before that date the costs should be assessed on the basis of actual Defined Costs incurred. After that date the assessment is of the effect on forecast Defined Cost of work not yet done at that date.*
>
> *18. However, the switch date moves each time a subsequent instruction is given to revise a quotation. In the instant case the 'switch date' for each compensation event moved to a date when the vast majority of works had been completed. Accordingly, the compensation events are to be assessed based on the actual Defined Costs incurred by FBS or 'retrospectively'.*"

10. In commenting on clause 63.1, Byrne referred to clauses 62.3 to 62.5 at paragraph 10 of the submission. In addition Byrne attached to the submission a commentary on Clause 63.1 from Keating on NEC3 which referred, amongst other provisions, to the four situations in which the Project Manager assesses a compensation event, which are set out in Clause 64.1. That commentary stated "*Leaving aside the quotation being out of time, failure to submit a program or alterations thereto, or the latest programme not being accepted, the most general ground on which the Project Manager can make his own assessment is if he decides that the Contractor has not assessed the compensation event correctly in a quotation and he does not instruct a revised quotation.*"

11. Byrne served a Rejoinder, FBS served a Surrejoinder and Byrne served a Rebutter. Finally on 4 December 2012 FBS responded to Byrne's Rebutter. Under the Adjudication provisions the Adjudicator had power to award costs, as well as his fees, as between the parties. In a letter dated 28 November 2012 the Adjudicator recorded a procedure agreed by the parties for dealing with costs. That procedure was that he should issue a draft decision on the "substantial" issue on 6 December 2012, the parties should then made submissions and the adjudicator would make his decision on 18 December 2012. It was agreed that the draft decision would not be subject to any change save for the application of the "slip rule".

12. After issuing the draft decision Fenwick Elliot wrote on 14 December 2012 raising four matters which they indicated they were raising under the slip rule. On 17 December 2012 Wright Hassall wrote objecting to the matters raised, saying that with the exception of one small item the submission by Byrne was an attempt to make a further submission on the merits of the Adjudicator's decision "*dressed up as a slip rule application.*" The Adjudicator agreed with FBS and made a small adjustment for the one item which came within the slip rule. The Adjudicator then issued his decision on 18 December 2012.

13. Following the termination of the Subcontract, Byrne prepared it assessment of the final payment due under Clause 93 of the Subcontract. On 17 December 2012 Byrne certified that a final payment was due from FBS to Byrne in the amount of £2,328,756.09.

14. Also on 17 December 2012 Wright Hassall had written to Fenwick Elliott seeking confirmation that payment of the sums due to FBS under the imminent Adjudicator's Decision would be made on or by 19 December 2012.

15. The day after the Adjudicator's decision was published Fenwick Elliott wrote on 19 December 2012 to Wright Hassall saying as follows:

> "*Before we can take instructions upon the question of whether [Byrne] will make any payment in respect of this decision, please provide a copy of FBS' latest management accounts and a breakdown of the Debtors figure included within them. Please also provide a breakdown of the debtors figure included within the latest published accounts for year ending September 2011. Once we have these we expect to be able to respond to you substantively within one working day.*
>
> *We make this request because unless FBS' financial position has significantly improved since September 2011 then it appears, on the basis of the latest published accounts, that FBS are insolvent.*"

16. That letter concluded with the following paragraph:

"*This Letter is written notwithstanding and without prejudice to a Natural Justice objection [Byrne] may make to the enforceability of the adjudicator's decision, in respect of which we are currently taking our client's instructions.*"

17. Payment was not made by Byrne of the sum awarded to FBS in the Adjudicator's decision and on 28 December 2012 FBS commenced these proceedings against Byrne seeking payment of the sum £561,194.92 plus interest as set out in Particulars of Claim. The usual applications were enclosed and on the same day directions were given leading to an early hearing. The application was supported by the first witness statement from Stuart Thwaites. In response Byrne served a statement by Mr Toby Randle accompanied by a Witness Statement of Steven Fellows, Managing Director of UK Electrical Installations Limited ("UK Electrical") who were engaged as electrical subcontractors by FBS at the Hammersmith Underground Station project.

18. On 23 January 2013 FBS served the second witness statement of Stuart Thwaites, a statement from John Farrelly, a Director of FBS and from Bill Price, Contracts Manager of FBS.

19. At pages 467 to 481 of the exhibit to Mr Randall's witness statement was a letter from Forensic Department of KPMG LLP dealing with the financial position of FBS. One of the exhibits to Mr Thwaites' second witness statement was an expert report by Mr Victor Young of Thomas and Young who are the auditors for FBS. Mr Young has been the engagement partner at Thomas and Young for the audit for over 10 years.

20. The parties served opening submissions. In the submission served by Mr Jonathan Lewis, who appeared on behalf of Byrne, he referred to a further letter from KPMG dated 28 January 2013 and a second witness statement from Steven Fellows also dated 28 January 2013 which were provided at the hearing. At the hearing Mr Simon Lofthouse QC, who appeared on behalf of FBS, produced second witness statements from Mr Farrelly and Mr Price responding to Mr Fellows' second witness statement.

21. On 30 January 2013 I notified the parties of my decision in relation to FBS's application in which I granted summary judgment to FBS on their application and refused the application to stay the judgment sought by Byrne. I now set out my reasons for that decision.

**The Issues**

22. There are four issues which have to be determined on this Application:
    (1) Whether Byrne has waived any natural justice challenge;
    (2) Whether the Adjudicator's finding that he should assess FBS's entitlement to direct costs on a prospective basis breached the rules of natural justice;
    (3) Whether the Adjudicator's rejection of Byrne's case as to concurrent delay breached the rules of natural justice;
    (4) Whether any judgment in favour of FBS should be stayed.

23. I shall deal with each issue in turn.

**Waiver of the Natural Justice Challenge**

24. Mr Lofthouse submitted that Byrne waived any natural justice challenge because they failed to raise that challenge when the Adjudicator sent his draft decision to the parties on 6 December 29012. Whilst he accepted that it was agreed that the draft decision would not be subject to any change save for the application of the "slip rule", Mr Lofthouse submitted that where a party has notice that there has been a breach of the rules of natural justice it is obliged to raise that breach and request that the breach be remedied or at least seek permission to advance submissions on the alleged breach of natural justice. He submitted that if that is not done the party with notice of the grounds for a natural justice challenge affirms the validity of the decision and thereby waives any natural justice challenge.

25. He referred me to the decision of Her Honour Judge Kirkham in Cowlin Construction Limited v CFW Architects [2003] BLR 241 where she discusses the nature of affirmation in connection with challenges to the jurisdiction of an adjudicator at [59] to [68]. He properly also referred me to the case of R Durtnell and Sons v Kaduna Limited [2003] BLR 225 which would appear to conflict with the decision in Cowlin. He submitted that the decision in Cowlin is to be preferred.

26. In response Mr Lewis submitted that there was no affirmation or waiver. He pointed out that the Adjudicator's decision was published in draft only so that the parties could make submission on costs and that it was made clear that the draft decision could not be changed other than to correct errors under the slip rule. Whilst the Adjudicator did not accept all the matters raised under the slip rule, Mr Lewis pointed out those matters were confined to issues which Byrne expressly raised under the slip rule. He submitted that it would not have been appropriate to invite the Adjudicator to change his draft decision on the basis that he had acted contrary to the principles of natural justice. He submitted that on the basis of the agreed terms for the production of a draft decision the Adjudicator would not have done so and would not have had jurisdiction to do so.

27. In principle a party may waive a failure by an Adjudicator to comply with the rules of natural justice, although the nature of a natural justice challenge differs in important respects from a challenge to the jurisdiction of an adjudicator. For there to be a waiver it is evident that a party must be aware of or be taken to be aware of the right of challenge to the adjudicator's decision. The second step requires a clear and unequivocal act which, with the required knowledge, amounts to waiver of the right.

28. In the case of jurisdiction a party must know or be taken to know that the ground for challenging the jurisdiction has arisen. If, with that knowledge a party then continues with the adjudication process without raising the challenge then it may waive its rights to challenge jurisdiction at a later date. In the case of jurisdictional challenges it is therefore by continuing with the adjudication in the knowledge that there are grounds for jurisdictional challenge that gives rise to a waiver.

29. In the case of a natural justice challenge the party has to know or be taken to know that the grounds for a natural justice challenge have arisen. However there has

then to be some clear and unequivocal act by that party to show that it does not intend to rely on that natural justice challenge before there can be waiver.

30. As Dyson LJ, as he then was, said in AMEC Capital Projects Limited v Whitefriars City Estates Limited [2005] BLR 1 at [14]:

> "The common law rules of natural justice or procedural fairness are two-fold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be biased. In either event, the decision will be in breach of natural justice, and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable."

31. It may be that different approaches apply to the two rules. In relation to the first some procedural unfairness may become apparent during the proceedings. If it does and the party asserting a breach of the rules of natural justice does nothing but continues with the adjudication I find it difficult to see that that would be a clear and unequivocal act which would deprive that party from relying on a breach of the rules of natural justice if, once the adjudicator's decision is produced, that breach has a sufficiently significant effect on the outcome. The fact that a party continues with the adjudication knowing of the breach of the rules of natural justice may however have other consequences. First, if that party had raised that matter with the adjudicator then the adjudicator would have had the opportunity to amend the procedure to overcome the breach in the rules of natural justice. Again, it is not clear where this would take the position because merely providing the adjudicator with the opportunity might or might not have led to the breach of the rules of natural justice being overcome. Evidently if it were raised and the adjudicator did nothing about it that would strengthen any ground of a breach of the rules of natural justice. But, if it is not raised, it is difficult to see how it could be said that that means that the underlying breach of the rules of natural justice, if later established, cannot be relied on by the party.

32. The second way in which the failure to raise the matter may be relevant is that it might be said that if a party is subject to such serious procedural unfairness that it breaches the rules of natural justice, the natural reaction on discovering that breach would be to raise it with the adjudicator. A failure to raise it would then be a matter which could be relied on as demonstrating that the party did not believe that there was any substance if it later contended that there was a breach of the rules of natural justice.

33. On the facts of the present case Byrne received the draft decision on 6 December 2012 and it was provided on the basis which had been agreed. That agreement was that the "*Draft Decision will not be subject to any change save for the application of the 'slip rule'*." Evidently, if Byrne had responded by pointing out that it

considered that there had been a breach of the rules of natural justice and seeking to make further submissions that would be seeking to change the Adjudicator's draft decision.

34. It is clear from the submissions made during the course of the Adjudication that the parties were not reluctant to raise any points which they wished to raise, despite any agreed procedure. However I do not consider that it can be said that by failing to draw to the Adjudicator's attention the matters which Byrne now contends amount to a breach of the rules of natural justice Byrne's conduct can be said to amount to a clear and unequivocal waiver of their right to rely on that contention once the Decision was published.

35. Some support for this contention can be found in the decision of Brandon J, as he then was, in Sokratis Rokopoulos v Esperia SpA (the "Aros") [1978] 1 Lloyds LR 456 where it was held that by taking up an arbitrator's award in the belief that there had been an error in the conduct of the proceedings did not waive the right to rely on that error. It would follow that on that basis there was no waiver in continuing with the proceedings in the belief that there had been a procedural irregularity. Brandon J said this at 461:

> "*As it will be necessary to stress later, the mere fact that there has been an error in the conduct of arbitration proceedings does not mean that an award made in them must be remitted. It is necessary for an applicant for remission to go further and show that the error concerned has, or may well have, resulted in the award made being unjust to him.*
>
> *Against that background a party to an arbitration, who believes that there has been an error in the conduct of the proceedings which could, but need not necessarily, have led to a decision unjustly adverse to him, is placed, when he knows that an award has been made but does not know its contents, in a difficult position. Unless the decision is in fact adverse to him, he has neither interest in, nor ground for, applying for remission of the award.*"

36. It follows that on the facts of this case I do not consider that there was waiver of any right by Byrne to rely on a breach of the rules of natural justice. I therefore turn to the substantive points raised in that respect.

**The assessment of direct costs**

37. The first natural justice challenge arises from the Adjudicator's assessment of direct costs. One of the issues raised in the Adjudication was the question of the sum due to FBS in respect of direct costs of work carried out by FBS in relation to compensation events. In particular there was a difference between the parties as to the correct rate to apply for FBS's electrical operatives.

**The underlying issue**

38. FBS claimed that the hourly rate should be £35. They also contended that Byrne had during the course of the works agreed a rate of £35 and therefore all compensation events should be assessed using that rate.

39. Byrne contended that FBS had never provided adequate evidence that it was paying hourly rates to its operatives of £35 and that in the absence of such evidence the Adjudicator should award an hourly rate of £nil. Byrne's alternative case was that an hourly rate of £35 was significantly above the market rate and based on expert quantity surveying evidence an average hourly rate of £24.43 was reasonable. Byrne denied that it had agreed an hourly rate of £35 and, even if it had, denied that it was bound to apply that rate in respect of every Compensation Event.

**The submissions in the adjudication**

40. In the Referral these matters were dealt with in paragraphs 208 to 225. In the Response Byrne dealt with it at paragraphs 6.20 to 6.24. In paragraph 6.21 Byrne referred to the witness statement of Paul Reeves at paragraphs 23 to 37 and said that the rate of £35 was in relation to "*prospective quotations i.e. before the works were completed.*" At paragraph 6.22 they said that "*In the vast majority of cases of compensation events being submitted by FBS from mid 2011, the works had already been completed and so the compensation events were being assessed retrospectively.*" FBS then responded to those matters in paragraphs 95 to 113 of the Reply.

**The Adjudicator's letter of 27 November 2012**

41. At that stage the Adjudicator then wrote the letter of 27 November 2012, referred to above, having considered paragraphs 35 and 36 of Mr Reeves' witness statement and Mr Reeves' statement that the method of assessing compensation events had changed from being prospective to being retrospective. The Adjudicator referred to his own knowledge of the NEC3 Contract and, in particular, clause 63.1 and to the difference between prospective and retrospective assessments. He asked the parties for submissions on the question of whether a Compensation Event should be assessed prospectively or retrospectively and if both applied, when the assessment should change from prospective to retrospective.

42. In response to that question Byrne contended that the assessment of Compensation Events should, in this case, be carried out retrospectively. Byrne referred to the correct construction of Clause 63.1 of the NEC Conditions incorporated into the Subcontract and the commentary in Keating on NEC3. They then added this:

> "*In respect of the compensation events relevant to this Adjudication, the parties failed to reach agreement over rates or lump sums. As such it remains the case that the compensation events are to be assessed by using Defined Cost and the assessment is to be made taking into account the actual costs allegedly incurred by FBS in carrying out the works. Entirely without prejudice to that submission, FBS has not demonstrated that the rates sought in this Adjudication bear any relation to the Defined Cost.*"

43. FBS, in response to the question, referred to the guidance notes to the NEC3 Contract and the Adjudicator's text book on the NEC3 Contract where he referred to the danger of the Project Manager or Contractor trying to use whichever of the prospective or retrospective approaches was most financially advantageous. FBS submitted that this was what was happening in this case. It denied that the assessment should be on a retrospective basis but submitted that, in any event, they had provided details of the costs incurred.

**The Decision**

44. In his Decision the Adjudicator set out the background in paragraphs 128 to 132 and says that Mr Reeves stated that a reason for the reduction in the hourly rate was because the assessment of the compensation events changed from being prospective to being retrospective. At paragraphs 133 to 145 of the Decision the Adjudicator then dealt with the question of whether or not there should be a prospective or retrospective valuation of the compensation events and, at paragraph 145, held that it should be prospective. He said that the difference between assessing compensation events prospectively or retrospectively had not been commented on in any detail by either party and this had led to his letter of 27 November 2012, responded to on 28 November 2012. He said that whilst the parties agreed that the switch date in clause 63.1 was agreed as being the date at which the quotation was instructed or should have been instructed, the submissions of the parties then diverged.

45. He referred to FBS's submission that the assessments should be on a prospective basis and its concession that if a forecast was to be made after the work had been carried out then forecast costs might be influenced by actual costs incurred. He referred to Byrne's reliance on Keating on NEC3 and submission that the switch date moved each time a revised quotation was instructed. He accepted that there was a lot to be commended in Byrne's submissions but he referred to submissions both by FBS and Byrne that the other party did not operate the Subcontract correctly. He said that apart from FBS's clause 62.6 notice of 6 July 2012 and Byrne's letter and attached assessments dated 22 August 2012, he had seen no other evidence that either party had properly operated the procedures in respect of compensation events.

46. He referred to FBS's submissions that Byrne did not operate the Subcontract correctly. In particular, FBS had referred him to early warning notices which recorded that a drawing issue by Byrne would have an impact on the prices and/or Subcontract completion date. Byrne then required FBS to notify the change as a Compensation Event and FBS stated that that was an example of Byrne not operating the Subcontract correctly. The Adjudicator then took an example in paragraph 140 of the Decision. He said that Byrne could issue an instruction to change the Subcontract works information under clause 14.3 but clause 61.1 required Byrne, when issuing that instruction, to notify FBS that the change constituted a Compensation Event and instruct FBS to provide a quotation.

47. On that basis the Adjudicator said the date when Byrne issued the drawing to FBS was the switch date in relation to that particular Compensation Event because it was the date on which Byrne should have instructed FBS to submit a quotation. He said it was also the date from which the three weeks for FBS to submit a

quotation under clause 62.3 commenced. He then stated that Byrne was required to reply within six weeks and if Byrne elected to instruct a revised quotation then the switch date moved and FBS had two weeks in which to submit the revised quotation. He said that although the evidence available was sketchy and primarily in the form of complaints about lack of compliance, it appeared that neither party complied with the procedures properly.

48. The Adjudicator then added this at paragraphs 143 to 145 of the Decision:

> "*143. Another aspect to consider is that if FBS did not submit a required quotation within the 3 weeks set out in clause 62.3 then under the first bullet point in clause 64.1 [Byrne] became obliged to assess the event. The dates of notification and submission of the compensation events in Appendix 3 to the Referral Notice suggest that this was a regular failure by FBS. It is clear that [Byrne] is aware of clause 64.1 as they have referred to it in every compensation event assessment contained in Appendix 4 to the Referral Notice. I have seen no evidence that [Byrne] complied with this obligation until after they received the clause 62.6 notice dated 6 July 2012 from FBS.*
>
> *144. When FBS failed to submit a quotation under clause 62.3 had [Byrne] complied with the obligation under clause 64.1 to assess that compensation event then the 'switch date' would not have changed from its original starting point and [Byrne] would have been obliged to assess the compensation event, in the main, prospectively. There is no provision for a revised quotation to be issued when the obligation to assess a compensation event has passed to the Contractor tinder clause 64. Therefore the 'switch date' would remain as the date upon which [Byrne] should have instructed the quotation in the first instance.*
>
> *145. Given the analysis above I find from the information available to me that neither [Byrne] nor FBS operated the compensation event procedure as set out in the Subcontract. In determining when the 'switch date' should be for each compensation event I find that I should revert to the date upon which it should first have been set by the act of [Byrne] issuing an instruction to submit a quotation to FBS. As FBS then failed to submit quotations in the three weeks from being instructed I find that there is no mechanism for the 'switch date' to be moved. Accordingly I find that the majority of the work in the compensation events should be assessed on a prospective basis*."

49. At paragraph 146 of the Decision the Adjudicator then goes on to consider the use of actual cost and says as follows:

> "*[Byrne] state that the hourly rate should be based on actual cost as this is what the definition of 'Defined Cost' and the Shorter Schedule of Cost Components under the Subcontract require. I find that [Byrne] is correct in this respect.*"

50. He then deals with the average hourly rates at paragraphs 147 to 160 of the Decision but at paragraph 147 states as follows:

> "*Having found that the hourly rate should be based on actual cost and taking the point that Mr Reeve [Byrne] made about compensation events being priced prospectively, as I have indeed concluded, I find that it is necessary to consider the hourly rates submitted by the parties on the basis that the actual cost is forecast prospectively. This may appear to create a conflict but in practice it is nothing more than a contractor does when pricing a tender.*"

**The submissions of the parties**

51. Mr Lewis submitted that, in coming to that decision, the Adjudicator breached the rules of natural justice. He said that despite the fact that the Adjudicator raised the question of how clause 63.1 should be interpreted, ultimately the Adjudicator took a crucial point against Byrne that neither party had advanced. He said that FBS had not sought to argue that the switch date would not move because FBS had failed to submit its quotations within three weeks of an instruction so that it was out of time and therefore Byrne was required to assess the Compensation Event. He submitted that FBS did not argue that the switch date would not move because of the application of clauses 62.3 and 64 and the Adjudicator did not invite or receive submissions from either party on the application of those clauses. He submitted that the Adjudicator should have raised the point with the parties so it could be addressed. He said that if it had been raised Byrne could have made submissions on the Adjudicator's intention to apply clauses 62.3 and 64 in the way that he did.

52. Mr Lofthouse submitted that the argument raised by Byrne related to the proper construction of clause 63.1 of the Subcontract on which the Adjudicator reached a different conclusion to Byrne's submission and held that the costs should be assessed on a prospective basis. He said that this was a matter on which the Adjudicator specifically wrote to the parties on 27 November 2012 seeking the parties' assistance as to when the switch occurred. He submitted that, given the Adjudicator's letter and the submissions of the parties, the Adjudicator was entitled to come to his own conclusion on the switch date and he did so finding that this led to a prospective assessment. He referred to the submissions of the parties in which clauses 62.3 and 64.1 of the NEC3 Conditions had been cited. He pointed to paragraph 76 of the Referral which referred to Byrne's obligation to provide a reply within six weeks of receiving FBS's quotation and in paragraph 103 to FBS's letter of 13 July 2012 acting as a clause 62.6 notice requiring Byrne to assess the compensation events within six weeks.

53. Mr Lofthouse also referred to paragraph 10 of Byrne's submissions in response to the Adjudicator's letter of 27 November 2012 where the following is said:

> "*With respect to instructions to submit revised quotations the Adjudicator is referred to clauses 62.3 to 62.5 of the subcontract. Clause 62.3 provides that where the Subcontractor submits its quotation the Contractor either instructs the Subcontractor to submit a revised quotation, he accepts the*

*quotation, notifies the Subcontractor that a change will not be made or notifies the Subcontractor that he will be making his own assessment.*"

54. He also referred to the extract from the commentary from Keating on NEC3 which was attached to Byrne's submission where clause 63.1 is discussed by reference to the obligations in clauses 61, 62, 63, 64 and 65 of the NEC3 Conditions.

**Analysis**

55. The parties are agreed as to the principles of law which apply in this case. They referred me to the decision of Akenhead J in Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) where he said at [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 [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.*"

56. I was also referred to [53] of that judgment where Akenhead J set out what was said in Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2006] BLR 15 at [85] to [87]. In particular, at [85] Chadwick LJ said this:

> "*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 para 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment.*"

57. In the present case the focus by the parties was on [57(e)] of the judgment in Cantillon. In Carillion at [84] the Court had endorsed the propositions set out at first instance by Jackson J, as he then was, where he said this :

> "*It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position for which neither party was contending. It will only be in an exceptional case such as Balfour Beatty v Lambeth London Borough Council that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the court will decline to enforce his decision.*"

58. Reference is made in both Cantillon and Carillion to Balfour Beatty v Lambeth London Borough Council [2002] BLR 288 where the Adjudicator constructed his own "as built programme" and derived his own retrospective "critical path". He did not invite comments on whether those were correct nor did he inform the parties of the methodology he intended to adopt or seek observations from them as to the manner in which it or any other methodology might reasonably be properly used in the circumstances to establish an extension of time. The adjudicator therefore formulated and analysed the claimant's case in a way which had not been put forward by the claimant.

59. In the present case there was a simple dispute between the parties as to a rate to apply to value compensation events. Byrne raised the question of whether the analysis was to be carried out prospectively or retrospectively in coming to a conclusion on that issue. The Adjudicator, conscious of the need for submissions from the parties as to the "switch date" from prospective to retrospective analysis under clause 63.1 wrote his letter of 27 November 2012 so that he did not take a "flight of fancy", as he put it, on that issue. The parties made their submissions as to the "switch date" and the Adjudicator assessed those submissions and all the submissions in coming to his conclusion that the analysis should be carried out prospectively.

60. The provision as to the "switch date" in clause 63.1 has to be read in the context of the provisions relating to compensation events found in clauses 60 to 65 of NEC3. The Adjudicator analysed the facts against those clauses of the Subcontract. He relied on clause 62.3 which had been referred to by both parties in their submissions and he referred to clause 64.1 which was referred to in the commentary on clause 63.1 in Keating on NEC3 which had been submitted to the Adjudicator by Byrne.

61. In my judgment this case does not come anywhere near to the exceptional type of case of which Balfour Beatty v Lambeth LBC is an example. This is not a case

where the Adjudicator went off on a frolic of his own determining the relevant rate on a factual or legal basis which had not been argued or put by either side. Rather he decided that there should be a prospective rather than a retrospective analysis which was a point on which he sought further submissions from the parties. He then determined the appropriate rate based on what had been submitted to him. In coming to his decision that the prospective method was appropriate he looked at the contentions of the parties that the clauses of the Subcontract had not been complied with and referred to particular correspondence which had been exhibited. He reviewed that correspondence in the light of the provisions on compensation events in NEC3 which had been referred to and were relevant to the analysis of the "switch date" in clause 63.1.

62. I do not consider that the Adjudicator was under an obligation to go back to the parties another time to seek their further submissions on clauses 62.3 and 64.1 which were matters which went to the "switch date" and the question of whether the analysis should be prospective or retrospective. As observed by Jackson J in Carillion at first instance, it is not practicable for the Adjudicator to go back to the parties with each of his provisional conclusions which represented some intermediate position for which neither party was contending. In this case the parties had chosen an agreed Adjudicator who was the author of a commentary on the NEC3 Conditions and evidently, as he said, he was chosen because of that expertise. From his letter of 27 November 2012 it is evident that he was conscious of his need to seek further submissions on certain matters so as not to run the risk of going off on a "flight of fancy". In those circumstances I do not consider that, despite the persuasive submissions by Mr Lewis, this is a case where Byrne has any real prospects of successfully arguing that the Adjudicator breached the rules of natural justice.

63. As referred to above, it is noteworthy that when the Adjudicator sent his draft decision to the parties there was no sudden reaction from Byrne alleging that there had been some serious breach of the rules of natural justice.

64. In those circumstances I do not consider that Byrne has real prospects of successfully defending the enforcement of the Adjudicator's Decision on the basis that there was a breach of natural justice in determining the relevant rate to be applied to compensation events.

**Byrne's defence based on concurrent delay**

65. There is a degree of overlap with the contention that the Adjudicator breached the rules of natural justice in relation to his findings on concurrent delay and Byrne's contention in relation to the first alleged breach of the rules of natural justice.

**The underlying claim**

66. It was common ground that FBS was entitled to an extension of time to the Subcontract completion date but there was a dispute as to the appropriate length of that extension. The issue relevant to the alleged breach of natural justice arises because Byrne contended that FBS was in concurrent delay and whilst it accepted that FBS was entitled to an extension of time, it relied upon concurrent delay by FBS as being a defence to FBS's claim for time related money.

**The Decision**

67. At paragraph 239 of his Decision the Adjudicator found that the impact of the ten compensation events relied on by FBS changed the Subcontract completion date by a period of 171 working days. He then proceeded to assess the time related claim by FBS. He found that, contrary to FBS's submissions, a daily rate had not been agreed. At paragraphs 254 to 268 of the Decision he then dealt with the submission by Byrne that no payment was due because there was concurrent delay for which FBS was responsible. At paragraph 262 the Adjudicator considered how the assessment of delay costs for compensation events related to the other submissions and evidence he had about the assessment of compensation events.

68. At paragraph 263 he referred to the submissions made by the parties about whether the compensation events should be assessed prospectively or retrospectively on which he found at paragraph 145 that the majority of compensation events should be assessed on a prospective basis. He then deals with the evidence and finds that Byrne's evidence is based on a retrospective analysis which is contrary to his previous finding and he then concludes that it has not been established that FBS was in concurrent delay.

**The submissions in the Adjudication**

69. In paragraphs 237 to 251 of the Referral FBS dealt with the reasons put forward by Byrne for not paying for delay costs on the basis of alleged concurrent delay. FBS said that Byrne had not provided any detail of the alleged delay and FBS said it was unable to deal with Byrne's contention in the Referral. FBS did however refer to the law on delay and to an expert report from Mr Rashad on delay.

70. In the Response, Byrne dealt with concurrent delay and in particular explained at paragraph 8.10 that Mr Clough, their programming expert, had "*compared the prospective start and end dates of the 10 compensation events as assessed by Mr Clough with the available As-built data.*" In their Reply at paragraphs 229 to 238 FBS dealt with alleged concurrent delay and said that, based upon Mr Clough's evidence, Byrne had failed to prove concurrent delay.

**The submissions of the parties**

71. Mr Lewis submitted that there was a breach of natural justice because FBS had not sought to argue that Byrne's case on concurrent delay should fail because it had not sought to prove its case on a prospective assessment. He said that FBS's analysis of delay had been carried out in Mr Rashad's second report on the basis of a retrospective analysis. He also said that the agreed basis for granting an extension of time was on the basis not of a prospective analysis ignoring actual events but by reference to the events that had occurred. He submitted that the Adjudicator's letter of 27 November 2012 made no reference to the influence of the question on whether or not FBS was in concurrent delay and that if Byrne had been given the opportunity it would have sought to demonstrate that there was evidence from Mr Clough which allowed analysis on a prospective basis.

72. Mr Lofthouse challenged the assertion that both parties adopted a retrospective analysis for the consideration of concurrent delay but that the Adjudicator adopted a prospective approach. He referred to the evidence of Mr Thwaites that FBS's

alternative case in the second set of experts' reports was not a retrospective approach on actual data but an approach which was based on estimates.

**Analysis**

73. When the Adjudicator posed his question on 27 November 2012, although it arose out of Mr Reeve's statement dealing with the rate for electrical operatives, it was a general question relating to the assessment of compensation events and whether they should be assessed prospectively or retrospectively. In response Byrne dealt with the general principle and also made submissions as to its impact in relation to the assessment of the rate for electrical operatives. In their response FBS said that the approach in NEC3 was "based on prospective forecasts of time and costs" and that their submission was based mainly on the costs element given that this was the context of Mr Reeve's statement. Again they set out submissions which dealt with the assessment of compensation events as a matter of general principle.

74. When the Adjudicator came to determine whether FBS was entitled to delay costs arising from the 10 compensation events he had to consider a number of issues, one of which was whether on the basis of Mr Clough's evidence Byrne had established concurrent delay. This, necessarily, involved the question of how compensation events should be assessed. In turn that necessarily involved consideration of the submissions which had been made by the parties on whether there should be a prospective or retrospective analysis. Having found that there should be a prospective analysis the Adjudicator upheld FBS's submission that Byrne had not proved concurrent delay because Mr Clough's analysis was retrospective rather than prospective.

75. For the reasons set out above I do not consider that in coming to his conclusion that the assessment should be carried out on a prospective rather than retrospective basis there was a breach of the rules of natural justice. Having come to that conclusion and having posed the general question of prospective and retrospective analysis, I consider that the issue had been sufficiently aired in the context of the Adjudication and that the Adjudicator was entitled to come to the conclusions he did, without putting to the parties any other provisional conclusions for comment. The Adjudicator found that the assessment had to be prospective. He found that Byrne's analysis was retrospective and for that reason he upheld the submission of FBS that Byrne had not proved concurrent delay. I do not consider that this amounted to a breach of the rules of natural justice.

76. Again it is noteworthy that this matter was not raised when the Adjudicator sent out his draft decision on 6 December 2012.

77. Accordingly for those reasons I do not consider that Byrne has real prospects of successfully defending the enforcement of the Adjudicator's decision based on a contention that in rejecting Byrne's case on concurrent delay because Byrne had not proved its case, the Adjudicator was in breach of the rules of natural justice.

**The application to stay enforcement**

78. Byrne seek to stay the enforcement of any judgment on the basis that it is probable, on the basis of the evidence of FBS's present financial position, that

FBS will be unable to repay the judgment sum if ordered to do so. It is common ground that the principles to be applied were those set out by His Honour Judge Coulson QC, as he then was, in Wimbledon Construction Company v Vago [2005] BLR 374 at [26] where he set out the principles as follows:

> "*26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:*
>
> > *(a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.*
> >
> > *(b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.*
> >
> > *(c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind (see AWG).*
> >
> > *(d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances rendering it appropriate to grant a stay (see Herschel).*
> >
> > *(e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see Bouygues and Rainford House).*
> >
> > *(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:*
> >
> > > *(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see Herschel); or*
> > > *(ii) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see Absolute Rentals).*"

79. Byrne relied upon the evidence of KPMG contained in the two letters written by KPMG to Byrne's Solicitors by Mr Jason Pate, a Director of KPMG. Byrne also relied on the evidence of Mr Steven Fellows of UK Electrical who were a subcontractor to FBS on this project. It said that this and other evidence indicates that FBS would be unable to repay the judgment sum.

**The submissions of the parties**

80. Mr Lewis referred to the latest filed accounts for FBS for the year ended 30 September 2011, which are more than 16 months old. He submitted that on their face they show that FBS was at that date solvent but concerns existed over the reliability of those accounts and FBS has failed and refused to provide its recent management accounts.

81. He said that this is despite repeated requests for recent management accounts and FBS's accountants relying on those management accounts to assert that FBS is presently solvent. He submitted that it may be that FBS do not want Byrne to examine the management accounts because they are likely to show a significant deterioration in FBS's financial position. In relation to the filed accounts for the year end of September 2011 he submitted that the most significant asset is its debtor figure which stood at £3,215,000.

82. He pointed out that based on information from FBS's auditors dated 7 January 2013 the amount of £860,467 related to Byrne of which £595,000 related to work that had not in fact been applied for by FBS but had been valued based on FBS's own assessment. He said that doubts existed of the accuracy of a schedule of works showing that sum which were attached to the document provided by FBS' auditors, Thomas and Young. He submitted that based upon FBS's accounts for the year ended 30 September 2011 it would only need a negative adjustment of £49,500 to render it balance sheet insolvent.

83. In relation to the comparison between the position at the date of the Subcontract date and the present date, which was a factor to be taken into account under [26(f)(i)] of the judgment in Wimbledon v Vago, he submitted that FBS's refusal to disclose its management accounts have made it impossible to establish with certainty whether FBS's financial position had worsened since the Subcontract date of 21 March 2011 and if so to what extent. He submitted that the inference must be that it had worsened because of the refusal to disclose the management accounts, the failure to prepare management accounts after September 2012 and significant evidence that FBS is unable to pay its subcontractors. In particular he referred to the evidence of Mr Fellows.

84. In addition, Mr Lewis stated that Byrne has commenced its own adjudication against FBS claiming a sum of over £2.3 million arising from the termination of the Subcontract. He stated that it was estimated that the decision in that adjudication would be received in about 28 days from the hearing and would resolve the final account between the parties. He submitted that there is considerable doubt that FBS will be in a position to repay the judgment sum and referred to a strong belief within Byrne that the entire purpose of the Adjudication was to allow FBS to "cut and run" before it would have to face payment of the considerable sum which it owes to Byrne.

85. Mr Lofthouse said that Byrne have failed to establish the probable inability of FBS to repay the judgment sum. He submitted that whilst insolvent liquidation usually satisfied the test, Byrne is unable to demonstrate that FBS is insolvent. Instead, he said that Byrne had sought to rely on alleged disputes between FBS and third parties as a basis for submitting that FBS's failure to pay sums to third parties was evidence of insolvency. He submitted that such evidence is insufficient and that Byrne have attempted to reverse the burden of proof by requiring FBS to provide confidential, and as yet, unpublished information to Byrne so that they can be satisfied as to FBS's financial position. He relied on observations in O'Donnell Developments Limited v Build Ability Limited [2009] EWHC 3388 (TCC) at [61] to [68] as showing that it is wrong to expect a party to give widespread disclosure of its financial and business information so that the other party can see whether there is something which gives rise to grounds for an application to stay.

86. Mr Lofthouse referred to the evidence from KPMG and submitted that, as set out in paragraph 6.8 of the letter dated 18 January 2013, KPMG said that the accounts indicate that FBS was "*technically solvent at 30 September 2011*". He also said that in paragraph 4.6 of that letter KPMG reviewed the accounts from 2007 onward and stated that the later years appeared to show "*a recovering upward trend*". He said that further that this all KPMG stated was that they would require information to form a proper view.

87. He submitted that given this evidence the Court should take note of what had been said by Mr Young of FBS's auditors, Thomas and Young, and who had been involved in carrying out the audit for ten years,. He submitted that Mr Young's report confirmed that FBS was solvent and, based on the latest management accounts to 30 September 2012, has shareholder funds in excess of £400,000 and that FBS's financial position appeared not much worse than when they contracted with Byrne.

88. In relation to the third party disputes Mr Lofthouse said that the sum claimed by UK Electrical is disputed and referred to the evidence from Mr Farrelly and Mr Price which dealt with the communications between Byrne and UK Electrical in relation to the provision of that evidence. In relation to a winding-up petition by TEW against FBS he referred to evidence that this was dismissed by consent as the debt of £80,000 was disputed. In relation to the claim by ABC Limited, one of FBS's subcontractors, the sum relied upon by Byrne of £40,000 was similarly a disputed debt.

89. On this basis Mr Lofthouse submitted that there were no grounds upon which the Court should exercise it discretion to stay the enforcement of the enforcement of the judgment in this case.

**Analysis**

90. For the reasons given by Mr Lofthouse, I do not consider that this is a case where I should exercise my discretion to stay enforcement. It has not been shown that FBS is insolvent or that its current financial position is any different to its financial position when it entered into the Subcontract in March 2011. The

evidence from KPMG, whilst raising points on FBS's solvency, essentially concluded that on the basis of reported information, the solvency of FBS could not be challenged, but that was only the position on the basis of the evidence which was currently available. The evidence from Mr Young of FBS' auditors was that based upon the management accounts to 30 September 2012 FBS was solvent and that the net assets of the company would remain at about £450,000 which, he comments, is a healthy situation for a private company. He also concluded that FBS' financial position was not much worse than when they entered into the Subcontract, being solvent with a healthy balance sheet.

91. On the basis of the evidence I do not consider that there are grounds for imposing a stay. As I stated in O'Donnell v Build Ability, there is no general obligation on a party when seeking enforcement to disclose to the other party confidential information of its financial and business position so that the other party can consider whether there are grounds for applying for a stay of any judgment. If there were such an obligation it would mean that parties could gain the benefit of that confidential information which in the competitive construction industry would have serious consequences in relation to the ability of contractors and subcontractors when tendering or dealing with disputes.

92. In this case Byrne have also relied on other evidence to seek to challenge the current solvency of FBS in relation to TEW and ABC Limited. The fact that there is a disputed sum does not allow the Court to draw any conclusions. In relation to the evidence of the payment to UK Electrical the evidence from both parties sought to cast doubt on what the other party was saying as to the payment of £40,000 to this Subcontractor. The Court cannot resolve the position on that evidence and this indicates that on an application to stay enforcement where the accountancy evidence cannot support that application, a party cannot, except in the clearest cases, establish the necessary grounds by relying, as in this case, on disputed evidence of failure to pay against a complex background of commercial issues. It is noted that if the sums are said to be due to UK Electrical that company could seek adjudication. If sums were then not paid on enforcement of any adjudicator's decision, it would be at that stage that grounds for alleging insolvency might arise.

**Summary**

93. For the reasons set out above I do not consider that Byrne have real prospects of successfully defending the enforcement of the adjudicator's decision and I therefore grant summary judgment to FBS to enforce the terms of the Adjudicator's decision. This is not a case where Byrne have established the grounds for the Court to exercise its discretion to stay that judgment.

94. Whilst I understand the concerns of Byrne that, in this case, if the termination of the Subcontract by Byrne was to be held to be correct significant sums would be due from FBS, the basis of the termination is disputed as is the statement of what sums are due. It will only be when there is an adjudicator's decision that the position will be more certain. The essence of adjudication is to provide cashflow and the fact that there may, on one party's contention, be an adjudicator's decision at a future date which may require the payment of sums by the party entitled to

payment under another adjudication decision, cannot affect the approach of the Court to an earlier application to enforce that adjudication decision.