Case No: HT-2020-000276

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 3314 (TCC)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 03/12/2020

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

GLOBAL SWITCH ESTATES 1 LIMITED	**Claimant**
- and -	
SUDLOWS LIMITED	**Defendant**

- -
- -

James Leabeater QC (instructed by **Macfarlanes LLP**) for the **Claimant**
Roger Stewart QC (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 22nd September 2020

- -

Approved Judgment

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

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties; representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 3rd December 2020 at 10:30am"

.....

Mrs Justice O'Farrell

Mrs Justice O'Farrell:

1. This is an application by the claimant ("GSEL") for summary judgment to enforce the adjudication decision of Mr Nigel Davies dated 17 July 2020, directing the defendant ("Sudlows") to pay to GSEL £5,019,120.86 plus the adjudicator's costs in the sum of £81,588.00.

2. Sudlows resists enforcement on the grounds that:

    i) the adjudicator failed to consider and deal with matters relied on by Sudlows as defences to GSEL's claim, thereby acting in breach of the rules of natural justice;

    ii) the adjudicator failed to consider and deal with an allegedly fraudulent call on a bank guarantee, a further breach of the rules of natural justice; and

    iii) the adjudicator wrongly came to decisions contrary to the decision of a previous adjudicator, thereby acting in excess of jurisdiction.

Factual background

3. The dispute arises out of a project to fit out and upgrade GSEL's specialist data centre housed in the listed former Financial Times print works building at East India Dock House, East India Dock Road, London.

4. Sudlows was engaged by GSEL to carry out the works pursuant to a JCT Design and Build 2011 form of contract, with amendments, dated 22 December 2017 ("the Contract").

5. Mace Limited was the Employer's Agent under the Contract.

6. The works comprised the main works to fit out the hall A04, which had previously been stripped out under an enabling works package, and the installation of five chillers, with connections for additional eight chillers.

7. The Contract Sum was £14,829,738 or such other sum as should become payable under the Contract.

8. The works were divided into two sections:

    i) section 1 - the chiller upgrade works, which had a contract sum of £5,792,675; and

    ii) section 2 – the main works A04 fit out, which had a contract sum of £9,037,062.

9. The contractual date for completion of section 1 was 31 May 2018. The Contract provided for liquidated damages of £10,000 per week capped at 15% of the contract sum. Practical completion was certified as having been achieved on 3 July 2019.

10. The contractual date for completion of section 2 was 26 October 2018. The Contract provided for liquidated damages of £54,000 per week capped at 15% of the contract sum. Practical completion has not yet been certified.

11. Clause 2.25 of the Contract entitled Sudlows to a fair and reasonable extension of time to the completion date for the relevant section of the works in respect of relevant events identified in the Contract which caused delay to completion.

12. Clause 4.7.1 provided for interim payments to be made to Sudlows in respect of the works.

13. Clause 4.7.2 stated:

> "The sum due as an Interim Payment shall be an amount equal to the Gross Valuation under clause 4.13 where Alternative A applies, or clause 4.14 where Alternative B applies, in either case less the aggregate of:
>
> .1 any amount which may be deducted and retained by the Employer as provided in clauses 4.16 and 4.18 ('the Retention');
>
> .2 the cumulative total of the amounts of any advance payment that have then become due for reimbursement to the Employer in accordance with the terms stated in the Contract Particulars for clause 4.6; and
>
> .3 the amounts paid in previous Interim Payments."

14. Clause 4.14 (Alternative B) applied and provided:

> "The Gross Valuation shall be the total of the amounts referred to in clauses 4.14.1 and 4.14.2 less the total of the amounts referred to in clause 4.14.3, calculated as at the date for making an Interim Application under clause 4.8.3.
>
> 4.14.1 The total values of the following which are subject to Retention shall be included:
>
> .1 work properly executed including any design work carried out by the Contractor …
>
> .2 Site Materials …
>
> 4.14.2 The following which are not subject to Retention shall be included:
>
> …
>
> .3 any amounts ascertained under clause 4.20 …
>
> 4.14.3 The following shall be deducted …"

15. Clause 4.20 provided:

> "If in the execution of this Contract the Contractor incurs or is likely to incur direct loss and/or expense for which he would not be reimbursed by a payment under any other provision in these Conditions due to a deferment of giving possession of the site or relevant part of it under clause 2.4 or because the regular progress of the works or of any part of them has been or is likely to be materially affected by any of the Relevant Matters, the Contractor may make an application to the Employer. If the Contractor makes such application, save where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause, the amount of the loss and/or expense which has been or is being incurred shall be ascertained and added to the Contract Sum; provided always that the Contractor shall:
>
> .1 make his application as soon as it has become, or should reasonably have become, apparent to him that the regular progress has been or is likely to be affected;
>
> .2 in support of his application submit to the Employer upon request such information and details as the Employer may reasonably require."

16. Supplemental clause 5 modified clause 4.20, including supplemental clause 5.2, which stated:

> "Where the Contractor pursuant to clause 4.20 is entitled to an amount in respect of direct loss and/or expense to be added to the Contract Sum, he shall [except where the Contractor's estimate is accepted or negotiated in accordance with supplemental clause 4] on presentation of the next Interim Application submit to the Employer an estimate of the addition to the Contract Sum which the Contractor requires in respect of such loss and/or expense which he has incurred in the period immediately preceding that for which the Interim Application has been made. "

17. Article 7 and clause 9.2 of the Contract provided for disputes to be referred to adjudication under the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme").

18. Disputes arose between the parties and there followed four adjudications.

19. On 3 June 2019 Sudlows commenced the first adjudication. The dispute was whether Mace, the Employer's Agent, had failed to serve a timely payment notice in respect of Interim Application 16. Mr Andrew Kearney was appointed as the adjudicator. On 17 July 2019 he issued his decision, finding that GSEL had failed to issue effective payment notices or pay less notices within the required time. The adjudicator awarded Sudlows the sum of £4,351,642.68, which sum was paid by GSEL.

20. On 29 July 2019 Sudlows commenced the second adjudication. The dispute concerned Sudlows' application for an extension of time in relation to section 2 of the works, that is, the main fit-out works. Mr Peter Curtis was appointed as adjudicator. He issued his decision on 11 October 2019, finding that:

    i) Sudlows was entitled to an extension of time of 292 days, by reason of (a) delayed access to the works and additional scope of the stripping out works; and (b) structural enhancements instructed by GSEL;

    ii) the extended completion date for the Section 2 works was 14 August 2019;

    iii) GSEL was entitled to withhold or deduct liquidated damages for the period from 14 August 2019 to the date of Practical Completion.

21. By letter dated 10 October 2019, Mace asserted that Sudlows was in specified default pursuant to clause 8.4 of the Contract, in that it had failed and continued to fail to proceed regularly and diligently with the performance of its obligations under the Contract, and was in breach of the CDM Regulations.

22. On 23 October 2019 Mace issued non-completion notices to Sudlows by reference to the following:

    i) failure to complete section 1, the chiller upgrade works, by the revised completion date of 7 July 2018; and

    ii) failure to complete section 2, the main fit-out works, by the revised completion date of 14 August 2019 (subject to a reservation as to GSEL's right to challenge the second adjudication decision).

23. On 24 October 2019 GSEL notified Sudlows that it was entitled to payment of, or to withhold, liquidated damages in respect of the above failures to meet the relevant sectional completion dates. On the same date, Sudlows responded to the default notice served by Mace, disputing the allegations.

24. On 25 October 2019 GSEL made a demand under a bank guarantee procured by Sudlows in the sum of £1,018,024.82, stating:

> "In accordance with the Guarantee (a copy of which is enclosed, for reference), we write to confirm that:
>
> 1. The Principal, Sudlows Limited, are in breach of their obligations under a contract in respect of Chiller replacement works and A04 fit out works.
>
> 2. The Beneficiary claims the amount demanded now (GBP 1,018,024.82) as a result of such breach.
>
> 3. This demand shall be conclusive evidence of the Guarantor's liability and of the amount of the sum which it is liable to pay the Beneficiary, notwithstanding any objection made by Sudlows Limited or any other person."

25. By letter dated 30 October 2019, Sudlows disputed GSEL's entitlement to make a call on the guarantee and stated:

> "For the reasons set out at length in our letter of 24 October 2019, and above, Global Switch cannot have any honest belief that Sudlows is in default and/or in breach of its obligations. Accordingly, and in any event, it is Sudlows' position that Global Switch's call on the Bank Guarantee is completely unfounded."

26. On 29 October 2019 Sudlows commenced the third adjudication. The dispute was whether Mace had failed to serve a compliant payment notice in respect of Interim Application 21. Mr Andrew Kearney was appointed as the adjudicator. On 13 December 2019 he issued his decision, finding that GSEL had failed to issue a valid payment notice. The adjudicator awarded Sudlows the sum of £7,036,112.37, which sum was paid by GSEL.

Interim Applications 27

27. Under cover of a letter dated 31 March 2020, Sudlows submitted to Mace Interim Applications 27 for: (a) the sum of £2,617,845.22, based on a gross valuation of £11,689,981.10 in respect of the chiller replacement works; and (b) the sum of £6,146,854.03, based on a gross valuation of £18,701,779.92 in respect of the main fit-out works. Thus, the total interim payment claimed was £8,764,699, based on a gross valuation of the works of £30,391,761.

28. The interim applications included:

    i) sums claimed in respect of the structural enhancement works, including associated additional preliminaries;

    ii) loss and expense in respect of a further 209 days of delay to the main fit-out works, allegedly caused by relevant events, namely, GSEL's failure to provide an adequate underground duct network for the HV-B cable, an instruction (PMI 059) to change the power energisation procedure, and removal of damaged HV-B cable caused by defective underground ductwork provided by GSEL;

    iii) further extensions of time and loss and expense in respect of delays to the chiller replacement works; and

    iv) a refund in respect of the demand made on the bank guarantee.

29. Payment notices were served by Mace in accordance with the contractual timetable. No payment was made by GSEL to Sudlows in respect of Interim Applications 27.

The fourth adjudication

30. On 15 May 2020 GSEL commenced the fourth adjudication, the subject of these proceedings. Mr Nigel Davies was appointed as the adjudicator.

31. The notice of adjudication sought a decision as to the true value of parts of Interim Applications 27 and that Sudlows should pay GSEL the sum of £6,831,163.03 or such other amount as the adjudicator determined. The notice defined the dispute as follows:

> "By this adjudication, Global Switch is asking the Adjudicator to open up, review and revise – and determine the true value of – certain parts of Interim Applications numbered 27 for the Section 1 and Section 2 Works dated 31 March 2020 ("Interim Applications 27"). In order to reach a Decision, this will also technically require the Adjudicator to open up, review and revise – and determine the true value of – the equivalent parts of the Payment Notices served by Mace in response to Interim Applications 27.
>
> …
>
> 25. The parts of Interim Applications 27 and the Payment Notices to be opened up, reviewed, and revised by the Adjudicator relate to:
>
> 25.1 the value of the Contract Works;
>
> 25.2 the value of Changes/variations; and
>
> 25.3 the value of loss and/or expense (in relation to delay for which extensions of time have been awarded, both under the contract and by way of adjudication).
>
> 26. These values are to be assessed by reference to the position as at the date of Interim Application 27
>
> 27. As such, and for the avoidance of doubt only, the following matters are not part of the dispute/difference being referred to this adjudication and so are not included within the scope of this adjudication (the "Excluded Matters"):
>
> 27.1 Sudlows' entitlement or otherwise to further extensions of time for Section 1 or Section 2 of the Works. The position as at the date of Interim Applications 27 is that Sudlows has been awarded an extension of time of 37 days in respect of Section 1 of the Works and an extension of time of 292 days in respect of Section 2 of the Works (the latter established by the decision in Adjudication 2); and
>
> 27.2 the question of liability for defective works, including (but not limited to):

> 27.2.1 the high voltage cables installation (which is a relatively recent issue that has arisen between the parties). For the purposes of this "true value" adjudication, Global Switch will not be relying on its position that some or all of the high voltage cable works undertaken by Sudlows are defective; and
>
> 27.2.2 potential overloading of the roof. Again, for the purposes of this "true value" adjudication, Global Switch will not be relying on its position that Sudlows has overloaded the roof.
>
> Global Switch reserves its rights in relation to these matters, but they do not fall for consideration in this adjudication."

32. The decision sought by GSEL was in the terms set out in paragraph 31 of the notice:

> "31.1 as at Interim Applications 27:
>
> 31.1.1 the true value of the Contract Works payable to Sudlows was £13,022,757.54, or such other amount as the adjudicator determines;
>
> 31.1.2 the true value of Variations payable to Sudlows was £122,712.10, or such other amount as the Adjudicator determines; and
>
> 31.1.3 the true value of the loss and expense payable to Sudlows was £696,567.35, or such other amount as the Adjudicator determines;
>
> 31.2 taking into account sums already paid by Global Switch to Sudlows, and the applicable Retention, Sudlows is required to pay Global Switch forthwith the sum of £6,831.163.03 or such other amount as the Adjudicator determines; and
>
> 31.3 Sudlows pays the Adjudicator's fees of this adjudication."

33. In its referral document dated 22 May 2020, GSEL clarified that the scope of the adjudication included the true value of the contract works and contract preliminaries, the true value of variations and the true value of loss and expense, based on extensions of time awarded to Sudlows, but excluded the following:

> "114. For the avoidance of doubt, the following matters are outside the scope of this adjudication:

> 114.1 Sudlows entitlement or otherwise to an extension(s) of time in respect of Section 1 (in addition to or in lieu of the 37 days EOT awarded);
>
> 114.2 Sudlows entitlement or otherwise to an extension(s) of time in respect of Section 2 (in addition to the 292 days EOT awarded);
>
> 114.3 Sudlows' entitlement to loss and expense for delay, other than in respect of the EOTs already awarded."

34. GSEL summarised in the conclusion at paragraph 584 its calculation of the sum claimed by way of payment due from Sudlows.

35. In its response document dated 8 June 2020 Sudlows disputed GSEL's attempt to confine the scope of the adjudication by excluding certain matters identified in paragraph 27 of the adjudication notice and the referral:

> "4.2 …GS seeks to exclude from the scope of this Adjudication:
>
> 4.2.1 Sudlows' entitlement to extensions of time beyond (a) the EOT awarded by the adjudicator in Adjudication No.2 in relation to section 2 (main A04 fit out works) and (b) the EOT awarded by Mace in relation to section 1 (Chiller replacement works); and
>
> 4.2.2 The question of liability for defective works, including: (a) the HV-B cable installation; and (b) the potential overloading of the roof.
>
> …
>
> 4.4 The amount claimed by Sudlows in Interim Applications 27 (£30,391,761) includes sums in respect of all of the matters referred to in paragraph 4.2 above. On any view, therefore, those matters form part of the dispute referred in this Adjudication.
>
> …
>
> 4.9 Sudlows' case in this Adjudication is that its Interim Applications 27 represent the true value of its works as at the date of Interim Applications 27 (31 March 2020). In presenting that case, it is open to Sudlows to raise any defence open to it to defend its assessment of the value of the works as presented in its Interim Applications for Payment No. 27."

36. At section 10 of the response, Sudlows set out its case that GSEL's call on the bank guarantee was invalid, unjustified and not made with any honest belief that Sudlows was in breach of the Contract. On that basis, Sudlows asserted that the demand was based on fraud.

37. Sudlows asked the adjudicator to determine its entitlement to additional extensions of time, adjusted contractual completion dates and the true value of the works carried out, including loss and expense.

38. On 15 June 2020 GSEL submitted its Reply, in which it maintained its position that the scope of the adjudication was limited to GSEL's claim:

> "8. This is not an opportunity for Sudlows to litigate all of its potential entitlements under the Contract in some sort of quasi final account assessment. Rather, the purpose of this adjudication is to re-set the contractual payment regime – and establish a position whereby Sudlows has to establish entitlement before it is paid. The key question for the Adjudicator is: For various items, what valuation should have been included in the certificate in response to Interim Applications 27? This requires an examination of claims properly made as at that date. It does not permit Sudlows to promulgate claims (e.g. for delay / loss and expense) that were speculative, incomplete and unsubstantiated as at Interim Applications 27.
>
> 9. For the avoidance of doubt, Global Switch does not say that Sudlows can never prosecute its further claims for delay and loss and expense, or later establish entitlement to variation claims. It is simply that this adjudication – as commenced and defined by Global Switch – is not the forum for those matters.
>
> …
>
> 13. Sudlows suggests that Global Switch is wrongly seeking to prevent Sudlows from relying on material defences to Global Switch's claim. That is, however, a mischaracterisation of Global Switch's position. Sudlows is, of course, entitled to raise and rely on any relevant defence to Global Switch's claim. Global Switch's Notice of Adjudication anticipated – and Global Switch's fundamental objection to the content of Sudlows' Response arises from – the fact that Sudlows seeks to raise irrelevant defences (which are, therefore, not defences at all)."

39. GSEL submitted that the call on the bank guarantee was irrelevant to the adjudication.

40. On 17 July 2020 the adjudicator issued his decision (corrected on 21 July 2020). The adjudicator considered that GSEL was entitled to limit the scope of his jurisdiction to specified parts of Interim Applications 27 and that he did not have jurisdiction to award further extensions of time or decide whether Sudlows was entitled to additional loss and expense in respect of any such matters:

> "44. With regards to the jurisdictional challenge as to the scope of my jurisdiction I conclude that Global could and did limit the scope of the adjudication and my jurisdiction as specified in the Notice. In accordance with St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd [2015] EWHC 96 (TCC) it is well established that a Party is entitled to refer to adjudication a dispute about only part of an interim application. My jurisdiction was to open up, review and revise – and determine the true value of – certain parts of Interim Applications 27, i.e. a true valuation of those certain parts as at the date of Interim Applications 27. In order to reach my Decision it would be necessary for me to open up, review and revise – and determine the true value of – the equivalent parts of the Payment Notices served by Mace in response to Interim Applications 27 all as specified within the Notice as at that date. Global identified in the Notice that the parts of Interim Applications 27 and the associated Payment Notices to be opened up, reviewed and revised by me related to:
>
> 44.1. the value of the Contract Works;
>
> 44.2. the value of the Changes; and
>
> 44.3. the value of loss and/or expense (in relation to delay for which extensions of time had been awarded either under the Contract or by reason of an Adjudicator's Decision).
>
> 45. Further, in addition to the Excluded Matters identified within the Notice, it was not within the scope of my jurisdiction to award further extensions of time and/or decide whether Sudlows was entitled to the reimbursement of additional direct loss and/or expense in respect to those periods in excess of the 37-day period awarded by Global to Sudlows in respect to Section 1 (Chillers) and/or the 292 days decided upon in the second Adjudication Decision dated 11 October 2019 in regards to Section 2 (A04 Fit-Out).
>
> 46. Global had made a call on the Bank Guarantee which Sudlows was required to have in place, however when Global made the call on the guarantee Sudlows claimed

such was illegitimate. I do not consider that such is relevant to the true value of the Works as at Interim Applications 27 and therefore I do not consider it further since it does not fall within my jurisdiction. If I am wrong, which I do not consider I am, but if I am, and/or to the extent such a claim may be relied upon in terms of mitigating any decision I make which favours Global, in the absence of material evidence demonstrating the call on the guarantee was illegitimate, I would not (and do not) make a decision in favour of Sudlows in regards to such in the adjudication in any event based upon the materials that were presented to me which did not demonstrate that the claim was illegitimate. I consider that the argument regarding the Bank Guarantee can be pursued by Sudlows separately.

…

51. Accordingly, in this adjudication I did not have jurisdiction to decide:

51.1. whether Sudlows was entitled to a further extension of time over and above that already agreed to by Global or previously decided upon by the Adjudicator on 11 October 2019;

51.2. whether Sudlows was entitled to the reimbursement of direct loss and/or expense in connection with delays etc., not already agreed to by Global or previously decided upon by an Adjudicator on 11 October 2019;

51.3. Sudlows' claim regarding what Sudlows averred was a highly technical M&E dispute concerning Sudlows' compliance or otherwise with the contractual obligations relating to the HV cable installation;

51.4. Sudlows' claim of c.£140k direct cost plus loss and/or expense in relation to the HV cable installation;

51.5. Sudlows' claims regarding structural engineering issues regarding the potential overloading of the roof, including Sudlows' claim for c.£223k of direct costs plus loss and/or expense; and

51.6 Sudlows' claim that Global had wrongly called in a bank guarantee in a sum in excess of £1m which Sudlows asserted Global had expressly made on

> the basis of an alleged breach of contract by Sudlows."

41. The adjudicator determined that the true gross value of the chiller replacement and main fit-out works was £16,927,352.15, including the true value of variations, preliminaries and loss and expense.

42. The adjudicator awarded GSEL the sum of £5,019,120.86 and directed Sudlows to pay the adjudicator's fees and expenses in the sum of £81,588. Sudlows failed to pay those sums.

43. On 31 July 2020 GSEL issued these proceedings, claiming the sum of £6,063,739.03 plus interest and costs.

Applicable legal principles

44. It is important to emphasise that the courts take a robust approach to adjudication enforcement. The relevant legal principles are well-established and clear, as summarised by Jackson J in *Carillion v Devonport Royal Dockyard* [2005] EWHC 778 (TCC) at [80]:

> "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."

45. The Court of Appeal approved the above summary and explained that the grounds for resisting summary judgment are circumscribed and limited: *Carillion v Devonport Royal Dockyard* [2005] EWCA 1358 per Chadwick LJ:

> "[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.

[87] In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the

> adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense …"

46. In *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), Akenhead J considered what would amount to a breach of the rules of natural justice in the context of adjudication:

> "[54] It is, I believe, accepted by both parties, correctly in my view, that whatever dispute is referred to the Adjudicator, it includes and allows for any ground open to the responding party which would amount in law or in fact to a defence of the claim with which it is dealing. Authority for that proposition includes KNS Industrial Services (Birmingham) Ltd -v- Sindall Ltd [2001] 75 Con LR 71.
>
> [55] There has been substantial authority, both in arbitration and adjudication, about what the meaning of the expression "dispute" is and what disputes or differences may arise on the facts of any given case. Cases such as *Amec Civil Enginering Ltd v Secretary of State for Transport* [2005] BLR 227 and *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757 address how and when a dispute can arise. I draw from such cases as those the following propositions:
>
> (a) Courts (and indeed adjudicators and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is.
>
> (b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is.
>
> (c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration.
>
> (d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.
>
> …
>
> In my view, one should look at the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds upon which that it has

> been rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it is referred to adjudication or arbitration. Similarly, the claiming party is not limited to the arguments, contentions and evidence put forward by it before the dispute crystallised. The adjudicator or arbitrator must then resolve the referred dispute, which is essentially the challenged claim or assertion but can consider any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute.
>
> …
>
> [57] … 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."

47. In *Pilon Ltd v Breyer Group* [2010] EWHC 837 (TCC) the contractor referred to adjudication a dispute about the correct valuation of an interim application in respect of a limited part of the works. The employer sought to set off an overpayment in relation

to another part of the works. The adjudicator refused to consider the overpayment argument, finding that it was outside his jurisdiction. The court declined to enforce the decision on the basis of a breach of natural justice. Coulson J (as he then was) considered the relevant authorities on this issue and stated:

> "[22] As a matter of principle, therefore, it seems to me that the law on this topic can be summarised as follows:
>
> 1. The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.
>
> 2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast*, *Broadwell*, and *Thermal Energy*.
>
> 3. However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.
>
> 4. It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd v City and General (Holborn) Ltd* [2006] EWHC 848 (TCC).
>
> 5. A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party.
>
> …

> [26] … an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim."

48. In *Kitt v The Laundry Building Ltd* [2014] EWHC 4250 (TCC) Akenhead J stated:

> "[26] The next question to consider is whether the Notice of Adjudication can so circumscribe and delineate the dispute set out in or purportedly defined within it so as to exclude particular defences. In my judgment, it cannot. It would be illogical and untenable, if not ludicrous, if this was the case …
>
> [28] … One cannot refer to adjudication a disputed claim to payment and dress up the definition of the dispute in such a way as jurisdictionally to prevent a defending party from raising any defence, whether good or bad, in the adjudication. A distinction is to be drawn between a potential evidential weakness in a defence, which can be highlighted in the Notice of Adjudication; an example would be that a money claim is based exactly on what the defending party's own architect has certified or approved such that this represents, so to speak, strong evidence in the referring party's favour. To seek, however, to refer a payment claim and say, at the same time, that the referring party is not referring parts of the claim which might be challenged by the defending party is illogical, unmeritorious and wrong. It is a device which cannot and should not work."

49. More recently, in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, Lord Briggs JSC stated at [44]:

> "However narrowly the referring party chooses to confine the reference, a claim submitted to adjudication will nonetheless confer jurisdiction to determine everything which may be advanced against it by way of defence, and this will necessarily include every cross-claim which amounts to (or is pleaded as) a set-off."

50. Applying those legal principles to the circumstances that arise in this case, I make the following observations.

    i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the

valuation of particular elements of work forming part of an application for interim payment.

ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.

iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.

iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.

v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.

vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.

vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.

viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.

ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.

x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced.

Ground 1 - excluded matters

51. Mr Stewart QC, leading counsel for Sudlows, submits that the adjudicator wrongly considered that he had no jurisdiction to determine the excluded matters identified in paragraphs 44 to 51 of his decision. Each of the excluded matters was properly raised by way of defence to the money claim which was put forward by GSEL. In excluding those matters from his consideration, the adjudicator acted in breach of the rules of natural justice. In failing to consider Sudlows' defences, the adjudicator was misled into error by GSEL's erroneous submissions. The excluded matters were material in that their quantum exceeded the amount awarded to GSEL.

52. Mr Leabeater QC, leading counsel for GSEL, submits that the issue for the adjudicator was the true value of Interim Applications 27. Sudlows did not rely on the excluded matters as a defence by way of set off or as a cross claim. Although Sudlows sought to include the excluded matters (or at least those relating to loss and expense) in the valuation of Interim Applications 27, it was not entitled to do so because at the time of the application it had not properly made any claim for further extensions of time, or substantiated its loss and expense claims attributable to further delay.

53. In the adjudication GSEL claimed payment of the balance due to it from Sudlows based on a true valuation of Interim Applications 27. Sudlows' defence to that claim for payment was that it was not due on a true valuation of Interim Applications 27. Sudlows relied on its claims for loss and expense (including, but not limited to, loss and expense arising out of the extensions of time already granted by Mace or in the second adjudication) as part of its true valuation case.

54. Part of Sudlows' claims for additional monies in Interim Applications 27 included claims in respect of the high voltage cables and overloading of the roof. GSEL's position in the adjudication was that the adjudicator could proceed on the assumption, in Sudlows' favour, that the high voltage cable was not installed defectively by Sudlows and that it had not overloaded the roof. On that basis, GSEL submitted that questions of liability for these defective works were excluded from the scope of the adjudication. That addressed any claims that might be made by GSEL for contra charges in respect of the defective works but did not address the claims made by Sudlows in Interim Applications 27 for additional payment in respect of the rectification costs and consequential loss and expense.

55. Sudlows' loss and expense claims were clearly relevant to the valuation of Interim Applications 27 for the purpose of any payment. They raised a potential defence to GSEL's claim for payment in the adjudication. It was a matter for the adjudicator to determine whether, as submitted by GSEL, the loss and expense claims were unsubstantiated and invalid, or whether, as submitted by Sudlows, they amounted to a defence to the sum claimed by GSEL. Unfortunately, the adjudicator did not consider these arguments because he assumed, wrongly, that he did not have jurisdiction to do so.

56. The adjudicator correctly identified in paragraph 44 of the decision that the notice of adjudication set the boundaries of his jurisdiction. However, he failed to appreciate that what GSEL was claiming in the notice (at paragraph 31) was not only the true valuation of specific parts of Interim Applications 27 but also payment of the net sum considered due having regard to the sums already paid and applicable retention. The adjudicator was entitled to limit the declaratory relief to the issues of valuation identified by GSEL but determination of the claim for payment required him to consider all of the matters raised by Sudlows in support of its case that it was entitled to additional sums as part of the valuation. The adjudicator's failure to take into account Sudlows' defence based on its additional claims for loss and expense amounted to a breach of the rules of natural justice.

57. The breach of natural justice is plain and obvious on the face of the adjudicator's decision. The breach arose as a result of GSEL's erroneous submission that the adjudicator did not have jurisdiction to consider Sudlows' claims for loss and expense. GSEL's position was that Sudlows should pay to it the sum of £6,831,163.03; Sudlows'

position in the adjudication was that GSEL should pay the sum of £5,529,046.72. The adjudicator awarded GSEL the sum of £5,019,120.86. The adjudicator's jurisdictional error precluded any consideration of a very substantial part of the defence. In those circumstances, that amounted to a material breach of the rules of natural justice and renders the decision unenforceable.

Ground 2 - bank guarantee

58. Sudlows applied for a full refund in respect of the call on the bank guarantee as part of Interim Applications 27.

59. In the adjudication, Sudlows' case was that the call on the bank guarantee was fraudulent. It relied on the fact that, despite repeated requests, no basis for the demand had been set out. On the contrary, an email written by Mr Lane of GSEL and sent to Sudlows, presumably in error, directed that the reason for the call on the guarantee should not be disclosed to Sudlows. At paragraphs 10.13 and 10.52 of its response, Sudlows claimed a credit in respect of the valuation of Interim Applications 27; alternatively, at paragraph 10.53 it relied on the guarantee claim as a set-off by way of defence against any monies considered to be due to GSEL in the adjudication.

60. GSEL's position is that it was entitled to make the call on the bank guarantee. It maintains that it had no obligation to explain the basis of the call but as set out in paragraph 18 of the second witness statement of Mr Lawrence of Macfarlanes LLP, GSEL considered that it was entitled to substantial liquidated damages based on delays to the works.

61. In the adjudication, GSEL's position was that the call on the bank guarantee was irrelevant to the dispute.

62. Mr Stewart submits that the adjudicator wrongly excluded consideration of the alleged fraudulent call on the bank guarantee.

63. Mr Leabeater submits that the evidence indicates that the call was an honest claim justified, among other things, by the extension of time and declaratory relief granted in the second adjudication. In any event, the adjudicator decided that Sudlows' claim should fail through lack of substantiation. Even if that was wrong as a matter of law or fact, that does not vitiate the decision.

64. Sudlows relied on the alleged invalidity of the call on the bank guarantee as giving rise to a credit under Interim Applications 27 and/or as a set-off against any sums due to GSEL in the adjudication. The adjudicator was obliged to consider that defence in order to determine what, if any, sum should be paid by way of interim payment between GSEL and Sudlows. The adjudicator wrongly assumed that he did not have jurisdiction to decide Sudlows' claim in respect of the bank guarantee – see paragraphs 46 and 51 of his decision.

65. However, in respect of this issue, the adjudicator went on to consider the substance of the claim. He held that the material presented by Sudlows in the adjudication did not demonstrate that the call on the guarantee was illegitimate. That was a finding of fact that he was entitled to make on the evidence before him. In any event, it is irrelevant

whether such finding was right or wrong because the adjudicator asked the right question. It follows that this issue would not render the decision unenforceable.

Ground 3 - previous decisions

66. Sudlows' case is that the adjudicator wrongly came to decisions that were contrary to the decisions of a previous adjudicator and thus exceeded his jurisdiction.

67. It is common ground that once an adjudicator has reached his decision then unless and until challenged in arbitration or the courts, it is binding on the parties: *Balfour Beatty v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC) per Akenhead J at [41]:

> "… once an adjudicator has decided the first dispute, that dispute cannot be referred to adjudication again because it has already been resolved. The second adjudicator must be astute to see that he or she decides nothing to override or undermine the first adjudicator's decision; jurisdictionally, a later adjudicator's decision cannot override an earlier valid adjudicator's decision. The later adjudication decision may be wholly or partly unenforceable if materially it purports to decide something which has already been effectively and validly adjudicated upon."

68. It is the decision that binds the parties; that includes the essential components or basis of the decision but not the adjudicator's reasoning for the decision: *Hyder Consulting (UK) Limited v Carillion Construction Limited* [2011] EWHC 1810 (TCC) per Edwards-Stuart J at [36]; *Thameside Construction Company Limited v Stevens* [2013] EWHC 2071 (TCC) per Akenhead J at [24].

69. In order to determine what a previous adjudicator decided, it is necessary to look at the terms, scope and extent of the decision, and not just the adjudication notice in isolation: *Harding (t/a M J Harding Contractors) v Paice* [2015] EWCA Civ 1231 per Jackson LJ at [57] and [58]; *Brown v Complete Building Solutions Ltd* [2016] EWCA Civ 1 per Simon LJ at [23].

70. Mr Stewart submits that the adjudicator wrongly came to decisions that were contrary to matters which had been adjudicated upon by Mr Curtis in the second adjudication, namely:

    i) Mr Davies found that Sudlows was not entitled to an extension of time in relation to the additional strip out works, with the consequence that no loss and expense was due, contrary to the finding by Mr Curtis in the second adjudication that such works were a relevant event, giving rise to an extension of time of 81 days; and

    ii) Mr Davies found that Sudlows was contractually liable for the structural enhancement works and not entitled to loss and expense, contrary to the finding of Mr Curtis in the second adjudication that such works were instructed pursuant to an undefined provisional sum, giving rise to an extension of time of 211 days.

71. Mr Leabeater submits that in the second adjudication, Mr Curtis decided that Sudlows was entitled to an extension of time of 292 days; that the completion date for the main fit-out works was extended to 14 August 2019; and that GSEL was entitled to withhold or to deduct liquidated damages for the period beyond 14 August 2019 to the date of practical completion. In the fourth adjudication, Mr Davies expressly accepted that the extension of time of 292 days awarded in the second adjudication was binding upon him. Mr Davies proceeded to assess the loss and expense claim for the main fit-out works on the basis of that extension of time.

72. This is not a case in which the adjudicator trespassed on an earlier decision. The decision in the second adjudication was solely concerned with determining Sudlows' entitlement to extensions of time in respect of the main fit-out works. As part of that determination, Mr Curtis decided that the additional strip out works and the structural enhancements entitled Sudlows to extensions of time but he did not consider or adjudicate on Sudlows' entitlement to loss and expense.

73. The decision in the fourth adjudication was concerned with the valuation of the works, variations and ascertainment of the value of loss and expense. Mr Davies decided that the valuation of the strip out works Change was £NIL because those works fell within Sudlows' contractual allocation of risk. He also decided that the instructions regarding provisional sum items did not entitle Sudlows to any extensions of time. However, at paragraphs 12, 405 and 406 of his decision, he expressly accepted as binding the decision of Mr Curtis in the second adjudication that Sudlows was entitled to extensions of time of 292 days in respect of the main fit-out works.

74. The adjudicator valued Sudlows' claims for loss and expense in respect of the extensions of time of 292 days. Most of the claims for loss and expense were rejected by Mr Davies on the basis that he found them to be unsubstantiated, as set out in his analysis at paragraphs 516 to 580. Those were findings that he was entitled to make on the evidence before him, including the expert evidence. Even if he was wrong in his contractual analysis of the claims, or in his assessment of the evidence in support of the claims, such errors would amount to errors of law and/or fact which on their own would not render the decision unenforceable.

Conclusion

75. For the reasons set out above, the adjudicator was misled by GSEL and wrongly failed to consider and deal with matters relied on by Sudlows as defences to GSEL's claim, thereby acting in breach of the rules of natural justice. The jurisdictional error was critical to the determination of the dispute. The excluded loss and expense claims were material to the true valuation of Interim Applications 27 and the amount of any payment due between GSEL and Sudlows.

76. I have rejected grounds 2 and 3 of Sudlows' case but, even if severable, those parts of the decision would still be subject to the above defences and, for that reason, unenforceable.

77. In those circumstances, the court refuses to enforce the adjudication decision and GSEL's application for summary judgment is dismissed.