

Case No: HT-04-365

Neutral Citation Number: [2004] EWHC 3336 (TCC)

IN THE HIGH COURT OF JUSTICE

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand

London WC2A 2LL

Tuesday, 21st December 2004

B e f o r e:

MR JUSTICE JACKSON

BALFOUR BEATTY CONSTRUCTION

CLAIMANT

-v-

SERCO LIMITED

DEFENDANT

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(Official Shorthand Writers to the Court)

MR A EDWARDS-STUART QC and MR A RIGNEY appeared on behalf of the CLAIMANT.

MR T ELLIOTT QC and MR P BUCKINGHAM appeared on behalf of the DEFENDANTS.

J U D G M E N T

1.

MR JUSTICE JACKSON: This judgment is in seven parts, namely: Part 1, introduction; Part 2, The facts; Part 3, the present proceedings; Part 4, what was Balfour Beatty claiming; Part 5, what did the adjudicator decide; Part 6, is Balfour Beatty entitled to summary judgment; Part 7, conclusion.

Introduction

2.

This is an application for summary judgment to enforce an adjudicator's award. The claimant is Balfour Beatty Construction Limited ("Balfour Beatty"). The defendant is Serco Limited ("Serco"). The statutory provisions which govern adjudication are set out in the [Housing Grants Construction and Regeneration Act 1996](#) ("the Construction Act")

3.

Section 108 of the Construction Act provides:

“(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose ‘dispute’ includes any difference...

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

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.”

4.

Section 111 of the Construction Act provides:

“(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify-

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.”

In relation to s.111(3) it should be noted that the period prescribed in the scheme for construction contracts is seven days.

5.

Having outlined the statutory framework, I must now turn to the facts of the present case.

Part 2 – The facts

6.

By a contract dated 26th March 2001, Serco engaged Balfour Beatty to design, supply, install and test 104 variable message signs at locations on motorways throughout England (“the Contract”). The Contract includes the following provisions which are relevant to the present dispute.

7.

Clause 1.1 contains definitions. The phrase “Completion Date” is defined as:

“The date by which practical completion is to be achieved, being 23 months from the commencement date as the same may be adjusted from time to time in accordance with clause 7 and Schedule 8 (Change).”

8.

“Final Completion” is defined as:

“The date on which the final release certificate in respect of the last new variable message sign to be installed by the Contractor has been issued by Serco.”

9.

“Serco Change” is defined as:

“Any change to the services initiated by Serco pursuant to Schedule 8 (Change).”

10.

There then follows a definition of “Serco Compensation Event”. The effect of this definition is that a Serco Compensation Event is any breach of contract or change or similar act on the part of Serco which gives rise to an entitlement to compensation for Balfour Beatty.

11.

“Serco Delay Event” is defined as:

“Breaches of contract or Serco Changes, or other events on the part of Serco or those for whom Serco is responsible, which entitle Balfour Beatty to extension of time.”

12.

Clause 7 of the Contract is headed “Timescales and plan for implementation” and sets out a procedure whereby Balfour Beatty shall give notice to Serco of events or anticipated events which will cause delay. Clause 7.4 requires Serco to assess appropriate extensions of time for those events which entitle Balfour Beatty to such an extension.

13.

Clause 11 of the Contract is headed “Change”, and clause 11.1 provides:

“Any changes to the requirements within the scope of this Contract shall be made only in accordance with the procedures set out in Schedule 8 (Change).”

14.

Clause 17 of the Contract deals with payments. Clause 17.1 sets out a procedure for invoicing. Clause 17.2 enables Serco to set off against payments to Balfour Beatty any sums due to Serco subject to certain qualifications. Clause 17.2 must, of course, be read subject to s.111 of the Construction Act.

15.

Clause 18 of the Contract deals with additional payments and, in particular, it deals with additional payments which may be due to the contractor as a result of Serco compensation events.

16.

Clause 30 of the Contract deals with liquidated and ascertained damages for delay. Clause 30.1 provides for such damages to be payable, subject to certain conditions, in the event of delay in attaining practical completion. Clause 30.2 provides as follows:

“If Serco requires payment or allowance of liquidated and ascertained damages pursuant to clause 30.1, it shall first serve notice to that effect on the Contractor. Provided a notice has been served, Serco shall not be obliged to serve further notices of its requirement where the period for which liquidated and ascertained damages are payable is ongoing.”

Clause 30.3 provides:

“Liquidated and ascertained damages shall be due and payable or allowed to Serco at the end of each month to which they relate.”

17.

Clause 42 of the Contract deals with notices.

18.

Clause 47 of the Contract provides for a dispute resolution procedure.

19.

Clause 47 must be read in conjunction with Schedule 23 to the Contract. Schedule 23 provides a dispute resolution procedure. The first section of Schedule 23 provides for amicable settlement, where this is possible, to be achieved through the medium of a management committee. The management committee is drawn from senior managers, (a) of Serco and (b) of Balfour Beatty. Section 2 of Schedule 23 provides for adjudication of disputes which are not successfully resolved by means of the management committee procedure set out in section 1. Section 2 of Schedule 23 provides that the adjudication shall be conducted in accordance with the adjudication procedure, which is set out in Appendix A. Appendix A duly follows Schedule 23 and it does indeed set out the adjudication procedure. Paragraph 10 of Appendix A provides:

“The decision of the adjudicator shall be binding upon the parties, who shall forthwith give effect to the decision, unless and until the dispute is finally determined by the court or otherwise resolved by agreement between the parties.”

Paragraph 13 of Appendix A provides:

“The parties shall be entitled to the relief and remedies set out in the decision and to seek summary enforcement thereof subject to review by the courts. No issue decided by the adjudicator may subsequently be laid before another adjudicator unless so agreed by the parties.”

20.

Balfour Beatty duly commenced work in March 2001. The contractual completion date became 24th March 2003. Unfortunately, delays occurred which held up the progress of the works. One major source of delay was the Secretary of State’s decision to implement the procedure for environmental impact assessments pursuant to [sections 105\(A\) and 105\(B\) of the Highways Act 1980](#). The practical consequences of that decision were these: Balfour Beatty had to produce an environmental report in a specific form for each region. Subsequently, the Secretary of State had to produce a notice of determination for each region. The notice of determination is often referred to in the documents by the abbreviation “NOD”. After this procedure had been gone through, installation of the variable message signs could begin. Balfour Beatty maintained that this whole episode arose from events and changes for which Serco were responsible. Accordingly, Balfour Beatty made claims for extension of time and claims for loss and expense as a result of that matter. These claims were resisted by Serco.

21.

In October 2003, Balfour Beatty lodged a claim for 29 weeks’ extension of time, attributable, it was said, to delays by the Secretary of State in publishing notices of determination; in particular, the notice of determination for the Cheshire area. It was clear from the claim document and also made clear expressly in the covering letter dated 7th October 2003, that this claim for extension of time was put forward as a claim for an interim extension of time.

22.

In March 2004, Balfour Beatty provided to Serco a much larger claim submission. This claim submission embraced, in all, 18 heads of claim. The claim included within it the matters raised in the claim of October 2003, but there were many other claims as well for extension of time, loss and expense.

23.

The matters raised in the claim submission of March 2004 were dealt with under the dispute resolution procedure set out in Schedule 23 to the Contract. At the first stage, a management committee was convened and that committee successfully resolved one package of claims which, together, bore the title "Claim 9". The remaining matters contained in the March claims submission were not capable of resolution by the management committee. So the dispute proceeded to the second stage, set out in Schedule 23, and was referred to adjudication.

24.

The notice of referral is dated 24th September 2004. The adjudicator appointed was Mr John Marrin QC of Keating Chambers. Both parties made written submissions to the adjudicator. Written evidence was furnished to the adjudicator at the adjudicator's request. Expert reports on both sides were furnished to the adjudicator and there was a hearing before the adjudicator on 22nd and 23rd November 2004. The adjudicator considered the evidence and submissions which he had received and, on 1st December, he promulgated his decision.

25.

In paragraph 5 of his decision he listed Balfour Beatty's outstanding claims as follows:

"Claim (1) Notices of determination.

Claim (2) Additional traffic management.

Claim (3) Network access.

Claim (4) Additional design input.

Claim (5) Godstone quality.

Claim (6) Manchester piling cancellation.

Claim (7) Shared access costs.

Claim (8) Winter weather costs.

Claim (10) Additional varioguard.

Claim (11) Betterment.

Claim (12) Entitlement.

Claim (13) Prolongation up to 29th February 2004.

Claim (14) Mitigation.

Claim (15) Disruption.

Claim (16) Finance Charges.

Claim (17) VOP.

Claim (18) Anticipated staff costs to completion.”

26.

The adjudicator set out his final decision in paragraph 130 of his decision. In that paragraph he allowed Balfour Beatty’s extension of time claim under Claim (1), and revised the completion date to 7th June 2004. The adjudicator also allowed Balfour Beatty’s financial claims under Claims (1), (3), (8), (12), (13), (15), and (18) in part, and directed that Serco should pay to Balfour Beatty the sum of £620,664, together with Value Added Tax.

27.

Serco refused to pay the sums due under the adjudicator’s decision. By a letter dated 6th December 2004, Serco explained its refusal to pay. Serco pointed out that practical completion under the Contract still had not been received. The adjudicator had extended time only until 7th June 2004. Therefore, contended Serco, Serco was entitled to liquidated and ascertained damages in the period after 7th June 2004. Furthermore, it was said, those liquidated and ascertained damages, at the rate specified in the Contract, would exceed the sum payable to Balfour Beatty under the adjudicator’s decision.

28.

It is fair to say that Serco’s letter, dated 6th December 2004, did not come as a bolt from the blue. During the previous few weeks, Serco had foreshadowed what its position would be in a series of letters, which Serco now relies upon as constituting withholding notices under section 111 of the Construction Act. Serco’s letter dated 6th December 2004 brought matters to a head. Balfour Beatty were aggrieved by Serco’s refusal to pay the sums ordered by the adjudicator and, accordingly, Balfour Beatty commenced the present proceedings.

Part 3 – The present proceedings

29.

By a claim form issued on 9th December 2004, Balfour Beatty applied to the Technology and Construction Court to enforce the adjudicator’s decision. The Particulars of Claim, annexed to the claim form, set out the history of events and advanced the contention that Serco had no entitlement to set off a claim for liquidated damages against the sums awarded by the adjudicator. At the same time as issuing proceedings, Balfour Beatty applied to the court to abridge time in order to enable the matter to be resolved before the end of this calendar year. The case was referred to me on the papers on the afternoon of 9th December. I made an order abridging time and fixing the date 20th December for the substantive hearing.

30.

It should be noted at this point that Serco and its solicitors did not object to the order abridging time. On the contrary, both parties and their respective lawyers have co-operated to a commendable extent in preparing for the present hearing.

31.

During the course of last week, both parties served their evidence. The claimant’s evidence comprised a witness statement of Ms Catriona Dodsworth. The defendant’s evidence comprised a witness statement of Ms Lynne Freeman. Both statements helpfully annexed a variety of documents

evidencing the background to the adjudicator's decision and some of the material on which it was based.

32.

On Friday 17th December both counsel served their skeleton arguments. The matter came on for hearing yesterday. Mr Anthony Edwards-Stuart QC, for Balfour Beatty, contended, at the hearing yesterday, that Balfour Beatty are entitled to summary judgment now for the whole sum awarded by the adjudicator. Mr Timothy Elliott QC, for Serco, contended that Serco had an entitlement to liquidated and ascertained damages which followed as a consequence of the adjudicator's decision; and that, since those liquidated and ascertained damages exceed the sum awarded by the adjudicator, Balfour Beatty's claim should be dismissed. In the alternative, Mr Elliot asked the court to impose some form of stay upon its judgment, in order to allow time for the question of liquidated and ascertained damages to be referred back to the adjudicator.

33.

During the hearing yesterday both counsel concentrated primarily upon analysing the documents. There was considerable debate about (a) what claims were referred to the adjudicator for decision, and (b) what the adjudicator actually did decide. These questions are not straightforward but they must be resolved before I can address Balfour Beatty's claim for summary enforcement of the adjudicator's decision. I shall therefore address the issues in that order.

Part 4 – What was Balfour Beatty Claiming?

34.

It must be conceded at the outset that it is no easy task to deduce from Balfour Beatty's claim documents precisely what was being sought. There are inconsistencies and contradictions within the documents upon which both counsel have relied for different purposes. What I must do is to read the documents in a sensible and business-like way, avoiding the temptations of pedantry. Adopting this approach, I conclude that Balfour Beatty's claim document, dated 24th March 2004, was in essence a claim for (a) an interim extension of time up to 29th February 2004, and (b) loss and expense incurred during the period of 48.71 weeks between 24th March 2003 and 29th February 2004.

35.

In the course of this claim document, Balfour Beatty set out its entitlement to an extension of time running well beyond 29th February. However, Balfour Beatty was not asking Serco to award that full extension of time. Balfour Beatty was not, at that stage, facing any immediate claim for liquidated and ascertained damages. Balfour Beatty was focused instead upon recovering the loss and expense which it had actually incurred during the period of delay thus far. In order to quantify its financial claim Balfour Beatty took a cut-off date of 29th February, which was the last day of the month preceding Balfour Beatty's claim submission.

36.

I reach this conclusion for four reasons:

(1) Paragraphs 453 – 460, which are headed "Prolongation", specifically focus on the period up to 29th February 2004.

(2) Paragraph 454 of the document explains the logic of the cut off date.

(3) Part 2 of the claim document (paragraphs 21 – 85) justifies the first 34 weeks of delay. This delay is said to be due to additional work, namely the preparation of environmental reports for each region. This delay accounts for part of the 48.71 weeks claimed.

(4) In the section of the claim headed “Entitlement”, Balfour Beatty sets out a claim for 29 weeks’ extension of time based upon delays by the Highways Agency in issuing certain notices of determination. This extension of time, if granted in full and in addition to the 34 weeks, would run until 7th June 2004. However, Balfour Beatty did not ask for such an extension of time to be granted in full at that stage. In paragraph 13 of the executive summary Balfour Beatty limited the extension of time then sought to 29th February 2004 (see the second bullet point).

37.

The question then arises how I should make sense of paragraph 11 of the executive summary and the third bullet point of paragraph 13. In my view, these passages constitute general information. They do not bear upon the current claim, which is for historic loss and expense actually incurred.

38.

I turn next to Balfour Beatty’s referral notice dated 24th March 2004. This too has its problems and inconsistencies. In my view, however, the proper and least strained interpretation of the document is that Balfour Beatty were claiming primarily an extension of time until 29th February 2004. I reach this conclusion for seven reasons:

(1)

Paragraph 15 of the referral notice reads as follows:

“As a result of the actions of Serco, the Contractor seeks the award of £8,839,825 and an extension of time of 48.71 weeks, or such other sums or periods as the adjudicator thinks fit.”

(2)

Paragraph 394 of the referral notice reads as follows:

“The referring party asks the adjudicator to decide that the responding party grant to the referring party an extension of time of 48.71 weeks in respect of the delays caused by Serco or such period as the adjudicator may decide.”

(3) At the very end of the referral notice Balfour Beatty formulates its overall claim in the following two paragraphs:

“Summary of relief sought

Time

464. The Contractor seeks the award of a total of 48.71 weeks’ extension of time or such other period as the adjudicator may decide.

Quantum

465. The Contractor seeks the award of a total of £8,839,825 or such other sum as the adjudicator may decide.”

(4) The basic scheme of the referral notice was that it embraced those heads of claim in the March submission which had not been resolved by the management committee operating under section 1 of

Schedule 23 to the Contract. Therefore it made sense for the referral notice to take the same cut-off date as had been used in March.

(5) The thinking behind the referral notice appears to be that an adjudication must be preceded by a crystallised dispute. In this case the dispute which crystallised concerned the March 2004 claim.

(6) The referral notice includes justifications for extensions of time which, in aggregate, amount to 63 weeks (see paragraphs 127 and 304). The claimant's expert report sought to justify an extension of time of 81.5 weeks. However, none of this changed the nature of Balfour Beatty's primary claim, which was for (a) an extension of time of 48.71 weeks and (b) consequential loss and expense.

(7) Paragraphs 8.1.3 to 8.1.5 of Balfour Beatty's reply made it clear that Balfour Beatty was claiming an extension of time of 48.71 weeks. The question of culpable delay by Balfour Beatty in the period after 29th February was not an issue which the adjudicator was being asked to determine.

39.

Although, as I say, Balfour Beatty's primary claim was for an extension of 48.71 weeks, that was not quite the end of the matter. Balfour Beatty left the door ajar for the adjudicator to award a shorter or longer period if he saw fit. Those words of qualification are to be found in paragraphs 15, 394 and 464 of the referral notice.

40.

During the course of the adjudication, Balfour Beatty served a report by their programming expert, Mr Kaletka. Mr Kaletka believed that there should be an extension of time of 81.5 weeks due to long delays by the Highways Agency in issuing a notice of determination for the Penrith area close to Hadrian's Wall. Mr Kaletka's report, interesting though it is, does not change the character of Balfour Beatty's claim.

41.

Let me now draw the threads together. As I read the documentary material, Balfour Beatty's claim, both before and during the adjudication, was primarily for (a) an interim extension of time of 48.71 weeks, and (b) consequential loss and expense in respect of that period. Nevertheless, the referral notice left the door ajar for the adjudicator to award a longer or shorter interim extension of time if he thought fit to do so. Also, in the claim document Balfour Beatty foreshadowed or gave notice of arguments which would be developed later in respect of further and future extensions of time.

Part 5 – What Did the Adjudicator Decide?

42.

The adjudicator was confronted by claim documents which were not easy to follow and by evidence which had been prepared in haste. He produced his written decision, running to 61 pages, within a tight timescale, namely, some eight days after the oral hearing. In those circumstances, it is understandable that when the adjudicator's written decision is put under a microscope – as it has been during the present hearing – one or two ambiguities emerge.

43.

Let me begin by setting out the adjudicator's key findings before I turn to the more problematic passages. The adjudicator made three key findings, which I would summarise as follows:

(1) The requirement that Balfour Beatty should produce environmental reports for the purposes of environmental impact assessments constituted additional work. It was not part of Balfour Beatty's

original contractual obligations, as Serco contended. Accordingly, this work arose from a Serco change within the meaning of clause 11.

(2) As a result of (a) the need to produce environmental reports, (b) delays by the Highways Agency in producing notices of determination, and (c) other causes, Balfour Beatty was entitled to an extension of time of 63 weeks, i.e. up to 7th June 2004.

(3) The introduction of the regime for environmental impact assessments was a Serco compensation event. Accordingly, Balfour Beatty was entitled to recover the costs which it had incurred during the period of the extension of time granted.

44.

I must now turn to the problematic part of the adjudicator's decision, which has been the subject of extensive argument at the present hearing. This is contained in paragraphs 30 to 34 of the adjudicator's decision. It reads as follows:

"30. At the same time as addressing Balfour Beatty's claim for extensions of time set out in claim 1, it is convenient also to address Balfour Beatty's other claims to extensions of time. The overall position is as follows:

(1)

In claim 1 Balfour Beatty claims an extension of time of 34 weeks by reason of (a) the need to provide environmental reports in a revised format and (b) the need for NODs to be published by the HA.

(2)

In claim 12 Balfour Beatty claims an extension of time of 29 weeks by reason of delays to the publication of NODs in the northern area of the contract.

(3)

Also in claim 12 Balfour Beatty claims an extension of time of 48.71 weeks in consequence of various events summarised under the heading 'Actual delays'.

(4)

In various other claims Balfour Beatty advances various extensions of time claims related to specific matters. Largely these reflect the events summarised under the heading, 'Actual delays' referred to above.

31. The point has been made that these claims are expressed in a confusing way. Mr Kaletka did little to clarify matters in his report. However, I note from Serco's response at paragraphs 66 and 68 that it has read Balfour Beatty's claims for extensions of time of 29 weeks and 34 weeks as cumulative. I also read them that way. If granted, the completion date would be extended by 63 weeks to 7th June 2004.

32. The claim for 48.71 weeks set out in claim 12 appears to me to be a claim that the completion date should be extended by 341 days from 24th March 2003 to 29th February 2004. Accordingly, I read Balfour Beatty's claim for extensions of time as being essentially two in number, viz (1) a claim for extension of time to 7th June 2004 in respect of the requirements to comply with the NOD regime and (2) a claim for an extension of time to 29th February 2004 in respect of the events summarised under the heading 'Actual delays'.

I note that it is common ground between the programming experts, Mr Kaletka and Mr Dedha that, in the event, the critical aspect of the works has turned out to be the installation of two signs, known as '19TO3' and '19TO4' at Penrith. These signs have yet to be installed. In these circumstances it seems

to me that, for the purposes of assessing Balfour Beatty's entitlement to an extension of time, it is necessary to focus on these two signs and examine the effect of the requirement to comply with the NOD regime upon them. In these circumstances I ignore, for these purposes, the events summarised in claim 12 under the heading, 'Actual delays' and Balfour Beatty's other extension of time claims on the footing that those events were non-critical.

33. In respect of 19TO3 and 19TO4 my findings are as follows:

(1)

According to Balfour Beatty's implementation plan the environmental report in respect of the three signs at Penrith was due on 19th November 2001.

(2)

Balfour Beatty submitted its original environmental reports on 17th October 2001.

(3)

Following receipt of comments, Balfour Beatty submitted its revised environmental report in respect of Penrith (Environmental Report 2) on 21st March 2002.

(4)

Subsequently, Balfour Beatty was instructed to produce separate environmental reports for the signs at Penrith. That which covered 19TO3 and 19TO4 was to be environmental report 2B. In the event that report was submitted on 4th June 2003.

(5)

Following submittal of that report the earliest possible date for reaching practical completion for 19TO3 and 19TO4 was 4th September 2003.

(6)

However, in the event the NOD, in respect of 19TO3 and 19TO4, was not published until 3rd September 2004.

(7)

In consequence, following publication of that NOD, the earliest possible start date for Balfour Beatty's installation works on site was 15th October 2004.

I am conscious that it is Serco's case that at least part of the delay in the finalisation of Balfour Beatty's environmental reports is to be attributed to failures on the part of Balfour Beatty to draw up the earlier versions in a competent manner. In his report Mr Dedha criticises Balfour Beatty for significant delays during the drafting stage and suggests that insufficient time was allowed for that activity. Such observations appear to be of general application. In relation to Penrith specifically, Mr Dedha says,

'The decision to split Hadrian's Wall from report 2 was undoubtedly delayed in itself because of the need to deal with significant comments on the reports' (paragraph 1.54).

I calculate the delays in submitting the report to be at least the period 31st October 2001 to the submission of report 2A on 25th March 2003 less 35 days, which is 510 days. Once again, there are unexplained gaps that may be other delays or float between the effective commencement date and sign erection. I am aware of some of the possible reasons for delay but have not had time to factor them into my analysis (paragraph 6.6.3).'

There was no other evidence which directly linked the delay in preparation of the Penrith reports with default on the part of Balfour Beatty. On the basis of this evidence I am not satisfied that the extension of time in respect of 19TO3 and 19TO4 should be adjusted in Serco's favour to allow for default on the part of Balfour Beatty. In any event, I note that Balfour Beatty's claim in these proceedings is not for a full extension of time but rather for an extension of time to 7th June 2004, which is some five and a half months short of a full extension of time. Even if some allowance were to be made for default on the part of Balfour Beatty, it seems to me most unlikely that the necessary adjustment could be as much as five and a half months.

34. In these circumstances I think it right to allow Balfour Beatty's claim for extension of time and to revise the completion date to 7th June 2004. I propose to dismiss Balfour Beatty's other extension of time claims. For this reason I do not refer to those other extension of time claims when addressing the claims under separate headings below."

45.

A number of different interpretations of this passage have been urged upon me by counsel. In essence, Mr Edwards-Stuart contends that the adjudicator has granted an interim extension of time, leaving open the question what extension of time is due beyond 7th June 2004. Mr Elliot, on the other hand, contends that the adjudicator had positively refused any extension of time in respect of the period 7th June to 15th October 2004. Accordingly, says Mr Elliott, it follows logically that Serco is entitled to liquidated and ascertained damages in respect of that period.

46.

Counsels' submissions were ingenious and they ranged across other parts of the decision which relate back to the crucial passage. Having considered these competing arguments, I prefer and accept the submission of Mr Edwards-Stuart. The adjudicator was simply granting an interim extension of time of 63 weeks and leaving open what further extension was due. I reach this conclusion for four reasons:

(1) Balfour Beatty's primary claim was for an extension of time up to 29th February 2004. Accordingly, whatever Balfour Beatty said about later delays was not put forward as being its entire case on extensions of time after the cut-off date. Therefore, it would have been unfair for the adjudicator to shut out the possibility of further extensions being granted. Accordingly, it would not be right to read the adjudicator's decision as having that effect.

(2) In the last three sentences of paragraph 33 the adjudicator comes close to awarding a full extension of time up to 15th October 2004. As I read that passage, the phrase "Five and a half months" is an arithmetical or clerical slip. This should, I think, read "Four and a half months". In this passage the adjudicator certainly acknowledges that a further extension of time is due beyond 7th June.

(3)

In paragraph 38(2) of his decision the adjudicator writes:

"However, Balfour Beatty was prevented from completing its installation works until at least 7th June 2004."

The phrase "at least" indicates the contemplation of a further extension of time beyond that date. This reference, in paragraph 38(2), back to paragraph 33, reinforces my reading of that paragraph.

(4) The contract was still ongoing. The start of works at Penrith had been delayed until mid-October 2004. It would have been premature at that stage for any adjudicator to conclude that there could be

no extension of time beyond 7th June. I cannot read the adjudicator's decision in such a way as to reach so unreasonable a conclusion.

47.

Let me now draw the threads together. As I read the adjudicator's award, the adjudicator was granting an interim extension of time up to 7th June 2004. He was awarding loss and expense in respect of that period. He was not refusing to grant any further extension of time. Indeed, he had not been asked to grant any further extension of time. The adjudicator was simply leaving open the question what further extension might be found to be due after 7th June 2004.

Part 6 – Is Balfour Beatty entitled to summary judgment ?

I must begin this part of the judgment by reference to the authorities. In VHE Construction PLC v RBSTB Trust Co Limited [2000] BLR 187, the parties contracted on the JCT Standard Form With Contractor's Design (1981 edition). The employer sought to set off liquidated damages against monies payable to the contractor under an adjudicator's award. His Honour Judge Hicks QC held that such a set off was not permissible. Judge Hicks had regard to the overall purpose of Part 2 of the Construction Act. He concluded that the employer's obligation to comply with the adjudicator's decision meant:

"...comply, without recourse to defences or crossclaims not raised in the adjudication."

49.

In David McLean Housing Contractors Limited v Swansea Housing Association Limited [2002] BLR 125 the parties contracted on the same JCT form of contract as was used in VHE Construction. Following practical completion, a variety of claims by the contractor were referred to adjudication. The adjudicator awarded certain sums to the contractor. He also determined that the contractor was entitled to an extension of time which fell short of the actual delay in achieving practical completion. On the day after the adjudicator's corrected decision was published, the employer wrote to the contractor stating that it would deduct liquidated and ascertained damages. Thereafter, the employer made only a partial payment to the contractor of the sums awarded by the adjudicator. The employer withheld liquidated and ascertained damages in respect of the period of delay for which there was no extension of time. In subsequent enforcement proceedings, His Honour Judge Lloyd QC held that the employer was entitled to set off the liquidated and ascertained damages which were due. At paragraph 18 of his judgment Judge Lloyd said this:

i.

"The next point is the real issue: is the claimant entitled to all the money the subject of the adjudicator's decision. All the money that was certified in certificate 20, bar the amount in dispute on liquidated damages, has in fact been paid. Is the claimant entitled to the amount for liquidated damages? That amount now reflects the adjudicator's view about the extension of time that was sought by the claimant so the claimant is bound to accept that conclusion in these proceedings since it was part of the dispute which it referred."

50.

There is, in my judgment, no inconsistency between the reasoning in VHE Construction and David McLean. In each case the decision flows from an analysis of what the adjudicator had decided and from the particular circumstances of the case.

51.

The manner in which VHE Construction and David McLean can be reconciled has been discussed by His Honour Judge Seymour QC in Solland International Ltd v Daraydan Holdings Ltd [2002] EWHC 220 (TCC); 83 CONLR 109 at paragraphs 30 to 32. The same matter has been discussed by His Honour Judge Thornton QC in Bovis Lend Lease Ltd v Triangle Development Ltd [2003] BLR31 at paragraphs 35 to 36. I note next the decision of the Court of Appeal in Parsons Plastics (Research and Development) Ltd v Purac Ltd [2002] BLR 334. In that case the contract contained a specific claim as to set off which determined the outcome.

52.

In Ferson Contractors Ltd v Levolux AT Ltd [2003] BLR 118, there was a sub-contract in the GC/Works/Sub-Contract form. A dispute arose between the main contractor (Ferson) and the sub-contractor (Levolux) concerning the efficacy of a withholding notice served by Ferson. The adjudicator held that the withholding notice did not comply with s.111 of the Construction Act. Accordingly, he ordered Ferson to pay to Levolux the sum of £51,659 which was due on application for payment No 2. Ferson declined to pay this sum on the ground that it had determined the sub-contract. The ground for determination was that Levolux has suspended works as a result of non-payment. His Honour Judge Wilcox gave judgment enforcing the adjudicator's award, and that judgment was upheld by the Court of Appeal. The appeal proceeded on the basis that the sub-contract had been invalidly determined. Mantel LJ gave the leading judgment, with which the other two members of the court expressed agreement. At paragraph 30 Mantel LJ said this:

i.

"But to my mind the answer to this appeal is the straight forward one provided by Judge Wilcox. The intended purpose of s. 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. If Mr Collings and His Honour Judge Thornton are right, that purpose would be defeated. The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision."

53.

I derive two principles of law from the authorities, which are relevant for present purposes.

a.

Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).

b.

Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

54.

In the present case, for the reasons set out in paragraph 5 of this judgment, the adjudicator has not reached any definitive conclusion as to the total extension of time which is due to Balfour Beatty. No specific entitlement to liquidated and ascertained damages follows logically from the adjudicator's

decision. It is strongly disputed between the parties whether any liquidated and ascertained damages are due and payable. Paragraph 10 of Appendix A to Schedule 23 of the Contract requires both parties to give effect forthwith to the adjudicator's decision. The effect of paragraph 13 of Appendix A is that Balfour Beatty is entitled to the relief and remedies set out in the adjudicator's decision and, moreover, is entitled to summary enforcement of such relief and remedies. These contractual provisions are consistent with the provisions of Part 2 of the Construction Act and with the Parliamentary intention referred to in the authorities.

55.

On the basis of these contractual provisions, in my judgment, Serco is obliged to pay to Balfour Beatty the sum awarded by the adjudicator. Serco is not entitled to set off the liquidated and ascertained damages which it claims. In these circumstances, it is not necessary to address the question whether the letters upon which Serco relies constitute effective withholding notices under s.111 of the Construction Act. Since Serco has refused to make payment, Balfour Beatty is entitled to summary judgment enforcing the adjudicator's decision.

Part 7 - Conclusion

56.

For the reasons set out in Part 6 of this judgment, Balfour Beatty is entitled to summary judgment enforcing the adjudicator's award. Issues remain between the parties concerning Balfour Beatty's entitlement to extension of time after 7th June 2004 and Serco's entitlement to liquidated and ascertained damages. These issues will have to be resolved on a future occasion, unless they are the subject of agreement between the parties.

57.

I see no reason to postpone drawing up the order of this court or to grant any form of stay, as proposed by Mr Elliot. The facts of this case are far removed from those in William Verry Limited v North West London Communal Mikvah [2004] 1 Ll LR 308.

58.

For all of these reasons, Balfour Beatty succeeds on its claim and is entitled to summary judgment. I invite counsel to assist the court in drafting the appropriate order.

59.

Finally, may I thank the solicitors on both sides for compiling the bundles so expeditiously and for limiting those bundles to that which is relevant. May I also thank leading and junior counsel on both sides for the excellence of their written and oral submissions.
