Neutral Citation Number: [2008] EWHC 282 (TCC)
Case No: HT 08 07

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 27th February 2008

Before :

MR JUSTICE AKENHEAD

- -

Between :

CANTILLON LIMITED **Cla**

- and -

URVASCO LIMITED **Defe**

- -

- -

Mark Raeside QC (instructed by **Wheelers**) for the **Claimant**

Sean Brannigan (instructed by **Fenwick Elliott LLP**) for the **Defendant**

Hearing dates: 8 February 2008

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JUDGMENT

Mr. Justice AKENHEAD:

Introduction

1.
This is a claim to enforce an adjudication decision issued on 28 November 2007. It raises issues about natural justice, jurisdiction and the possible severability, or separable enforceability, of parts of the decision.

2.
By a contract dated 1 August 2005 (“the Contract”), Urvasco Ltd (“Urvasco”) engaged Cantillon Ltd (“Cantillon”) to carry out demolition, piling and some other works (“the Works”) at 335-6, Strand, London WC2. The two buildings to be demolished were at the western end of Aldwych. The contract was in the Standard Form of Building Contract issued by the JCT, Private Without Quantities 1998 Edition, which contained the standard adjudication clause.

3.
Disputes arose between the parties largely revolving around Cantillon’s claimed entitlement to extensions of time and in particular to two claims, one for 16 weeks and the other for 13 weeks, together with related loss and expense. A compendious dispute encompassing these two claims was submitted to adjudication and Dr Franco Mastrandrea was appointed as adjudicator in late June 2007.

Following the exchange of written submissions and evidence and two meetings, he produced his decision which, against a much higher claim, allowed to the Claimant £391,565.60 plus VAT. Of this, on analysis, some one fifth relates to the claim for 13 weeks.

4.
It is argued by Urvasco that Dr Mastrandrea had no jurisdiction and failed to follow the rules of natural justice with regard to his dealing with the prolongation costs relating to the 13 weeks. It is said that, as Cantillon expressly claimed for a particular 13 week period and for the specific preliminary type costs said to have been incurred in that period, the adjudicator could not jurisdictionally and should not have allowed costs for a different and later period, at least without giving Urvasco the opportunity to adduce evidence and argument that the costs during that later period were significantly less than the earlier period.

The history and the adjudication

5.
Under the Contract, the named Architect was Foster & Partners ('Foster') whilst the Quantity Surveyor was Davis Langdon LLP ('DL'). Works comprised the asbestos removal, soft strip out and demolition of the whole site, retention of Marconi House's listed facades, the perimeter piling and excavation works to form new additional basement levels and the relocation of the existing EDF [electrical] substations. These Works were designed to enable, ultimately, a new hotel, the Silken Hotel, to be constructed. The Contract Sum was £4,626,756. The contractual Date for Completion was 27 March 2006, while the Date for Possession was 15 July 2005. Practical Completion was said, ultimately, to have been achieved on 20 December 2006.

6.
From a fairly early stage, Cantillon apparently suffered delays. For instance, by letter dated 12 October 2005 to Fosters, Cantillon gave notice purportedly, pursuant to the contractual extension of time clause, that an extension was sought for some eight events which it was said was likely to have delayed completion.

7.
By 19 April 2006, Fosters had granted an extension of time of 13 weeks in respect of a variation relating to the 'in-board permanent piling'. That was confirmed in their letter to Cantillon of 19 April 2006. I will refer to this and the money claim relating to it as 'The 13 Weeks Claim'.

8.
By letters dated 13 June 2006 and 30 June 2006 to Fosters, Cantillon made Interim Claim Submissions Nos. 1 and 2 respectively for further extensions of time. These related to events which occurred in 2005.

9.
By letters dated 22 November and 4 December 2006 to Fosters, Cantillon submitted claims for 8.5 and 7.5 weeks extension of time and related loss expense and damages. These claims were known as Statements of Claim Nos. 1 and 2. The sum claimed in those two claims was about £1.5m. In each letter, there appeared this paragraph:

"Accordingly, please ensure that you rectify undervaluation/ under certification of loss and/or expense previously certified in respect of this claim and the 21 weeks extension of time granted to date by reference to the said Appendix 6…"

Thus Statement of Claim Nos. 1 and 2 were for a total of 16 weeks; I will refer to this as the '16 Weeks Claim'. The reference to there having been a "21 weeks extension of time granted to date" is the fact that, in addition to the 13 Weeks Claim, there was also a further eight weeks extension allowed for matters which were not ultimately referred to Dr Mastrandrea.

10.
Over the following months there were three references to adjudication, of which the second was abortive. In Adjudication 1, the Adjudicator, Mr Holloway, decided on 30 March 2007 that Cantillon was entitled to extensions of time in respect of what were called Event Nos. 1, 2 and 3, which applies at least in part to the 16 Weeks Claim.

11.
In the third adjudication, Mr Holloway again as Adjudicator decided on 18 May 2007 in effect that Cantillon was entitled to 16 weeks extension and that £480,000 which had been deducted as liquidated damages in respect of that period by Urvasco should be repaid.

12.
Thus it was that on 22 June 2007, Knowles on behalf of Cantillon served, in respect of the fourth adjudication, Notice of Adjudication and wrote in the following terms:

"We refer, inter alia, to Cantillon's Statements of Claim No. 1 and No. 2 for extension of time and loss and/or expense and/or damages issued on 22 November and 4 December 2006 respectively and the Adjudicator's Decisions in Adjudications No.1 and 3.

In the same letters Cantillon requested that Foster rectify undervaluation of the under certification of loss and/or expense and/or damages against its claims and also against Foster's Notification of Revisions to Completion Date…

Foster has failed to certify any amounts against Cantillon's claims dated 22 November 2006 or for December 2006, or Cantillon's claims prior to those submissions in respect of the same Listed Matters, and has under certified amounts for loss and/or expense/damages in respect of the 13 weeks extension of time awarded by Foster under its Notification of Revision to Completion Date No. 1 dated 24 March 2006.

By the said claims Cantillon sought payment of loss and/or expense/damages against, inter alia:

(i) Statement of Claim 1…

(ii) Statement of Claim 2…

(iii) Claims made prior to (i) and (ii) and pursuant to and prior to Foster's Notification of Revision to Completion Date No. 1 dated 24 March 2006 (EOT 1) amplified by Foster's letter dated 19th April 2006 as to the relevant period of delay for the 13 weeks extension of time awarded by Foster due to the piling variation.

(iv) Updated requests for payment including Cantillon's letter dated 22 May 2007."

13.
In the Notice of Adjudication itself attached to that letter, there was a more detailed exposition of what was being claimed. Paragraph 7 related in effect to the 16 Weeks Claim, which in effect related to events in 2005, whilst Paragraph 9 referred to the 13 Weeks Claim which related to events in 2006. It was explained that the further eight weeks extension was not the subject of this adjudication.

Paragraph 10(h) referred to the fact that Foster had certified £260,000 in respect of the 13 weeks claim already. At Paragraph 14 Cantillon asks the Adjudicator to decide (amongst other things) the following:

‘(A) That Cantillon is entitled to be paid the principal amount of loss and/or expense and/or damages in the sum of £1,416,418.73 plus interest / financing charges or such other sum plus interest/financing charges that the Adjudicator shall decide is due and payable, less any amount previously paid by Urvasco.’

14.
Following that Notice of Adjudication Dr Mastrandrea was appointed as Adjudicator. He is well-known in the arbitration and adjudication ‘business’. Apart from being a chartered surveyor and a fellow of the Chartered Institute of Arbitrators, he also is a qualified barrister.

15.
Under cover of a letter dated 29 June 2007 to Dr Mastrandrea, Knowles on behalf of Cantillon served its Referral Notice. A very substantial amount of documentation was attached to this notice. In the Referral Notice the Executive Summary states as follows:

“(a) Cantillon has claimed the 29 weeks extension of time for events in 2005 and 2006 and associated loss and/or expense/damages providing regular notifications in accordance with clauses 25 and 26 of the Contract.

(b) Foster granted 13 weeks extension of time for in-board piling in 2006 but failed to grant 16 weeks for events in 2005.

(c) Cantillon issued claims for time and money including its claims dated 22 November and 4 December 2006 (known as SOC 1 and 2) and these claims were rejected by Foster.

(d)The Adjudicator in Adjudications 1 and 3 decided that Foster was wrong to reject Cantillon’s claim and Urvasco were required to repay £480,000 in LAD’s plus interest to Cantillon. The Adjudicator gave an extension of time of 16 weeks for events in 2005 but was not asked to ascertain any loss and/or expense/damages.

(e)Due to Foster’s failure to grant 16 weeks extension of time, decided on Adjudication No. 3, Foster also failed to certify payment of the related loss and/or expense to Cantillon, hence Cantillon’s Notice of Adjudication No. 4.

(f)Cantillon asks the Adjudicator to decide on the amount due and payable now to Cantillon in respect of loss and expense and interest to the financing charges as claimed in the Notice of Adjudication and in this Referral.’

16.
The Referral went on to refer to the fact, as was the case, that Foster had only certified the sum of £260,000 prior to the Notice of Adjudication No. 4 in respect of the 13 Weeks Claim. The money claims for the 16 Weeks claim and the 13 Weeks Claim were identified separately with the 13 weeks claim being for a gross total of £837,533.64. In paragraph 3.5(iii) this was put as follows:

‘Cantillon have claimed for loss and expense as Foster’s award for 13 weeks extension of time in 2006. Appendix A (5/68) and (5/69). For financial details see Appendix 6A: Paragraph 25 at page 6 (Appendix F: File 7).’

In paragraph 3.7 it was identified that from the overall claims various sums are being deducted and not claimed in this adjudication.

17.
In paragraph 3.8 of the Referral as adjusted in paragraph 3.9 it was identified that £488,785.05 was claimed in respect of the 16 weeks claim, £595,798.47 in respect of the 13 weeks claim and, for Overheads and Profit, £304,739.65 was claimed in respect of the 16 weeks claim and £27,095.56 in respect of the 13 weeks claim. From the overall total of £1,769,532.57, the sum of £353,113.84 was deducted in respect of subcontractors whose claims were not sought to be adjudicated. There was a further adjustment of £4,413.27, producing a net sum claimed of £1,412,005.46. A further deduction of £192,971 was made to reflect the amount previously certified.

18.
Interest and financing charges were claimed as well, totalling £142,445.56 both in relation to the loss or expense claimed together with a claim relating to the delayed release of retention monies.

19.
There then follows this:

“3.28 Annexure 1 is provided to assist the Adjudicator.

3.29 Annexure 1/1 and 1/2 comprise the general summary of Cantillon’s claims for extended preliminaries of the prolongation cost. The headings “Monthly Invoices” in the entries in these columns are cross-references to the invoices/substantiation provided to Foster… save that some additional evidence has been provided to assist the Adjudicator…the substantiation is provided within Appendix A to the Referral at Files 2-5 inclusive.”

All the Appendices running to some eleven files’ worth have been provided to the Court.

20.
At paragraph 4 to the Referral, Cantillon ask the Adjudicator to decide the following:

“(i) That Cantillon is entitled to be paid the principal amount of loss and/or expense and/or damages in the sum of £1,416,418.73 (less £4,413.27 above) plus interest/financing charges or such other sum plus interest/financing charges that the Adjudicator shall decide is due and payable, less any amount previously paid by Urvasco.”

21.
Annexure 1/2 to the Referral is headed ‘Appendix 6.1… loss and expense’ and in handwriting is a reference to “13 Wks”. It sets out against some 46 cost headings loss and expense incurred over a 13-week period starting in the week ending 23 April 2006 and ending in the week ending 16 July 2006. Some of the larger items are “Attendant labour”, “Craneage”, “Insurances”, “Maintenance”, “Plant – Own” and “Supervision”. The total sum in relation to the figures on the page is £595,798.47, which corresponds with the sum claimed (excluding overheads and profit) for the 13 weeks in the body of the Referral.

22.
Attached to Annexure 1/1 and 1/2 are pages 1/3 to 1/28 which purport to provide the breakdowns for the ‘Attendant Cantillon labour’ item on Annexure 1/1 and 1/2 by reference to the costs of various individuals such as gatemen from 17 July 2005 to 3 December 2006. It is clear that the individual costs are based on an averaged weekly cost for the various individuals.

23.
Later in Appendix 6 there is some further explanation of the extended preliminaries costs claimed. At paragraph A1 and 2 the following is said:

“1. The actual weekly recurring preliminary costs have been summarised into a number of typical cost headings numbered 1 to 46 within Appendix 6.1. The costs have been incurred from a number of sources, including material and miscellaneous purchases and suppliers, hired plant, both internal and external, subcontract preliminary costs, site staff and general labour supply…

2. The costs have been allocated for each week of the project, from week 1 to week 64 inclusive so far (costs are continuing), the overall period which includes periods of critical delay for which Urvasco is responsible. The period of critical delay is set out at Appendix 3 and summarised at Section 4. The particulars are provided at Appendix 4.”

24.
In the main Appendix 6.1 which follows, against the 46 heads of cost, the cost said to have been incurred for every week from 17 July 05 to 7 January 2007 is set out. In addition to the Attendant Labour breakdown for that period, there is also given in Appendix 6.4 the supervision costs broken down in relation to nine individuals, again from 17 July 2005 to week ending 5 November 2006.

25.
Although a 28-day period was provided for the resolution of the adjudication, the parties agreed substantially to extend that period. In the result a period of some five months from the date of the referral to the time of the decision elapsed. There were two jurisdictional issues for Dr Mastrandrea to resolve, which he did in writing on 8 and 14 August 2007. In the first he decided that he was bound by the decisions of Mr Holloway in Adjudications 1 and 3. In the second he decided that he could review the 13 week period of extension of time which had been granted by Fosters, which had not been the subject matter of Mr Holloway’s earlier decisions. There is no challenge to those resolutions.

26.
The parties exchanged further extensive documentation, by way of submissions and evidence. A response was served by Urvasco on 20 July, a reply by Cantillon on 24 August 2007 and a rejoinder by Urvasco on 20 September 2007. In addition two meetings took place at Dr Mastrandrea’s offices on 19 October 2007 and 23 October 2007, to which I will return. There were further written exchanges between the parties, together with certain notes, responses, documentations and submissions between 18 October and 19 November 2007.

Urvasco’s defence in the adjudication

27.
Urvasco put in a very substantial response. Urvasco counterclaimed, in effect, the sum of £257,256.88 on the grounds that Cantillon was said to have been overpaid with regard to loss and expense. In reality, Cantillon had been paid £260,000 for loss and expense with regard to the 13 week claim. In the Introduction section to the Response, the following is stated:

‘F(iii) The claim for loss and/or expense in relation to “in-board” piling does not represent the period in which the actual delay occurred, and cannot therefore represent the actual prolongation costs incurred. Accordingly, such costs have been wrongfully claimed and Cantillon’s claim for these costs must fail as they do not arise in consequence of the introduction of the in-board piling…’

At paragraph J, Urvasco concluded that Cantillon was entitled to nothing in money terms in respect of the 13 week claim. Urvasco relied upon the expert input of Mr Briggs, a programming expert.

28.
In what was called Section 1 to this Response, there was a detailed programming analysis of what happened when and when any delays occurred. In paragraph 1, Urvasco provided a synopsis of their position:

“Urvasco rejects [Cantillon’s claim] and submits that Cantillon is not entitled to the sum claimed for the following reasons:

(a) The claim for loss and/or expense is based upon a theoretical delay analysis (the prospective analysis) rather than an actual as built analysis (retrospective analysis). Accordingly, Cantillon have not properly substantiated its claims for prolongation costs;

(b) The claim for loss and/or expense does not recognise a substantial culpable delay for which Cantillon was responsible, which reduces or extinguishes Cantillon’s potential entitlement to recover such costs;

(c) The claim for loss and/or expense in relation to “in-board” piling does not represent the period in which the actual delay occurred, and cannot therefore represent the actual prolongation costs incurred. Accordingly, such costs have been wrongfully claimed and Cantillon’s claim for these costs largely fails as they do not arise in consequence of the introduction of the in-board piling;…

(d) The as-built critical path does not as suggested by Cantillon run through the 1903 building but through the 1958 building …. The effect of this is effectively to extinguish any prolongation cost claim made by Cantillon against the 1903 building.”

29.
Within the Response is the assertion that the variation involving the in-board piling ‘had no discernable delay effect on the progress and completion of the work’ (at Paragraph 120 of Section 1). At Paragraph 124, the following appears:

“Urvasco submits that Cantillon cannot recover any prolongation costs in consequence of the introduction of the in-board piling, as the period (17 April 2006 to 16 July 2006) against which Cantillon has claimed its prolongation costs is wrong. This period does not represent the period in which the potential delay (16 June 2006 to 14 November 2006) in relation to the in-board piling would have occurred. The costs claimed by Cantillon cannot therefore represent the actual prolongation costs incurred as they are for the wrong period. Accordingly, such costs have been wrongfully claimed.”

30.
In Section 2 Urvasco address the quantum of Cantillon’s claim. This quantum analysis in relation to the 13 weeks claim relates to the specific 13 weeks which were the subject matter of Annexure 1/1.

Cantillon’s Reply to the Response

31.
On 24 August 2007, Cantillon served its Reply. It attached a detailed programming analysis from a programming expert Mr Octavian Dan. This acknowledged that the in-board piling work had been done between August and November 2006. Mr Dan criticised Urvasco’s programming evidence. Much

of his criticism was upheld by the Adjudicator. The reply and supporting evidence was very substantial.

Rejoinder

32.
On 20 September 2007, Urvasco served a Rejoinder in the adjudication. In paragraph 4 it identified that it could assert any defence it considered appropriate. At paragraph 7 it says:

|As pleaded at Paragraph 4 above and for the avoidance of doubt, Urvasco do not challenge the Architect's Decisions: they are irrelevant to Urvasco's Defence. The Defence analyses Cantillon's claim for prolongation costs, which is philosophically different from a claim for an extension of time (even though the same delays, or some of them, may need to be taken into account in either case). Urvasco's Defence is built upon the as-built situation; Cantillon's is not. The error in Cantillon's methodology can be demonstrated by way of example. Thus, the Architect's prospective extension of time award was made 24 March 2006. Cantillon has claimed for delay cost to the in-board piling from 17th April 2006. However, the piling logs/records show that, in the event, in-board piling did not commence until 15 June 2006 (and the in-board piling within the building footprint did not commence until 27 June 2006). Thus, Cantillon wrongly rely upon a prospective hypothesis of loss based upon the Architect's pre-assessment of a likely delay to support their claim. They ignore the facts as they are known to have occurred. Accordingly, Cantillon claim a prolongation cost for a period during which they clearly did not incur them. That approach is misconceived. In the circumstances, Cantillon's case proceeds on a false predicate and Urvasco refer to Appendix 1 herein.

Urvasco confirms that its delay analysis takes into account the in-board piling. Urvasco had based their delay analysis on the actual as-built position. The Rejoinder had substantial attachments to it; as in the Response there was a detailed response to the loss and expense claim in respect of the 13 Weeks Claim in relation to each of the individual heads of cost. Urvasco did not apparently in writing in the Rejoinder or the Response analyse what costs had been incurred during the period when the in-board piling was actually carried out.

The meetings before the Adjudicator

33.
Little turns on the meeting of 19 October 2007. The agenda for the meeting was a number of points and questions, from the Adjudicator, mostly going to matters of detail. Question 2 in the agenda was:

"Does the claim for loss and/or expense in relation to "in-board" piling represent the period in which the actual delay occurred? [Response, F (iii)]. Are there other instances of mismatch between claimed periods and the loss and/or expense said to flow there from?"

There was no issue before me that anything was said at that meeting which impacts upon the issues before me.

34.
However there is some dispute about what was or was not said at the meeting of 23 October 2007. The Adjudicator headed the agenda 'Time/ Legal Issues'. The agenda nominally relates to a meeting on 10 October 2007 which was moved to 23 October 2007. Much of the agenda relates to delay issues. However, an issue was raised at paragraph 18 as to what the word "ascertain" in Clause 26 of the Contract conditions meant. In Clause 26, in broad terms, the Contractor is entitled to loss and expense occasioned by delay and disruption caused by various factors. It is the job of the Architect or

Quantity Surveyor, to “ascertain” such loss and/or expense. The meeting was attended for Urvasco by Dr Critchlow of Urvasco’s solicitors, Mr Beck (a claims consultant), Mr Zadeh of Urvasco and Messrs Briggs and Waddle of Brewer Consulting who were the programming experts. For Cantillon Messrs Crawley and Shahdoost-Rad for Cantillon and Messrs Giles, Gogarty and Mr Dan for Knowles attended.

35.
Amongst other matters discussed, it is accepted that there was a discussion about the as-built programme which was largely agreed. There is also no dispute that Mr Giles of Cantillon said to the Adjudicator that it was open to him to decide the period for which loss and expense had actually been incurred, even if different from the period in Annexure 1/1 and then form his own view as to the appropriate quantum for that period.

36.
What is not agreed is whether Dr Critchlow responded to the following effect:

“(a) What was being contemplated was that the Adjudicator make Cantillon’s case for it;

(b) At the very least if a different period and different quantum were to be considered, Urvasco’s experts would need the opportunity to analyse them and make further representations;

(c) That the Adjudicator could not set up a case for Cantillon to which Urvasco did not have the opportunity to respond.”

37.
There is no issue between the parties as to whether the Adjudicator made a positive response, either to what Mr Giles or Dr Critchlow said. He did not.

38.
It is not necessary for me to decide this factual issue for the purpose of this application because the parties wrote to the Adjudicator shortly after the meeting. Under cover of an email to Dr Mastrandrea on 24 October 2007, Mr Giles of Cantillon sent a written note. Materially it said as follows:

“1. This note is to clarify the Referring Party’s position on the ascertainment by the Adjudicator of loss and expense due under the contract and the law as set out in the judgment of Dyson J, in How Engineering v Lindner Ceilings…

Ascertainment by the Adjudicator.

3. At the meeting of 23 October 2007 Dr Critchlow and I agreed that the judgment of Dyson J, was both applicable and relevant to the task that the Adjudicator has set in the Adjudication. Particular reference was made to paragraph 23 of that judgment; a substantial section of which was read out by Dr Critchlow and approved by him and me as being a proper guide to the Adjudicator. And more particularly to Dyson J’s, words ,

“I would hold, therefore, that, in ascertaining loss or expense an arbitrator may, and indeed should, exercise judgment where the facts are not sufficiently clear…”

The point was made by Dr Critchlow that where facts may not be sufficiently clear due to the fault of the contractor he should suffer the consequences of not having sufficiently fulfilled his burden of proof and his claim failed to that degree. This point was put to me by the Adjudicator and I agreed that where evidence was lacking in his support it was fair that the contractors should go uncompensated.

4. Following that exchange, the point arose as to what the Adjudicator should do if he were to find the time of loss (the time of delay) to be different from those periods for which the Referring Party claim. My submission was that the Adjudicator, in ascertaining loss, should assess the losses for the periods he finds. Dr Critchlow did not agree and said the Adjudicator should be confined and consider only the losses in periods as claimed by the Referring Party, the implication being if those periods did not correspond to those the Adjudicator finds the Referring Party should get nothing.

5. On reflection it is clear to me that these two points need further clarification. Firstly, the Adjudicator is assessing the loss and expense due under Clause 26 of the contract and not, as Dr Critchlow's position would seem to be, assessing the contractor's entitlement in the times as claimed, rather in the times as found. Secondly, in the event of the Adjudicator finding entitlement is a different time than that claimed by the Referring Party he was still obliged to ascertain the loss for that different period. Thirdly, in applying Dyson, J, if that relocation in time of the loss makes the facts for that alternative period "not sufficiently clear" then the Adjudicator should endeavour to seek out those facts. In doing so he should not penalise the Referring Party for the falsity of evidence or lack of clarity as in this instance it is not the fault of the Referring Party as the claims are made in relation to time periods fixed by others; namely Mr Holloway and the Architects. In such circumstances I respectfully suggest it would be for the Adjudicator to inquire of the Party what further evidence they have regarding the loss incurred in the time periods he is considering. Evidence as to costs incurred in periods other than the 16 weeks of Mr Holloway and the 13 weeks of the Architect has been adduced in the Referral but not to the level of detail of these two periods: It is this less precise evidence to which the Adjudicator should "exercise judgment" as exhorted by Dyson, J. This wider and less detailed evidence is for the period July 2005 to December 2006 and is to be found in Referral Appendix A, Files 2, 3, 4 and 5. An overall schedule of this evidence is to be found in Referral File 1, Appendix A at Tab 6."

39.
Dr Critchlow replied by email to Dr Mastrandrea commenting on this further note. In his email dated 26th October 2007 he said, materially, as follows:

"I have seen the further information submitted by Knowles on 24 October 2007. You made it clear at our recent meeting that you did not expect to see further submissions except in exceptional circumstances. Accordingly, I do not understand the basis of this additional gratuitous material. However, it having been served, it seems appropriate to respond. I deal below with Mr Giles's remarks concerning ascertainment: the balance will be responded to in the Submission which we have agreed to provide by Wednesday, 31st October 2007.

I address Paragraphs 4 and 5 from Mr Giles's Submissions. I respectfully suggest that his proposition is misconceived. The role of the Adjudicator is to decide whether or not the Referring Party should succeed in respect of the dispute advanced in the Notice and Referral. However, the concept of a dispute is distinct from that of a claim. Thus, if a party brings a claim for a particular sum of money but the grounds upon which that claim is founded change significantly from those asserted before the adjudication was commenced, the Adjudicator does not have jurisdiction: the dispute is different even though the claim is the same. This distinction was observed by His Honour Judge Seymour QC, in Edmund Nuttall Limited -v- R G Carter Limited [2002] CILL 1853.

I respectfully suggest that it follows in this case that you, as Adjudicator, are bound to decide the dispute, i.e. to consider the assertions advanced by Cantillon in the Notice and Referral and decide the extent to which they succeed. You are not entitled to make your own separate assessment of

Cantillon's entitlement divorced from the arguments Cantillon themselves have put forward. To do otherwise would be to breach natural justice. In this regard I respectfully draw your attention to Balfour Beatty Construction Limited -v- The Mayor the Burgess of London Borough of Lambeth [2002] BLR 288. In that case, the Adjudicator identified his own analysis of the critical path, awarded an extension of time, and re-calculated what he considered to be the appropriate amount of damages for delay. This was held to be a serious breach of natural justice.

I suggest that the position in this case is that Cantillon effectively concede that they are unlikely to succeed on their claim as advanced. Accordingly, instead, they are looking to you to make an alternative case on their behalf. For the reasons set out above I suggest that that is impermissible. Mr Giles's proposition seeks to give the Judgment in the Lindner Ceilings an interpretation which it cannot realistically be made to bear. Dyson J, merely held that where the facts and matters of a dispute are so complex that precision cannot be looked for in its determination, a degree of judgement can be exercised. It is fundamentally different from the idea that a wholly new case can be fabricated by the Tribunal. Such a proposition is entirely at odds with Dyson J's, approval but the basic proposition in the Alfred McAlpine Homes North case that "to ascertain" means "to find out for certain" and does not connote as much use of judgement or the formation of opinion as had "assess" or "evaluate" has been used."

The decision

40.
The decision of Dr Mastrandrea, made on 28 November 2007 is a substantial document running to 40 pages of prose and some 30 pages of annexures. He also made various amendments under a slip rule on 5 December 2007 running to some nine pages. Although the contract did not require Dr Mastrandrea to give reasons he nonetheless did so.

41.
Dr Mastrandrea in his decision analysed the history, scope and effect of the decisions of Mr Holloway, culpable delays said to have been caused by Cantillon, issues of concurrency of delays and other such matters. With regard to the 13 Weeks Claim, he did not consider that he was bound by the 13 week extension of time in terms of identifying the period for which prolongation related costs should be recoverable. He addressed Urvasco's allegation that the introduction of the in-board piling had no discernable delay effect on the progress of the works but on balance he rejected that complaint; broadly, he accepted the programming evidence put forward in the adjudication by Mr Dan, Knowles' programming expert. At paragraph 7.116, he concluded that Cantillon was entitled 'to 9.71 weeks prolongation'. He analysed the evidence which had been put before him by both parties that the piling work became critical on or about 10 August 2006 and it remained on that critical path until the work was completed on or about 14 November 2006. That total period was 13.86 weeks. From that he deducted 4.14 weeks in respect of delays which were effectively the responsibility of Cantillon.

42.
When it came to quantum, Dr Mastrandrea dealt with the 16 Weeks and 13 Weeks Claims separately. With regard to the 13 Weeks Claim he set out in Appendix 2 his evaluation of the particular items involved. (Paragraphs 8.11 to 8.13). He said:

"8.12 Urvasco say the claim for loss and/or expense in relation to in-board piling does not represent the period in which the actual delay occurred, and cannot therefore represent the actual prolongation costs incurred. Accordingly, such costs have been wrongfully claimed and Cantillon's claim for these costs must fail as they do not arise in consequence of the introduction of the in-board piling.

8.13 I am satisfied that it is appropriate to take into account the cost of items which are time related, and are likely to have been incurred in any period of delay. In this context, I have sought to establish an average weekly rate for such resources, having excluded those items which I do not consider to be time related and those costs which, despite evaluation having been put upon them by Urvasco, are peculiar one-off costs, such as the closure of the parking meters."

43.
In Appendix 2 to the decision which is entitled 'Financial Evaluation of 13 Week Period', he set out a table identifying Cantillon's figures for prolongation costs as it had adjusted them during the course of the adjudication (£342,421.77) as against Urvasco's adjusted figures (totalling £114,942.49). Not all the items in Annexure 1/1 to the Referral have any sum claimed against them; only 29 items had figures put against them. In Appendix 2 he analysed each of the 29 items and, usually, when there was an agreed item he allowed the agreed sum.

44.
Dr Mastrandrea seems to have taken a number of the heads of cost, initially in relation to periods of up to 13 weeks. Having then secured figures for up to 13 weeks in respect of the 29 items, that produced a total (as adjusted) of £143,325.96. He averaged that by reference to 13 weeks, producing an average weekly cost of £11,025.07 to which he applied a multiplier of 9.71 weeks to produce a prolongation of £107,053.43.

45.
It seems at least possible that Dr Mastrandrea had some regard to costs which were or may have been incurred in the period mid-August to mid-November 2006. For instance at paragraph 8 of Appendix 2, he prefers the evidence of Cantillon's Project Manager that two gatemen were present at all times on site. With regard to one item, Parking Meter suspension, Dr Mastrandrea allowed nothing because such costs 'would probably not have applied to the costs during which the delay was actually suffered' (paragraph 49 of Appendix 2).

46.
It is clear from paragraph 8.28 that Dr Mastrandrea allowed for Head Office Overheads and Profits the sum of £304,739.65 with regard to the 16 Weeks Claim and £20,238.30 to reflect the sum originally claimed for overheads and profit £27,095.56 pro rata'd to relate to the 9.71 weeks allowance against the 13 week period claimed.

47.
Financing on loss and expense at £22,978.03 was allowed.

48.
The final sum which Dr Mastrandea found as due was £391,565.60 made up as follows:

'Prolongation as Appendix 1… £125,825.04.

Prolongation as Appendix 2… £107,053.43.

Head Office Overheads and Profit… £324,977.95.

Finance on Late Payment… Nil.

Finance on Retention… £3,702.14.

Sub-Total… £561,558.57.

Finance on Loss andl Expense… £22,978.03.

Sub total… £584,536.60.

Less Amounts paid to date… £192,971.00.

Balance Due to Cantillon… £391,565.60.'

In addition to that sum he ordered Urvasco to pay such VAT thereon as may be applicable together with his fees of £45,560.63 which Urvasco was to pay 70% and Cantillon the balance. Both parties had paid their respective shares of Dr Mastrandrea's fees. However, the main sum of £391,565.60 plus VAT has not been paid.

The Issues in this case

49.
Cantillon seek to enforce the Adjudicator's decision. Urvasco say that the Adjudicator exceeded his jurisdiction and failed to comply with the rules of natural justice with regard to his disposition of the 13 Weeks Claim. In particular, it is said that the Adjudicator had no jurisdiction to address and resolve any issue relating to a delay occurring and prolongation costs being incurred in a period other than the specific 13 week period identified by the Claimants and secondly that he failed to give to Urvasco any or any reasonable opportunity to make submissions and adduce evidence in relation to the amount of costs being incurred in the later period.

50.
Evidence has been adduced before me that if the Adjudicator had specifically given the parties more time or opportunity to address costs incurred during the later period, they would or could have put in further evidence and it might have made a difference of somewhere between about £17,000 and £60,000 lower than the amount allowed by the Adjudicator for the 13 Weeks Claim. I cannot on the evidence decide what if any difference further evidence and submissions would have made to the Adjudicator's decision.

The law

51.
After almost ten years of extensive litigation relating to the enforceability of adjudicator's decisions under the Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA 1996"), it has effectively been established that there are two principal grounds for avoiding enforcement of adjudicator's decisions:

(a) that the Adjudicator had no jurisdiction or exceeded his jurisdiction;

(b) that the Adjudicator failed in reaching his decision to apply the rules of natural justice or was biased.

52.
Over the years, a sense of impatience can be felt, particularly in the Court of Appeal, with regard to attempts to avoid enforcement of adjudicators' decisions. In **Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2006] BLR 15, the Court of Appeal (Sir Anthony Clark MR and Lords Justice Chadwick and Moore-Bick) stated the following:

"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…) 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 label of '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 recognise 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 sub-contractors. 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 the dispute in evolving 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 the case like the present.

87. In short, in the overwhelming majority of cases, the proper course to 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 is 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 – as, we suspect, the costs incurred in the present case will demonstrate only too clearly."

53.
Whilst that case is, obviously, not authority for the proposition that a "good" challenge to a decision on jurisdiction or natural justice grounds will be excluded on some statistical basis, a challenge on these grounds must be plain, clear and relatively comprehensible. In a case such as the present, the Adjudicator, albeit experienced, had a mass of conflicting evidence and argument to take on board. The Court should not take an over-analytical approach to questions of jurisdiction and natural justice arising in adjudications under the HGCRA 1996.

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 Engineering Ltd -v- Secretary of State for Transport** [2005] BLR 227 and **Collins (Contractors) Ltd -v- Baltic Quay Management (1994) Ltd** [2004] EWCA (Civ) 1757 address how and when a dispute can arise. I draw from such cases as those the following propositions:

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

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

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

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

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

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

In my view, one should look at the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds upon which that it has been rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it is referred to adjudication or arbitration. Similarly, the claiming party is not limited to the arguments, contentions and evidence put forward by it before the dispute crystallised. The adjudicator or arbitrator must then resolve the referred dispute, which is essentially the challenged claim or assertion but can consider any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute.

56.
So far as failures to comply with the rules of natural justice are concerned, there have been a number of cases in which the TCC (particularly) has considered the conduct of Adjudicators. These include **Discain Project Services Ltd -v- Opecprime Development Company Ltd** [2001] BLR 285 and **Balfour Beatty Construction Company Ltd -v- The Camden Borough of Lambeth** [2002] BLR 288. In the latter case, HHJ Lloyd, QC, had to deal with the case where a contractor considered it was entitled to extensions of time and claimed in respect of 31 different Relevant Events. Liquidated damages had been deducted. The contractor commenced an adjudication seeking the return of the liquidated damages. Each side put in expert programming evidence. The adjudicator had done his own expert analysis of where the critical delay path lay, awarded the Contractor the bulk of the extension of time claimed and ordered the repayment of most of the liquidated damages. Materially the judge said:

“27. It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties. In Macob Civil Engineering Limited v Morrison Construction Limited [1999] BLR 93 Dyson J made it clear that a mere procedural error should not invalidate an Adjudicator’s decision. Adjudication under the HGCRA is necessarily crude in its resolution of disputes. Errors of fact and law do not vitiate the decision which has to be complied with, unless of course it was not authorised and thus made without jurisdiction. On the other hand adjudication under the JCT conditions (which are typical of other forms) envisage that some basic procedural principles have to be applied in order that each party is treated fairly...

28. Is the Adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and of the conclusions which he might reach, taking those sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies, at least in part, in the requirement that the Adjudicator should act impartially…

29. Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether an Adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one… which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant…”

Because in the Balfour Beatty case the adjudicator did not inform the parties of his methodology and seek their observations on its suitability and because if the losing party had had the opportunity to comment it might well have made a difference, he refused to enforce the decision.

57.
From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:

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

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

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

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

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

58.

During the course of argument the question arose as to whether parts of an Adjudicator's decision could be enforced and other parts not, in circumstances where the Adjudicator's want of jurisdiction or failure to follow the rules of natural justice only and obviously related to one part of the decision. There has been surprisingly little authority directly on the point. In **Amec Capital Projects Ltd -v- Whitefriars City Estates Ltd** [2005] BLR 1, Dyson LJ said this at paragraph 14:

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

Although this case was relied upon by Mr Brannigan for Urvasco for the proposition that severability or separate enforcement of parts of an Adjudicator's award would not be allowed in the case of material breach of the rules of natural justice, I do not consider that Dyson LJ in that case was addressing the issue of severability. He was addressing the basic issue as to whether or not there was a breach of the rules of natural justice. Severability was not an issue in the case or on the appeal.

59.
In **Keating on Construction Contracts** (8th edition) the following is said at Chapter 17-045:

"It seems probable that if there is a breach of natural justice, the whole decision is unenforceable, and it is not possible to sever the good from the bad."

In a footnote supporting this observation the following is said:

"See RSL (South West) Ltd -v- Stansell Ltd unreported (June 16, 2003), but also see the observations in Griffin –v- Midas Homes Ltd [2001] 78 Con LR 152. For a discussion of the issue of severability of adjudicators' decisions generally, see Sheridan and Helps, 'Construction Act Review' [2004] 20 Const. LJ 71".

60.
I am by no means convinced that this observation in Keating (of great weight that it is) is correct. The case of **Griffin and Another -v- Midas Homes Ltd** [2000] 78 Con LR 152 is actually authority for the proposition that, where an Adjudicator has exceeded his jurisdiction, that part of the decision which was made within his jurisdiction can be enforced. It does not appear that the issue of severability as such was argued in that case or, as such, ruled upon by HHJ Lloyd, QC, who tried it.

61.
The paper by Peter Sheridan and Dominic Helps in the Construction Law Journal is specifically about "Severability of Adjudicator's decisions". The authors specifically addressed the issue as to whether an Adjudicator's decision may be partly enforceable and partly not enforceable. They make observations on a number of cases:

(a) **Homer Burgess Ltd –v- Chirex (Annan) Ltd** [2000] BLR 124. In that case in Scotland, a Scottish court decided that, even though the adjudicator had made an error in deciding on matters that were

found by the court not to be construction operations, this did not mean that the adjudicator's decision as a whole was beyond the proper scope of his jurisdiction.

(b) **KNS Industrial Services (Birmingham) Ltd -v- Sindall Ltd** (see above). The judge found that a jurisdictional challenge was not a good one and that effectively disposed of the case. He said:

"I have already explained why the dispute referred to the Adjudicator included any ground open to Sindall which would justify not paying KNS. There may be instances where an adjudicator's jurisdiction is in question and the decision can be severed so that the authorised can be saved and the unauthorised set aside. This is not such a case. There was only one dispute even though it embraced a number of claims or issues. KNS's present case is based on severing parts of the adjudicator's apparent conclusions from others. He is not entitled to do so."

(c) **Farebrother Building Services Ltd -v- Frogmore Investments Ltd** [2001] CILL 1589. Again the judge (HHJ Gilliland QC) found that there was not an effective jurisdictional challenge. The judge said:

"I take the view that it is not right for the court to try and dismantle or reconstruct a decision. It seems to me that a party cannot pick and choose amongst the decisions given by an adjudicator, assert or characterise part as unjustified and then allege that the part objected to has been made without jurisdiction… Either the adjudicator has jurisdiction or he does not.'"

(d) **Shimizu Europe Ltd -v- Automajor Ltd** [2002] BLR 113. Again HHJ Seymour, QC, found the jurisdiction objection was not made out. The learned judge said this:

"… if the adjudicator has had referred to him or her for decision both the question how much money is due to a contractor and also the question to what extension of time for completion of construction works the contractor is entitled, it is likely that it would be open to a party to the adjudication to accept the determination in relation to the sum due while disputing, if otherwise there are good grounds for so doing, the assessment of the extension of time, or vice versa. In such a case two separate questions would have been referred to the adjudicator. However, that situation is to be distinguished from the case in which in order to answer the question to what sum a party is entitled it is necessary to consider a number of elements of claim, or the case in which in order to reach a conclusion as to what extension of time is appropriate a number of grounds of possible entitlement to extension of time need to be considered. In each of these latter cases the result of the evaluation of the various elements will be a single cash sum or a single period of extension of time. It seems to me that the option available to a party who otherwise has good grounds for objecting to a decision that a particular sum is payable is to accept it in its entirety or not at all. He does not have the option of declining to accept the decision in its entirety, but to accept the reasoning which led to particular items being included in the overall total. Similarly with an evaluation of a period of extension of time. The overall period of extension must be accepted or none."

(e) **Durtnell -v- Kaduna** [2004] 20 Const LJ: this case does not take the debate very much further forward because the defending party in adjudication had paid those parts of the Adjudicator's decision which they did not object to. It was open to Kaduna to object to the enforcement proceedings on the grounds that at the very least the Adjudicator had no jurisdiction as regard to those elements to which it objected.

(f) **RSL (South West) Ltd -v- Stansell Ltd** [2003] unreported. Although I have not seen a copy of any report of the case, I take my observations from the article itself. The claim related to an

adjudicator's decision in relation to a claim which included elements of loss and expense associated with prolongation. The Judge decided that there had been a breach of the rules of natural justice in that the Adjudicator had failed to give the Defendant the opportunity to comment on an expert's report (the expert having been charged by the Adjudicator with the responsibility for considering this). The Claimant having sought summary judgment in respect of that part of the Adjudicator's decision which excluded prolongation loss and expense with which the report of the delegated individual dealt, HHJ Seymour QC, said this:

"…the alternative application… betrays a misconception as to the juridical nature of the decision of an adjudicator. The obligation on the part of those involved in an adjudication process to comply with or give effect to the decision is purely contractual. The decision of an adjudicator is not like an award of an arbitrator or the judgment of a court and directly enforceable. It is enforceable at all simply because by their contract the parties have agreed to comply with it or to give effect to it. This is so whether the parties have expressly agreed in their contract to a procedure for adjudication, as in the present case, or whether the relevant provisions of The Scheme for Construction Contracts have been implied into their contract by virtue of the provisions of Housing Grants, Construction and Regeneration Act 1996 s. 114(4). What, on proper construction of clause 38A.7 of the Sub-Contract, the parties agreed to do in the present case, in my judgment, was to be bound by and to comply with the decision of an adjudicator in relation to any dispute identified in a notice of adjudication which had been referred to him and which he had determined… It is obviously conceptually possible for parties to an adjudication procedure to agree to be bound by, and to give effect to, not only the decision on the dispute referred, but also any decision on a constituent element in the eventual overall total, or any process of reasoning adopted in the course of reaching a conclusion on the overall dispute. Whether that has happened in any particular case will depend upon the proper construction of the relevant contract, but it has not happened in the present case. Thus once the decision as to the total amount to be paid has been successfully attacked, it cannot be said that any other amount has been determined by [the Adjudicator] to be due in a way which is binding upon Stansell."

The judge went on to say:

"It is obviously also possible conceptually for more than one dispute to be referred to the same adjudicator on the same occasion and for him or her to deal with his or her decisions on the various disputes in a single document. In such a situation it may well be that a valid objection to the decision in relation to one dispute will not affect the validity and enforceability of the decision in relation to another…"

62.
The authors of this article conclude as follows:

"On the basis of the cases decided so far, the following would appear to be the position on severability:

(1) Where two or more disputes are referred to an Adjudicator, a valid objection to one decision, on jurisdiction or natural justice grounds, will not necessarily affect the validity and enforceability of the Adjudicator's decision on the other dispute or disputes.

(2) Where a single dispute is referred to one Adjudicator, it may not be severed so as to excise a part of the decision to which valid objection is taken, on jurisdiction or natural justice grounds, leaving the balance valid and enforceable. A decision on the single dispute is either valid and enforceable or invalid and not enforceable.

(3) It follows that an Adjudicator's decision may not be corrected to take account of a jurisdiction objection, with the result that a sum larger than that in the Adjudicator's decision may be enforced by a Claimant."

65. On the severability issue, I conclude, albeit obiter in the result, as follows:

(a)
The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.

(b)
It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.

(c)
If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).

(d)
The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

(e)
There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted, the decision will not be enforced.

(f)
In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the Court.

Discussion and decision

66 I must first determine what dispute, in relation to the 13 Weeks Claim, was referred to adjudication. In my judgment, it was a claim for loss and expense in respect of the 13 weeks extension of time which had been granted for the in-board piling variation which was disputed. One needs to look at that claim in the context of the fact that the extension had been granted prospectively, that is before the relevant piling had started. Unsurprisingly, but possibly not correctly as a matter of fact or law, Cantillon had quantified it on the basis apparently that, as the extension of time contractually extended the contractual Date of Completion, the quantum needed to relate to the extended period as opposed to a period which reflected when the piling was done.

67 It is not clear (or at least has not been highlighted) on the evidence on what basis Urvasco disputed the claim, prior to the adjudication; it is clear that they had paid £260,000 for loss and expense said to have been caused by the 13 weeks extension of time period, that is at the rate of

£20,000 per week. One can, and I do, assume that the dispute, pre-adjudication, revolved around quantification, rather specifically than when the losses were incurred.

68 Whatever the basis of objection was prior to the Notice of Adjudication, it is clear that the defence in the Response was in substance:

(a) the piling need not have taken as long as it did;

(b) Cantillon was not on site any longer than it would have been in any event; as the critical path ran through other areas and work (other than the piling) and no prolongation costs were recoverable because they would all (or almost all) have been incurred even if the piling had not been required.

(c) As Cantillon had quantified its 13 Weeks Claim by reference to Weeks 41- 53 (w/e 23 April to w/e 16 July 2006), there was no loss recoverable for any later period when the piling works were done.

69 It seems to me that, once these defences had been raised, the Adjudicator's job (and jurisdiction), with regard to the 13 Weeks Claim, extended to addressing them and their consequences. Thus, he was required to rule on what overall (if any) critical delay was caused by the in-board piling, when and what, if any, losses flowed from the prolongation which he found. If these defences had been raised before the dispute crystallised, which I rather doubt, then it was part of the crystallised dispute referred to adjudication. If not, it was encompassed by the claim for 13 weeks of prolongation which was simply not accepted by Urvasco. As the authorities establish that the responding party can put forward any arguable defence in adjudication, whether propounded before the adjudication or not, it must follow that the adjudicator can rule not only on that defence but also upon the ramifications of that defence to the extent that it is successful in so far as it impacts upon the fundamental dispute.

70 Adjudication, like litigation or arbitration, is not a game in which a defending party can run a defence but effectively prevent the consequences of that defence from running if and to the extent that the defence is successful. The rules of natural justice will operate to prevent the adjudicator from "making the case" for the claiming party or from going off on a forensic "frolic" of his own without the defending party having an opportunity to address the "frolic".

71 There can be no doubt that the defences of fact that Urvasco ran in the adjudication were ones which were predicated upon an as-built programme which demonstrated that the in-board piling work was done essentially later than the 13 week time period to which the extension of time related. That as-built programme was eventually and in essence agreed between the parties and their experts during the adjudication as confirmed at the meeting of 23 October 2007. The Adjudicator was not on a "frolic" of his own when he addressed what prolongation occurred and when, because he was simply addressing what the parties, and principally their programming experts, had put before him. Although he generally preferred the approach of Cantillon's expert, Mr Dan, he can not be criticised for that. He rejected the evidence and argument of Urvasco and their expert that the critical path, as from 10 August 2006, did not run through the piling operation until November 2006. Although their primary case was that there was no delay or prolongation caused by the in-board piling variation, their alternative case was that any critical delay fell outside the period quantified, financially, by Cantillon. He was required in effect to deal with this case.

72 The question was then, if the Adjudicator can not be criticised jurisdictionally for making findings that the critical prolongation delay fell between 10 August and 14 November 2006, whether he could be criticised, jurisdictionally, for reducing that period to 9.71 weeks. For similar reasons, he can not be so criticised. He reduced the period to reflect exactly some of the complaints made by Urvasco

about delay in execution of the in-board piling work by Cantillon; he had to address those complaints and factual defences.

73 One then moves to whether jurisdictionally the Adjudicator was entitled to address quantum for the period which he had properly (from a jurisdictional standpoint) found represented the actual period when the works were critically delayed by the piling variation. Although common sense is not always an accurate compass when addressing jurisdictional points, in this case it is. The consequence of Urvasco running the defences as to delay which they did was that, if and to the extent that they were successful, the quantum would inevitably (at least arguably) be different; thus, if the delays were shorter than the 13 weeks, there would be a lower weekly multiplier and if the delay occurred later the costs could well be different in that they might be lesser or greater. In effect, Urvasco implicitly accepted that this was at least possible by the very defence which they ran which was that, as no material piling work was done during the particular 13 weeks quantified by Cantillon, there was no loss. In effect, by taking what would in court proceedings be regarded as a pleading point, it recognised that there might be different losses during a later period.

74 It is of interest that Urvasco did not in their Response or Rejoinder argue, as such, that the Adjudicator had no jurisdiction to resolve the loss and expense claim for the 13 Weeks Claim. It argued that the sum claimed was “wrongfully claimed” and did “not arise in consequence of the introduction of the in-board piling”. This was a substantive defence with some shades of being a technical defence.

75 I have formed the view that the Adjudicator did have jurisdiction to find as he did that a later period of delay and prolongation applied to the in-board piling variation. The claim which he was addressing was one for loss and expense for 13 weeks said to be attributable to the in-board piling variation. It was not, and should not be considered to be, limited to a loss and expense claim for 13 specific calendar weeks. This becomes even clearer when Urvasco actually run a defence that the losses claimed can not be recovered because they relate, only upon Urvasco’s defence, to a later period. It offends reason that Urvasco could run that defence and avoid the consequences.

76 I now turn to the question of whether there was a breach of the rules of natural justice by the Adjudicator. I have formed the view that there was not:

(a)
If the adjudicator had jurisdiction to address the issue, it was up to the parties to put in such evidence as they thought fit to address the realistic permutations which might well apply. It is clear that Urvasco’s team was confident that, if there were any such costs payable, any prolongation costs would apply in the later period.

(b)
With the Referral, detailed records and other documentation about all the prolongation heads of cost was provided by Cantillon for the whole or virtually the whole of the contract period up towards the end of 2006. The same sort of exercise could have been done for the later period as it was for the earlier period. It is difficult therefore for Urvasco to say that it did not have the opportunity to address the quantum ramifications of there being a delay finding which reflected their own assertion that any prolongation occurred during the later period. The fact that they did not, and deliberately decided not to, take up that opportunity does not convert what happened in to some breach of the rules of natural justice.

(c)

The Adjudicator did not, deliberately or otherwise, mislead the parties as to what he was or was not going to do. If anything, he hinted broadly that he might be finding that any compensable delay could well relate to the period when the piling work was actually being done.

(d)
The fact that Cantillon on 23 October 2007 asked the Adjudicator to do something which was within his jurisdiction should have alerted Urvasco to the possibility that the Adjudicator might go down that route.

(e)
The remarks made at the time that the Adjudicator should not "make Cantillon's case" for them were not in point. He was not making Cantillon's case: he was assessing what was due to Cantillon on the evidence and argument. He was entitled to investigate the facts and evidence as presented.

(f)
There was time, as the parties well knew, after the 23 October 2007 for Urvasco to put in argument and indeed evidence about the later period. It was known that Dr Mastrandrea would take up to about 4 weeks to produce his decision. Urvasco for their own reasons decided not to put in any such argument or evidence even though, squarely, Cantillon had asked the Adjudicator on 23 and 24 October 2007 to ascertain the loss and expense by reference to the evidence and the prolongation period found by him. I will not speculate as the real reasons why Urvasco did not submit anything further. Dr Critchlow says that he believed that the point which he says that he made at the meeting of 23 October 2007 had got "home" with the Adjudicator. I do not have to decide whether he made that point at the meeting as he said or repeated it in effect in his email of three days later. However, the undisputed evidence of that meeting is that Dr Mastrandrea did not actually say anything indicating agreement or disagreement. The Urvasco's team judgment that Dr Critchlow's point had gone home obviously turned out to be a misjudgement.

77 The fact that the Adjudicator may have made some mistakes in his assessment of the loss and expense does not establish that he failed to have regard to the rules of natural justice. He had to do the best that he could on the available information. The parties both now accept that he allowed for various items of expenditure in the later period, which were not incurred during that period, such as craneage. All the relevant authorities establish that mistakes of fact or law will not prevent the enforcement of adjudicators' decisions (e.g. **Bouygues (UK) Ltd v Dahl- Jensen (UK) Ltd** [2000] BLR 522).

78 That essentially disposes of the objections by Urvasco. Since the point of severability was raised and it is an issue of some importance and interest to the construction industry and professions, I will comment upon what I would have done if I had found that there had been a more than peripheral breach of the rules of natural justice by the Adjudicator. I would have given judgment in favour of Cantillon in respect of all other parts of the decision which could be said with confidence were unrelated to and untainted by any such breaches. The reasons are as follows:

(a) On analysis, there were at least two disputes submitted here, namely that related to the 16 Weeks and to the 13 Weeks Claims. They were presented separately both before and in the Notice of Adjudication and the Referral. They were, logically and time-wise, separable claims relating to differing years and different factors said to have been causative of delay and cost. The quantum as presented by Cantillon was divisible into that relating to the two claims.

(b) The Adjudicator dealt with them separately in his decision.

(c) In this case, if there was a breach of natural justice even if more than peripheral, it was or would have been more of the inadvertent type rather than one which wholly undermined the decision and reliability of the Adjudicator. There was no hint or suggestion that his decision on all other matters was not anything other than fair, competent and reliable.

(d) The decision is in fact arithmetically divisible. The sums due in respect of the 16 weeks claim are:

(i) Prolongation (Appendix 1 to decision as amended by the Adjudicator): **£125,825.04**

(ii) Head Office Overheads (see Paragraph 8.28 of decision): **£304,739.65**.

(iii) Finance on retention (13/ 29ths of £3,702.14): **£1,659.58**

(iv) Finance on loss and expense: one could either "pro-rata" this (16/25.71 of £22,978.03 = **£14,299.82**) or do a more detailed calculation by reference to the fact that the financing for the 16 weeks which occurred earlier will probably have attracted a larger share than that: if in doubt, one would allow the lower figure.

So far as the deduction of "less amounts paid [to Cantillon] to date" identified by the Adjudicator, I would have called for more argument on this from the parties; this has been forthcoming in writing since the oral argument. I would probably have decided that there should be a deduction for the amount paid. Although the evidence before me and the Adjudicator was that the sum paid (of £260,000) was for the 13 Weeks Claim, it would be wrong to second guess the Adjudicator as to what he would have done with regard to this sum if he had allowed nothing for the 13 Weeks Claim. Thus, the minimum to be enforced separately would have been the sum of the figures set out above less the Adjudicator's sum paid figure of £192,971, namely £253,553.09. It would be unnecessary to deal with the Adjudicator's fees as they have been paid by the parties.

Disposal

79 It follows that Cantillon is entitled to have the Adjudicator's decision enforced and judgment should be entered for Cantillon for the sums found by the Adjudicator to be due which are unpaid.