Neutral Citation Number: [2008] EWHC 3315 (TCC)

Case No: TCC10908

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

Manchester Civil Justice Centre,

1 Bridge Street West,

Manchester, M60 9DJ

Date of draft judgment: 18 November 2008

Date judgment handed down: 5 December 2008

Before :

His Honour Judge Stephen Davies

- -

Between :

QUARTZELEC LIMITED **Cla**

- and -

HONEYWELL CONTROL SYSTEMS LIMITED **Defe**

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- -

Fionnuala McCredie (instructed by **Hill Dickinson LLP**) for the **Claimant**

Sean Brannigan (instructed by **CMS Cameron McKenna LLP**) for the **Defendant**

Hearing dates: 7 November 2008

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Judgment

His Honour Judge Stephen Davies:

Introduction

1. In this case the Claimant seeks summary judgment to enforce an adjudicator's decision. The Defendant resists enforcement on the grounds that: (a) the adjudicator misconstrued his jurisdiction by declining to consider a discrete ground of defence raised by the Defendant; (b) in failing to consider that ground of defence the adjudicator acted in breach of the rules of natural justice; (c) as a result the decision as a whole is invalidated and rendered unenforceable. The Claimant contends that: (i) the jurisdiction and natural justice defences have no substance; (ii) even if they do have any substance, the decision can be severed and that part which is unaffected can be enforced.

2. In summary, the relevant facts are as follows. (1) The Claimant considered that the Defendant had been wrong to exclude from certain interim valuations certain sums claimed in respect of a particular

change to the scope of the works ('the scope change'). (2) The Claimant submitted that dispute to adjudication. (3) One defence ('the omission defence') raised for the first time before the adjudicator was that the interim valuations had, in error, not included a deduction for cost savings due to a separate variation omitting part of the works, and that this amount (which the Defendant contended was worth approximately £35,000) should be deducted from any amount due to the Claimant in respect of the scope change. (4) The Claimant protested that the adjudicator had no jurisdiction to consider the omission defence, because it had not been raised at any time previously and, hence, did not form any part of the dispute referred to the adjudicator. (5) In his decision the adjudicator, so submits the Defendant, accepted this submission and considered that he had no jurisdiction to consider the omission defence. (6) He determined the dispute relating to the scope change and decided that a sum of approximately £135,000 was due to the Claimant in respect of the scope change. He also ordered the Defendant to pay a certain amount in respect of the Claimant's costs, and in respect of his fees. (7) The Defendant refused to comply with this decision and, hence, the present enforcement proceedings were issued and the instant application for summary judgment made.

3. In addition to the decision itself, I have been referred to the Notice of Adjudication, to the exchanges in the adjudication, and to various other documents. I received written skeleton arguments from both parties and heard oral submissions on 7 November 2008. I decided to reserve judgment.

4. As is common in cases such as this, in order properly to understand and to decide upon the arguments advanced it is necessary to refer in a little detail to the relevant contractual provisions, to the relevant circumstances leading up to the dispute being referred to adjudication by the Notice of Adjudication, to the written exchanges in the adjudication, and to the decision itself. Accordingly, I shall begin this judgment by referring as necessary to these matters, before turning to consider and rule upon the competing arguments.

The contract

5. The contract was made in a standard form, the 'Ivory' Form of Tertiary Sub Contract promulgated by the Confederation of Construction Specialists. It is apparent from the recitals that the Defendant ('Honeywell') was the sub-subcontractor on the project and that the Claimant ('Quartzelec' – at the time of contracting known as Cegelec) was the sub-sub-subcontractor, contracted (as appears from Appendix A) to undertake the design, supply, installation, documentation and commissioning of emergency and non-emergency communication systems for six buildings within the prestigious Paradise Street development in the centre of Liverpool, for a contract price of £672,640.

6. The subcontract made provision, by clause 4, for payments to be made in accordance with an attached schedule. Further terms as to payment were contained in what was referred to as the 'Secondary Subcontract', incorporated into this contract by clause 7 and being, it would appear, the form of subcontract in place as between Honeywell and Crown House, the subcontractor on the project. In particular, clause 11 made detailed provision for interim and final payments, in terms which are similar to many standard form construction contracts where there is no certifying contract administrator. Thus clause 11 provided for the subcontractor to submit applications for interim payments in accordance with the payment schedule, and for the contractor to give a payment notice 'specifying the amount (if any) of the interim payment to be made to the subcontractor in accordance with clause 11 or which would be made in accordance with clause 11 if the subcontractor had carried out its obligations under the subcontract and no set-off or abatement was permitted. Such notice shall also specify the basis upon which such amount was calculated'. The amount of each interim payment

was to be the ‘gross valuation’, including ‘the total value of the subcontract work on site properly executed by the subcontractor and all other sums ascertained in accordance with the subcontract’.

7. Clause 11 also made provision for set-off, but that was overridden by clause 6 of the Ivory Form, which provided that:

‘No sums shall be withheld from any interim payment unless agreed by [Quartzelec] or unless relating to a claim by [Honeywell] for an actual loss already incurred by [Honeywell] as a direct result of a breach of this subcontract by [Quartzelec]. No set-off or abatement relating to such a claim shall be made from any payment unless a written statement of the amount of the claim to be abated or set-off, quantified in detail and with reasonable accuracy, has been received by [Quartzelec] no less than 7 days before the final date for payment.’

8. Clause 8 of the secondary subcontract empowered Honeywell to instruct variations in writing, including the addition or omission of any works. Clause 9 provided for such variations to be valued in the manner provided for by that clause, and for that value to be added to or deducted from the contract price.

9. Clause 10 of the Ivory Form provided for disputes to be referred to adjudication in accordance with the Construction Industry Council Model Adjudication Procedure, but in the adjudication it was common ground between the parties that this was not compliant with the terms of the Housing Grants, Construction & Regeneration Act 1996 (‘the Act’), such that the adjudication should be treated as undertaken under the Scheme for Construction Contracts Regulations 1998 (‘the Scheme’).

Relevant circumstances preceding the Notice of Adjudication

10. It was not in dispute between the parties in the adjudication that there had been a relevant variation, in that there had been a change from loop to interleaved radial circuitry, although there was significant dispute in the adjudication as to the extent of that scope change and its consequences. It is not however necessary for me to consider the detail of that dispute in this judgment.

11. It was also not in dispute between the parties that in its application number 16 Quartzelec first included what was described as a ‘claim’ for £465,280.44. I have been shown application number 17, which appears to have been in identical form. This includes a supporting sheet, entitled ‘Paradise Street Development Area, Liverpool, Costs to 21st January 2008’, which is broken down into 5 separate heads of claim, one of which is a ‘calculation of the revaluation of works due to the revised scope of works’ in the sum of £189,721.89. The other 2 substantive heads of claim are delay related claims in respect of an alleged delay period of 25 weeks, one being for extension of time costs and the other being for loss of production costs. The remaining 2 heads of claim are for interest (which was ‘to be assessed’) and for the costs of preparing the delay related claims.

12. It should also be observed at this stage that as part of its application Quartzelec had also included a claim for work executed and for variations. There are supporting sheets for each. The supporting sheets for the variations claim are built up in a standard format with add and omit columns. It may be seen that no omissions were allowed for, but nonetheless the fact that the variations claim made provision for omissions as well as additions is not without significance, as shall be seen later.

13. As required by the terms of the contract, Honeywell produced payment notices in response to these applications. I have been shown the payment notice relating to application number 16 [1], which records Honeywell’s valuation of the application, and thus the net amount payable. Although the payment notice itself does not provide a breakdown of Honeywell’s valuation, an accompanying ‘sub-

contractor remittance advice' sets out Honeywell's valuation of the measured work, of the variations and of the 'adjustments/claim'. There are no further details of Honeywell's valuation of these items, but since the amount entered in relation to 'adjustments/claim' is 'nil' it is apparent that Honeywell considered that Quartzelec had no entitlement to anything under this head.

14. It appears that the same process was repeated in relation to interim application numbers 17, 18 and 19. It is also apparent that Quartzelec was dissatisfied with what it considered to by Honeywell's wrongful failure to allow any sums in respect of any of these claims, although I have not been taken to the detail of the communications about this.

The Notice of Adjudication

15. Thus it was that on 18 June 2008 Quartzelec issued and served its Notice of Adjudication on Honeywell and on the RICS as nominating body. As relevant to this case it read as follows:

'E. APPLICATIONS FOR PAYMENT

10. Quartzelec made an application for payment number 16 on 15 March 2008 in the sum of £1,408,723. On the 23 April 2008 Honeywell valued application for payment number 15 [sic] (the final date for payment of which was 1 June 2008) in the sum of £807,622.14 and Honeywell issued a notice of intention to withhold £601,100.86. The amount withheld in respect of the scope change from loop circuitry to interleaved radial circuitry was £189,721.89.

11. Quartzelec have made subsequent applications number 17, 18 and 19 requesting payment of the scope of works change that has been issued with supporting documentation by Quartzelec in its correspondence dated 8 February 2008.

F. DISPUTE

12. Quartzelec are entitled to payment of the sum of £189,721.89 on the application for payment number 16. Quartzelec's application for payment number 15 included the sum of £189,721.89 in relation to the costs incurred from the change in scoop from loop circuitry to interleaved radial circuitry and a sum of £275,558.55 in relation to the prolongation costs arising from the execution of the subcontract and change in scope.

Quartzelec are entitled to payment of the additional sum of £189,721.89 under the application number 16 under the contract.

Honeywell disputes Quartzelec's entitlement to payment for the change in scope and have withheld the monies that have become properly due.

Further, the notices of intention to withhold payment issued by Honeywell do not comply with the contract in that although they specify the amount of withholding they do not specify the grounds for withholding such amounts (by reference to Quartzelec's obligations under the contract) but merely outlined matters of which complaint is to be made. Honeywell is therefore unable to withhold any amount from Quartzelec. Quartzelec also disputes the grounds and the separate amounts attributable to such grounds as outlined in the notices of intention to withheld payment issued by Honeywell.

…

I.
RELIEF SOUGHT

17.
Quartzelec requests and will request that the Adjudicator decide that's a change in the scope of works has occurred and that Quartzelec are entitled to payment within seven days:

a)
the sum of £189,721.89 or such sum as the Adjudicator decides (in payment of the entitlement arising out of the scope change);

b)
the sum of £275,558.55 or such sum as the Adjudicator decides (in payment of the entitlement arising as of the prolongation costs caused by the scope change).

c)
…'

16. I should observe at this stage that it is common ground that the Notice of Adjudication was in error in referring to notices of intention to withhold payments. It is common ground that the only documents sent by Honeywell in response to Quartzelec's applications for payment were the payment notices and subcontractor remittance advices to which I have already made reference.

Conduct of the Adjudication

17. Mr. Bergin was duly appointed adjudicator, and Quartzelec duly served its Referral Notice. I do not need to make separate reference to the Referral Notice, because it is common ground that it does not say anything of substance which is not in the Notice of Adjudication.

18. I must, however, refer to Honeywell's Response. Honeywell, unlike Quartzelec, had instructed solicitors to represent them in the adjudication, and the Response was drafted by Honeywell's current solicitors. Much of the contents of the Response addressed the factual details of the dispute, to which I need not refer, but I should refer to certain sections of relevance to this application:

19. Under section 2, entitled 'Jurisdiction', Honeywell submitted that the adjudicator had jurisdiction only to consider claims arising out of the scope change. They contended that the claim for £275,558.55 included items which were not connected with the scope change. They referred to the decision of HHJ Lloyd QC in **KNS Industrial Services Ltd v. Sindall** [2000] EWHC Tec 75 for the proposition that the adjudicator's jurisdiction was confined within the limits of the dispute referred in the Notice of Adjudication.

(I should record at this stage that this was a submission which found favour with the adjudicator, and in the event that element of the claim which did not arise out of the scope change was withdrawn by Quartzelec.)

20. Under section 7, entitled 'Offsetting Decrease in Scope', Honeywell submitted as follows:

'7.1. The relief sought by Quartzelec is the payment of money arising from payment application number 15. The amounts now claimed were first sought in that application. They have also been claimed in subsequent applications. There is of course an important difference between:

7.1.1.
Fixing the correct amount for a change in scope; and

7.1.2.

Deciding whether an additional amount must be paid in respect of that change in scope for a specific payment application.

7.1.
The first question simply requires an assessment of the change in scope. The second question however can be affected by broader valuation issues which reduce the amount payable. For example, if omissions in scope were directed prior to the payment application but were not taken into account in calculating the payment notice, then those omissions can be raised to diminish any amount now said to be due on the application by virtue of the correct evaluation of an increase in scope. In short, to reach a conclusion about a further amount due under a payment application, any relevant items which might reduce the amount in the payment notice should also be taken into account.

7.2.
The consideration of such items does not require a withholding notice. This is discussed further in Honeywell's comments on the Referral Notice, but in brief this is because the question is one of valuation rather than of set off, abatement or counterclaim. The adjudicator has been asked on certain terms to value the payment application, therefore points leading to a reduction in valuation are free to be raised.

7.3.
There is one such point on which Honeywell relies. It is an omission in scope arising from the combination of the disabled refuge telephones with fire telephones for buildings 13A, 13B and 13D. This omission escaped Honeywell's attention until very recently when considering the final account. The omission was made between February and May 2007 for the three buildings and therefore well preceded payment application 15. Honeywell was therefore at liberty to reduce payment application 15 on the basis of this omission…. as an exercise in valuation therefore Honeywell requests the adjudicator to offset the omission in scope for combining telephones from any amount assessed for the increase in scope due to radial circuitry for building 13D.'

21. Honeywell then provided details of this omission defence, valuing it in the sum of £36,578.95.

22. In its Response Quartzelec responded to section 7 as follows:

'7. Again Honeywell seek to extend the jurisdiction of the Adjudicator by introducing items that are not contained within the scope of the dispute that has been referred, furthermore and due to Honeywell's failure to provide an appropriate withholding notice in detailing the issue's of contention, Quartzelec aver to any prior discussion in respect of this item (sic).

In re quoting our previous statement, it is clear that the Adjudicator's jurisdiction is confined to within the limits of the dispute referred in the Notice of Adjudication, and in reasserting the case law quoted by Honeywell [KNS v. Sindall]

There is no agreement from Quartzelec to extend the Adjudicator's jurisdiction to include the matters raised in section 7 of Honeywell's Response.

7.1.
Quartzelec do not consent to the adjudicator determining his own jurisdiction and reserves the right to raise these challenges in due course.

7.2.

Quartzelec aver that the Adjudicator's decision is limited to those matters correctly referred to in the notice and as provided by those matters raised in section B of this document.'

The Decision

23. The adjudicator dealt with the omissions defence in paragraph 28 of his decision. What he said was as follows:

' Respondent's case

28.1. It is contended that if there is an amount due to Quartzelec in the adjudication, then Honeywell is entitled to make an abatement for an omission in the scope of the subcontract works; on the basis that the omission was notified prior to the payment notice in connection with application for payment number 15 but not given effect at that time. In support of this contention I am directed to case law.

Referring party's case

28.2. Quartzelec avers that it has not been advised of any omission or its effect on any valuation. In the event, no withholding notice has been issued. Furthermore, my attention is drawn to case law with the object of demonstrating that the introduction of the proposed abatement is out with my jurisdiction.

Decision

28.3. Whilst acknowledging the ingenuity of Honeywell's argument I fail to be persuaded by it. In my opinion and having read the relevant cases, the proposed abatement would have needed to have been in play prior to the Notice of Adjudication, rather like Quartzelec's claim for interest, for it to have been part of the dispute. While Honeywell is entitled to run any defences in contradiction of Quartzelec's various claims [2] 62, they must surely be of direct relevance to those claims. For example, the reason that 100% payment has not been made is because the work is not complete and/or defective hence the claimant is not entitled to the full rate. Having read paragraph 37 of PC Harrington v Multiplex I cannot appreciate how the parties' agreement to something in that contract is a statement of law. While I recognise the distinction that Honeywell is making viz its claim is in diminution of any amount found to be due as opposed to a positive request for payment, this does not necessarily admits items unrelated to the matters in dispute.

28.4. In addition, I have consulted a reference book [3] 63 for further guidance. I cannot detect any direct example of the issue under consideration and therefore have no firm basis for contradicting my own conclusion in this regard.

28.5. Furthermore, I believe that if I were to value the variation combining the disabled refuge telephones with the fire telephones, then I am opening up a revaluation of application for payment number 15 in its entirety; and if this is the case, I wonder should this not include a valuation of Quartzelec's claims for additional fire cabling. While there is an element of ambiguity in this regard, for Honeywell says at paragraph 7.5 of the Rejoinder narrative 'There is a dispute over the proper valuation of payment application 15 and that question requires the consideration of the decrease in scope submitted by Honeywell', I do not believe the intention is for me to give this a wider meaning than the scope change. As Honeywell has successfully argued that the scope change is limited to the change to radial circuitry (and the effects thereof) I cannot accept the proposition for valuing Honeywell's unrelated claim. To take Honeywell's logic further: any item connected with the Sub-Contract is open for review in the guise of an abatement and can be used in diminution of an award. I do not believe the case law supports this contention. If it were otherwise, then every respondent to adjudication, irrespective of the contents of the payment notice, could avail itself of this type of

defence rendering the basis for the referring party's decision to embark on this form of dispute resolution misconceived.'

24. Having then considered all of the arguments which he considered he was required to do in relation to the dispute referred, he ordered Honeywell to pay Quartzelec the sum of £134,708 in relation to the scope change and prolongation costs associated therewith, and he further ordered Honeywell to pay £21,815.93 in respect of costs (having made an order giving Quartzelec 80% of its costs and Honeywell 20% of its costs, and netting one off against the other). He also ordered Honeywell to pay 85% of his fees and, on the assumption that Quartzelec would have already paid his fees in full, ordered Honeywell to pay a total of £173,919.62 plus VAT properly due by 14 August 2008.

The competing arguments

25. Honeywell's arguments are that: (a) the adjudicator was wrong to decide that he did not have jurisdiction to consider the omissions defence; (b) the adjudicator was obliged to consider the omissions defence in order that he could fulfil his obligation under paragraph 20 of the Scheme to decide the matters in dispute; (c) his failure to consider the omissions defence was a significant jurisdictional error and was also a serious breach of natural justice; (d) in consequence, the decision is unenforceable; (e) it is not possible simply to deduct the value of the omissions defence from the overall amount payable under the award, because severance is not available in relation to a decision on one dispute, and in any event it is not possible to second-guess what different award the adjudicator might have made in relation to costs had he considered the omissions defence; (f) at worst, the court should only enforce the net element of the principal award (i.e. £134,708 less the value of the omissions defence).

26. Quartzelec's arguments are that: (a) the adjudicator was right to decide that he did not have jurisdiction to consider the omissions defence and, therefore, that he was right not to do so; (b) the adjudicator was also right to decide that the omissions defence could not be run in the absence of a withholding notice; (c) even if the adjudicator was not right on the withholding notice point, that was a decision on a matter within his jurisdiction which cannot be challenged in an enforcement action; (d) thus, even if the adjudicator was wrong in relation to jurisdiction, since he reached the same decision on a basis which cannot be challenged, his decision should be enforced; (e) there was no breach of natural justice; (f) in any event, the court can and should sever the decision by deducting the value of the omissions defence from the total award, alternatively by deducting the value of the omissions defence and the costs orders from the total award.

Jurisdiction

27. Quartzelec's case is that since the omissions defence was not, to adopt the adjudicator's words, in play prior to the Notice of Adjudication, and was not the subject of any withholding notice prior to that date, it formed no part of the dispute which was referred to him, which was limited to the question of what was properly due to Quartzelec in relation to the scope change.

28. Honeywell's case is that: (i) on proper analysis what was referred to the adjudicator was Quartzelec's money claim for payment in respect of the scope change under interim applications 16-19; (ii) it is well-established by authority, most recently the decision of Akenhead J. in **Cantillon v. Urvasco** [2008] EWHC 282 (TCC), that it is open to a respondent to an adjudication to raise any ground which would amount in law or in fact to a defence of the claim; (iii) Honeywell's defence that the amount properly due under each interim valuation ought to be reduced to take into account the

omissions defence was one which Honeywell was entitled to raise in defence to Quartzelec's money claim, even though it was not in play prior to the Notice of Adjudication; (iv) whether or not a withholding notice is required is irrelevant to the question of the adjudicator's jurisdiction, it was merely one issue which had to be considered by the adjudicator in deciding whether or not the defence was a good one; (v) in any event, and insofar as relevant to the instant application, a withholding notice was not required, because the omissions defence goes to the proper valuation of each interim application, rather than being a deduction from that valuation.

29. It will be helpful to refer first to paragraphs 54 and 55 of the decision of Akenhead J. in the case of **Cantillon** relied upon by Honeywell. I need not refer to the particular facts of the case, because the passage upon which reliance is placed by Mr. Brannigan is of general application.

'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 Ltd v. Sindall** [2001] 75 Con LR 71.

55. There has been a 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** [2004] EWCA Civ 1757 address how and when a dispute can arise. I draw from such cases 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 the 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 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.'

30. I respectfully agree with what is said by Akenhead J. Where the dispute referred to adjudication by a claimant is one which involves a claim to be paid money, it is difficult to see why a respondent should not be entitled to raise any defence open to him to defend himself against that claim, regardless of whether or not it was raised as a discrete ground of defence in the run-up to the adjudication, and subject to any considerations of natural justice. The adjudicator has jurisdiction to, and should, consider any such defence. That may result in him accepting or rejecting the defence, in whole or in part. It may be the case that one ground for rejecting a defence not previously raised is that it cannot properly be advanced in the absence of a withholding notice. It may be the case that another ground for rejecting a defence not previously raised is that the failure to raise it at an earlier stage is fatal to the adjudicator's assessment of the genuineness of that defence. But it does not seem to me that a decision to either such effect is a decision by the adjudicator as to his jurisdiction to consider the defence; instead it is a decision within his jurisdiction about the merits of that defence.

31. I consider, therefore, that Ms. McCredie was right to submit that if the adjudicator had considered the defence and decided, even if wrongly, that it could not succeed in the absence of a withholding notice, that would be a decision within his jurisdiction and would not be one which this court could review on an enforcement hearing. This is consistent with the judgment of Lord MacFayden in **SL Timber Systems Limited v Carillion Construction Limited** [2001] BLR 516, to which she referred me, at paragraph 23. However the corollary of that, in my judgment, is that since the adjudicator has jurisdiction to consider such defences, he ought to do so, and if he does not do so then he does not properly perform the task which he has been appointed to do. In those circumstances, he also does not in my judgment act in accordance with natural justice, because he has not heard the respondent on all of the defences which he seeks and is entitled to put forward.

32. Ms. McCredie submitted that in paragraph 54 of his judgment Akenhead J. was saying no more than that where a defence was properly open to a respondent, then the adjudicator ought to consider it. I do not accept this. Apart from the objection that such a reading would deprive the paragraph of any meaningful content, it is wholly inconsistent with paragraph 55, where Akenhead J. says in terms that 'it is open to any defendant to raise any defence to the claim when it is referred to adjudication or arbitration' (emphasis added).

33. I conclude, therefore, that in this case the adjudicator did make a significant jurisdictional error and that he did not act in accordance with the requirements of natural justice in refusing to consider the omissions defence. It was a defence which was open to Honeywell to advance as a defence to Quartzelec's money claim, and it should have been considered by the adjudicator on its merits. In fairness to him, the adjudicator appears to have decided not to do so at the express invitation of Quartzelec and without, it would appears, having had the advantage of Cantillon having being cited to him.

Withholding notice

34. It follows from what I have already said that whatever conclusion the adjudicator may have reached in relation to the need for a withholding notice was not relevant to his decision in relation to his jurisdiction.

35. However I must also consider Ms. McCredie's fallback argument, which is that since according to her the adjudicator did decide in Quartzelec's favour on the withholding notice point, and since this

was a decision which he had jurisdiction to make, his decision can be enforced on this basis alone, so that his jurisdictional error and his failure to act fairly may in effect properly be ignored.

36. The difficulty with this submission, as Mr. Brannigan observed in his oral submissions, is that it cannot withstand a proper reading of paragraph 28 of the decision itself. Although the adjudicator recorded in paragraph 28.2 of his decision that the withholding notice point was being taken by Quartzelec, it is quite clear in my judgment from his decision that he did not purport to deal with or decide the withholding notice point separate or independent from the jurisdiction point. Ms. McCredie submitted that he dealt with the withholding notice point in paragraphs 28.3 and 28.4 and went on to deal separately with the jurisdiction point in paragraph 28.5. In my judgment it is impossible to read paragraph 28.3 as anything other than a decision on jurisdiction. The reference to the need for the proposed abatement to have been in play prior to the Notice of Adjudication to have been 'part of the dispute' shows unequivocally, in my judgment, that the adjudicator was dealing with jurisdiction in this paragraph.

37. It follows that it is not necessary for me to decide what would have been the effect of the adjudicator having reached a decision on the alternative bases of lack of jurisdiction and absence of a withholding notice, because that is not what happened in this case. I can see that there could be room for argument as to the effect of the adjudicator purporting to decide he had no jurisdiction to deal with a point, but then going on to decide it anyway, and I consider that this point is something which should be addressed as and when it actually arises for decision.

38. It is also strictly unnecessary for me to consider whether or not Honeywell was obliged to serve a withholding notice in order to rely on the omissions defence. However, because the point was argued, it may be helpful for me to indicate that had I needed to decide the point I would have held that it was not necessary for a withholding notice to be served. My reasons, in brief, are that: (i) on a true analysis the dispute referred was a dispute about whether or not Quartzelec was entitled to further payment under its interim applications, albeit one which it had limited to its claim in respect of the scope change; (ii) under the contract, Honeywell was perfectly entitled to bring into account at the interim application stage any savings attributable to a variation omitting part of the works, and that this would have been part and parcel of the valuation process; (iii) even though Honeywell had not sought to bring the omissions defence into account this in respect of any of the interim applications in respect of which Quartzelec had referred the dispute to adjudication, it does not follow in my judgment that in order to raise the omissions defence in the adjudication it was necessary for Honeywell to have issued a withholding notice; (iv) that is because if the contract does not on proper analysis require a withholding notice to be served in order to include savings due to an omission in an interim valuation, it cannot be necessary in my judgment for the employer to have to serve one to be entitled to raise the defence in any subsequent adjudication where the question of what the contractor is entitled to be paid under that interim valuation is in issue. In my judgment this is consistent with the observations of Christopher Clarke J. in **PC Harington Contractors v. Multiplex Construction** [2007] EWHC 2833 (TCC) at paragraph 37 of his judgment, to which it appears (from paragraph 28.3 of his decision) that the adjudicator was referred.

Severance

39. Ms. McCredie submitted very forcefully that not to permit the offending element of the decision to be severed in this case would produce a result which would be both wrong in principle and unjust. However in making this submission she had to face the difficulty that in **Cantillon** Akenhead J. had

conducted an extremely careful review of the authorities and learning on this area of the law, and had then concluded (paragraph 63(f)) that:

‘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.’

40. McCredie did not seek to persuade me that this conclusion was wrong, and with respect to Akenhead J. I am quite satisfied that it is correct. She did however submit that in a case such as this where, on analysis, the referring party submits a claim to adjudication, and the responding party advances a discrete ground of defence, there is in fact or in effect in substance more than one dispute in play, so that the offending part may be severed. In making that submission she based herself on paragraph 63(a) of the decision in **Cantillon**, where Akenhead J. said:

‘(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.’

41. However, as Mr. Brannigan observed in his oral submissions in response, it is difficult to read that passage, set in its proper context, as providing any support for a submission that in a case such as this where there is more than one issue in play (i.e. the claim advanced by the referring party and a the discrete defence raised by the responding party), there is more than one dispute before the adjudicator. It is clear from the judgment as a whole that Akenhead J., unsurprisingly, had well in mind the distinction between a dispute, which of course founds the adjudicator’s jurisdiction and beyond which he cannot go unless the contract permits or the parties agree to him deciding more than one dispute, and the various issues which need to be resolved as part of the process of deciding that dispute.

42. I agree that it may at first impression appear unfair that Honeywell, who vigorously disputed that it was liable to pay anything, and who in the result the adjudicator decided was liable to pay a principal sum of approximately £135,000 together with substantial costs, should be able to avoid any liability to pay anything because the adjudicator failed to consider a defence which at best was worth approximately £36,500. However, there are a number of answers to this, as it seems to me:

(1) The first is that since adjudication is intended to be a speedy interim procedure, with the default provision being no entitlement to costs, it ought not in normal circumstances to lead to substantial delay or additional cost for someone such as the claimant to have to make a new referral in order to obtain an enforceable decision. That may particularly be so if the reason why the first adjudicator’s decision is unenforceable is not such as to prevent him from being selected to adjudicate the new referral.

(2) The second is, as Mr. Barannigan observed, that in many cases it is very difficult if not impossible for the court to be completely confident that the adjudicator’s decision on the other issues which at first blush appear to be discrete might not have been affected had he properly dealt with the offending issue. I can see that in this case it may be said that it is extremely unlikely that the adjudicator’s decision on the other issues would have been affected by whatever decision he might have made on the omissions defence, had he dealt with it. However, that does not invalidate the general principle. Indeed, even in this case it is possible to conceive that evidence adduced in relation to that issue might affect the decision on the other issues, especially if it went to the adjudicator’s overall assessment of the credibility of the evidence put forward by one or both of the parties. Moreover, as

Ms. McCredie recognised in argument, it is almost impossible in a case like this to be sure what the adjudicator would have done about costs had he considered the omissions defence and found in Honeywell's favour on the point.

(3) The third is that where a party such as Quartzelec decides, wrongly as it transpires in my judgment, to encourage the adjudicator to decline to consider a defence on jurisdictional grounds, then it cannot complain if as a result it loses the benefit of the whole decision.

Conclusion

43. In my judgment, therefore, the consequence of the material error of jurisdiction and the breach of natural justice is that the decision in its entirety is not enforceable, and the application for summary judgment must therefore fail.

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[1] In fact it is headed application number 15, and generally there appears to be some confusion as between application numbers, but nothing turns on this.

[2] 62 William Verry v Furlong Homes [2005] EWHC 138 (TCC)

[3] 63 Chapter 10, Construction Adjudication by HHJ Peter Coulson QC.