Neutral Citation Number: [2009] EWHC 127 (TCC)

Case No: HT-08-183

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 31 January 2009

Before:

MR JUSTICE AKENHEAD

- -

Between:

YCMS LIMITED (trading as Young Construction Management Services)

Cla

- and -

(1) STEPHEN GRABINER

(2) MIRIAM GRABINER

Defen

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Gaynor Chambers (instructed by **Colman Coyle LLP**) for the **Claimant**

Riaz Hussain (instructed by **Greenwoods**) for the **Defendants**

Hearing dates: 16 and 31 January 2009

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JUDGMENT

MR JUSTICE AKENHEAD:

Introduction

1.
YCMS Limited ("YCMS"), the Claimant, applies for summary judgment to enforce the Decision of an Adjudicator, that Decision being dated 27 October 2007, issued on 29 October 2007 but collected on 31 October 2007. Issues are raised as to the jurisdiction of the Adjudicator, whether the Adjudicator was entitled to revise his Decision, whether the revision should have been made without giving the Defendants the opportunity of being heard, whether a Second Award effectively duplicated the decision in the First Award and whether the Defendants can set off sums awarded in their favour under a Third Award.

The history

2.
YCMS is a construction company. Mr and Mrs Grabiner, the Defendants, are the owners of Heath House, Turner Drive, London NW11 ("the Property"); this was their residence.

3.
By abuilding contract in writing which incorporated the JCT Intermediate Form (including all amendments up to and including 2005), the Defendants employed YCMS to carry out extensive works at the Property. The Defendants' Architect was Graham Wright. The original contract sum was £380,026.50. The commencement date was 27 February 2006 and the contractual completion date 10 September 2006.

4.
It is clear that substantial variations were ordered which, on any account, involved the contract sum being increased to something over £1 million.

5.
Interim (money) Certificates were issued by the Architect on a regular basis. Thus, on 26 April 2007, the Architect issued his Interim Certificate No. 12 which identified a gross value of work executed as £1,063,481.44, leaving after a deduction for retention of 2½% a net gross sum of £1,036,885.03. Allowing for sums previously certified (£889,939.83), a total due on this Certificate, exclusive of VAT was £146,955.20.

6.
On 12 June 2007, Certificate No. 13 was issued. In the court papers there are two versions, both signed by the Architect. One is entitled "Draft" and identifies a gross sum after retention of £1,087,879.17 and certifies as due, exclusive of VAT, the sum of £50,984.14. The other version identifies a sum of £1,086,908.17 (after retention) and identifies a total due exclusive of VAT of £50,013.14. Certificate No. 13 was not paid by the Defendants. A dispute arose as to whether or not either sum was payable to YCMS pursuant to Certificate No. 13 and also as to whether there was any justification for withholding earlier sums certified as due and VAT sums .

7.
YCMS decided to refer this dispute to adjudication pursuant to the contractual adjudication clause in the contract. Mr David Watkins was appointed as Adjudicator. There is no suggestion that his appointment was invalid or that there was not a comprehensible dispute between the Parties relating to Certificate No. 13 or the other alleged non-payments.

The Adjudication

8.
The Notice of Adjudication and the Referral Notice are materially in identical terms. The Referral Notice was dated and served on 17 September 2007. At that stage, the money dispute related not only to Certificate No. 13. Inclusive of VAT, a sum of £59,906.36 was said to be outstanding on Certificate No. 13. However, there was said to be a further sum or sums outstanding as unpaid on earlier certificates. The total amount certified was said to be (inclusive of VAT) £1,244,192.37 which left a balance after allowing for amounts paid of £1,111,613.66, a gross amount said to be unpaid of £132,578.70. Thus, a sum of £72,672.36 was said to be outstanding in respect of earlier certificates.

9.
Part of the referred dispute related to when practical completion was achieved and another part related to whether and if so to what extent the YCMS remained liable for defects under the defects liability clause in the Contract. Little if anything turns on these two aspects of the dispute.

10.

Before the Defendants submitted their Response in the adjudication (served at least in draft on 8 October 2007), they paid to the Claimants £72,672.36 on 24 September 2007. This was clearly intended to relate to the sums said to have been outstanding in relation to certificates prior to Certificate No. 13.

11.
On 13 September 2007, YCMS had submitted their Valuation No. 14 to the Architect in the total sum of £1,318,030.11. On 2 October 2007, YCMS wrote to the Adjudicator (copied to the Defendants) referring to this Valuation No 14 and saying:

“We note that our Notice and Referral does not deal with the final account but only to specific items.

That said if there is the possibility that parties can mutually agree to extend your jurisdiction and if you have such suggestions then it will be appropriate that we be made aware of these and have time to consider these.”

12.
The Adjudicator responded on the same day referring to Valuation No. 14:

“I refer to YCMS faxed letter to me this evening together with Valuation No. 14 which, for the present, I will designate the draft Final Account.

As YCMS have appreciated I realised on re-reading the Notice and Referral that the direction to be issued with the draft Final Account, contained within my letter to the Parties of 25 September 2007, exceeded my jurisdiction.

I therefore now invite both Parties to mutually agree to extend my jurisdiction to consider and decide on the Final Account which, given the current circumstances, I suggest excludes any additional works which are yet to be instructed.

I note that I received the Referral on the19th September 2007 and therefore without YCMS granting an extension of time I am required, at present, to publish my Decision by no later than the 17th October 2007. However, time has been lost in the proceedings, with beneficial results, and as a consequence I now propose that YCMS agree to the date being extended to the 29th October 2007.”

He called for an early response.

13.
On 4 October 2007, YCMS wrote to the Defendants (copied to the Adjudicator) in the following terms:

“Further to your/Abacus suggestion of extending the jurisdiction of the Adjudicator to deal with the Valuation No. 14 we note that the Adjudicator is prepared to accept such a suggestion.

We request that you put forward a draft of agreement dealing with the extension to jurisdiction and the new timetable that needs to be agreed as a result of this.

Finally, I think it is best that this is agreed between the Parties and then put forward to the Adjudicator.”

Abacus was a claims consultant retained by the Defendants in relation to the adjudication.

14.

On 4 October 2007, Abacus responded on behalf of the Defendants to the suggestion contained in the Adjudicator's letter of 2 October 2007 in the following terms:

"We have now received instructions from Mr and Mrs Grabiner with regards to the proposition contained within your facsimile transmission of 2 October 2007 that the Parties mutually agree to extend your jurisdiction to consider and decide upon the Final Accounts. Mr and Mrs Grabiner do not agree to such an extension of your jurisdiction."

15.
On 5 October 2007, Abacus wrote to YCMS in response to the latter's letter of 4 October 2007 in the following terms:

"… We have discussed, with our Clients, the Adjudicator's proposal to extend their jurisdiction to take into account the valuation of the Final Account and/or Valuation 14. Mr and Mrs Grabiner were not particularly happy with this idea and therefore instructed us to reject the proposal, which was done. A few minutes after our fax was sent to the Adjudicator the writer was made aware of your facsimile transmission. Your fax implies that you think there is some merit in such an extension of the Adjudicator's jurisdiction …"

16.
The Adjudicator wrote to the Parties on 5 October 2007 in the following terms:

"I note and accept from Abacus's letter that the Respondent does not wish to extend my jurisdiction to appraise and decide on the Final Account …"

17.
On 9 October 2007, the Architect issued what he called Certificate No. 14. This identified a gross valuation after retention of £1,052.510.48 which was some £34,000 less than that contained in either version of Certificate No. 13. The net result was that the total due on that Certificate exclusive of VAT was said to be £15,615.45. At the foot of Certificate No. 14 the following was written:

"The Certificate preceding this one is Certificate No. 12."

18.
By this the Architect seems to have been suggesting that no or no valid and enforceable Certificate No. 13 had been issued. That net sum with VAT totalling £18,348.15 was paid at about this time and certainly before the Adjudicator's Decision was issued. Accompanying Interim Certificate No.14 was a 20-page breakdown of how the sum certified had been reached.

19.
The Defendants' Response (possibly in draft) served at about this time set out the following general Summary at Paragraph 4:

"As a general summary of our position and based on an assessment of the information available to us it is [the Defendants'] case that YCMS are not entitled to any further payments over and above those that have been made (postal strike excepted) at the time of this Response. The Adjudication notice refer[s] to Certificates 12 and 13 but these have been superseded by Certificate 14 which has been honoured by the Employer (subject only to the postal strike). Matters relating to Defects and the issue a Practical Completion Certificate have been fully dealt with by Architect, exercising his authority under the Contract by issuing correspondence dealing with the date of practical completion and the schedule of defects."

20.
The theme relating to Valuation Certificate 14 was continued at Paragraphs 18 and following:

“18. The table of payments issued by YCMS [in the Referral] is incorrect and does not deal with payments up to and including Valuation 14.

19. The Architect has received Certificate 13 as draft and seeks the express request of the Referring Party. The Referring Party cannot state that any document marked as ‘draft’ is not ‘draft’ by their wish and their wish alone …

23. Certificate 14 was issued in response to an extensive bundle of documents that was deposited at the Architect’s offices on Saturday 15 September 2007. These documents substantially clarified the issues raised in Application 13 and the issue of the draft Certificate. For avoidance of doubt and to ensure there was no confusion the revised Certificate has been referred to as ‘Certificate 14’ and not Certificate 13 (formal release) as was intended …

28. The Responding Party requests that the Adjudicator accepts that Certificate 14 supersedes Certificate 13 (whether draft or otherwise) and that payment by [the Defendants] of the sums contained in Certificate 14 and in accordance with the provisions of the Contract resolves and deals with the matter of payment …”

21.
It is clear therefore that the Defendants were making the point that Certificate 13 was a draft certificate and was not itself valid and enforceable. Their defence included the assertion that Certificate 14 was enforceable and represented in effect the sum due to the YCMS.

22.
By letter dated 12 October 2007, YCMS wrote to the Adjudicator addressing amongst other things whether the Adjudicator had jurisdiction to consider Certificate No. 14 in the following terms:

“… the issue of what constitutes a dispute relies upon events leading up to that dispute. Once a dispute crystallises, its foundations are the events leading up to that dispute. The actions of parties after the issue of the Referral, for example, the making of payments does not remove the dispute. The Adjudicator still has to decide the dispute. The Adjudicator has jurisdiction (and indeed a contract) to decide the dispute referred to and decide the sums to be paid. If the Respondents make payment during the dispute and let us say for example the sums are found not to be due then I am sure you will agree with us that an adjustment would be proper. Hence it is our view that we must proceed to an award. Indeed without an award the parties would be at a loss as to how your costs are to be apportioned. Further events such as the Architect’s issue of Certificate No. 14 and the interesting suggestion that this now becomes part of the dispute would suggest that the Respondents have singularly extended your jurisdiction, something I am sure that the Respondents would like to be able to do however I think you will concur you are unable to.

The point argued by the Respondents that certificate No. 14 is part of the dispute is therefore no longer relevant. Further if consideration must be given for certificate No. 14 (which our argument is that it should be ignored) we fail to see how the Respondents can maintain that position given that they have, as demonstrated in our Referral, proposed to pay certificate. 12 and 13 in instalments.”

23.

On 17 October 2007, Abacus sent to the Adjudicator “an updated Response” together with seven appendices in support of that Response. This document in substance contained the same references to Certificate No. 14 as the earlier draft Response.

The First Adjudication Decision

24.
It is accepted that the Adjudicator had until 29 October 2008 to issue his decision. In fact his Decision is dated 27 October 2008, albeit that it was actually sent to and received by the Parties on 29 October 2008.

25.
Overall, the Adjudicator decided that the Defendants should pay YCMS:

“The balance of the sum due, certified up to and including Interim Certificate No. 14, of £25,942.74 plus the VAT which may be due on the sum certified under Interim Certificate No. 14.” (Para 7.1)

26.
At Paragraph 5.1(c) he considered each of Certificates 9 to 13 to identify what sums had been invoiced, what amounts paid together with observations as to whether and when sums not paid on early Certificates were or were not paid later. He then continues:

“(d) A further payment, on account, of £100,000 was then made which reduced the shortfall of the sum due to £132,578.70 (adopting the sum actually claimed).

(e) Since the commencement of the adjudication

Interim Certificate no 14 has been issued certifying a further sum of £15,615.45 (excl VAT).

The following further payments have been made

24th September £72,672.36

8th October £18,348.15

Total £91,020.51

(f) These further payments reduced the shortfall up to and including the total sum certified on I.C. no 14 £25,942.74 (£132,578.70 minus £106,635.96).

(g) There is no provision within the Contract for the issue of a ‘Draft’ Interim Certificate therefore the qualification attached to I.C. no 13 is invalid. …

COMMENT AND OPINION

(i) If a CA [Architect] is not in possession of all the information required to support the sum to be certified he should reduce the sum accordingly. A ‘Draft’ interim certificate cannot be issued.

(ii) If it is found the sum certified is incorrect then the proper procedure is to make the necessary adjustment in the next certificate.

(iii) Once an interim certificate is issued it triggers a number of other contractual provisions which cannot be ignored and therefore a certificate cannot be withdrawn.

(iv) It is therefore my opinion YCMS are entitled to be paid the further sum of £25,942.74.”

27.
In the Section headed “Adjudicator’s Decision”, he directed that:

“7.1 [The Defendants] pay within 7 days of the date of this decision [YCMS] the balance of the sum due, certified up to and including Interim Certificate no 14, of £25,942.74 plus the VAT which may be due on the sum certified under Interim Certificate no 14.”

28.
Upon receipt of this on the same day YCMS wrote to the Adjudicator in the following terms:

“We would like to draw your attention to page 7 items (e) and (f) specifically. We concur that the sums calculated in item (e) show £91,020.51. This figure is taken from copies of cheques received. These cheques include VAT.

In paragraph (f) you deduct the sum of £106,635.96. You have added VAT to £91,020.51. The figure of £91,020.51 includes VAT so there is no reason to add VAT again.

The correct calculation is £132,578.70 less £91,020.51 leaving the amount payable as £41,558.19 and not £25,942.74. Please could you revise your Award.

We note you refer to I.C. No. 14. We are of the opinion that this should read I.C. 13 as 14 was not part of this Adjudication and you awarded on the basis that I.C. 13 was in fact a valid certificate.

Finally we thank you for your Award and look forward to the correction of these slips.”

This letter was copied to the Defendants and Abacus.

29.
By letter dated 31 October 2007, the Adjudicator responded to the Parties as follows:

“I acknowledge receipt of YCMS’ letter to me of the 29th October 2007 in which they drew my attention [sic] a ‘slip’ made in my calculations with respect to the outstanding sum to be paid from that certified up to and including Interim Certificate no 14.

I have now rechecked my calculations and found that the sum YCMS claim and my calculations are both incorrect. Our joint confusion has arisen because payments made, on account, do not relate to either of the sums certified or the amounts which are outstanding at any point together with the issue of I.C. 14 during the proceedings.

I therefore enclose pages nos 6, 7 and 12 of my Decision which have been amended to reflect the corrections required which will be substituted into the Decision.

I apologise in this matter …”

30.
The “corrected” pages, so far as is material amended Paragraphs 5.1(c) and Paragraph 7.1 of the earlier Decision:

“5(c) I note from the Schedule that payments were made in full up to and including Interim Certificate No. 9. The position was then, and subsequently

Int. Celt.	Sum Invoked	Amount Paid	Payment Date
9	£97,718.44	£83,164.33	0401.07

		£ 14,55381	2301.07
10	£199,963.03	£199,693.33	07.0207
11	£104,663.71	£40,00000	2103.07
		£64.663.71	3004.07
12	£172,67236	£100,00000	09.0707
		£72,672.36	24.0907 (In AdjudicatonPenbd)
13	£59,90536		
14	£18,348.15	&OSJ5.	08.10 07 (In Adjudication Penbd)
Totals	£653,00205	£593,09569	

(d) The sum outstanding from Interim Certificates up to and including no 14 is therefore £59,906.36 (£653,002.05 total amount certified minus £593,095.69 total amount paid to date).

(e) There is no provision within the Contract for the issue of a 'draft' Interim Certificate therefore the qualification attached to I.C. no 13 is invalid.

...

COMMENT AND OPINION

(i) [as before]

(ii) [as before]

(iii) [as before]

(iv) It is therefore my opinion YCMS are entitled to be paid the further sum of £59,906.36 ...

7.1 Mr and Mrs Grabiner pay, within seven days of the date of this Decision, [YCMS] the balance of the sum due, certified up to an including Interim Certificate no 14, £59,906.36 (which sum includes the VAT due) ..."

31.
On 1 November 2007, Abacus wrote to the Adjudicator commenting on these paragraphs in the First Decision and the Revised First Decision. Abacus argued that there were errors in the Decision and then said:

"In our calculations and based on the principles laid down in your Adjudication Decision we do not believe that there was any money owed by [the Defendants] to YCMS up to and including the proper issue of Certificate 14 and we invite you to correct your decision accordingly.

A schedule is attached that deals with the properly certified gross value (Certificate 14) and other values relating to payment."

That schedule took the gross value of work as certified in Certificate No 14, deducted retention, added VAT and deducted the amount paid by the Defendants to YCMS leaving a balance of "NIL".

32.
The Adjudicator's reaction was contained in his letter of 2 November 2007 in which he declined further to correct his Decision, saying:

“There is precedent supported by case law, which permits an Adjudicator to correct ‘slips’ within a Decision. I took advantage of this accepted practice to adjust the incorrect calculation in my Decision.”

The Second Adjudication

33.
The sum said to be due under the First or Revised First Decision was not paid. Certificate No. 15 was issued on 9 November 2007 by the Architect which certified the same amount as Certificate No. 14.

34.
YCMS commenced a second adjudication in May 2008. The Referral identifies the two elements of the dispute which was referred:

“4.5 The first part of the Adjudication is about a dispute over the value of the preliminaries given that both the Contract Duration and Contract Sum have increased substantially. This part of the Adjudication shall be referred to as ‘Additional Preliminaries’.

4.6 The second part of the Adjudication is about items of work that have been completed on site and valued in earlier Interim Certificates then omitted in subsequent Certificates. This part shall be referred to as ‘Undervalued Works’.”

£159,062.85 was claimed for the Additional Preliminaries whilst £111,732.97 was claimed with regard to the Undervalued Works.

35.
This Adjudication seems to have been fought with vigour by the parties. The Adjudicator was Mr Watkins again. With regard to the Additional Preliminaries, he decided that YCMS were entitled to be paid £34,630.79. With regard to the Undervalued Works, he decided that £75,312.00 was due. He ordered that the Defendants pay these sums plus VAT together with part of his fee. That Decision was dated 30 June 2008.

36.
On 14 July 2008, the Defendants’ solicitors wrote to YCMS saying that a cheque in the total amount awarded pursuant to this Second Decision “could be made available tomorrow”. The letter continued:

“However, in view of:

1. The duplication between the two Adjudications (as to which, we refer you to our letter of 13 May 2008 and paragraphs F and G of the Rejoinder in the Second Adjudication), the sums awarded in the latter Adjudication quite clearly embrace the sum awarded in the former Adjudication, both being clearly expressed to be payments in excess of the gross sums certified and paid under Certification 14 – your client cannot purport to adjudicate and recover the same sum twice, and

2. The fact that your clients have issued two sets of Enforcement Proceedings.

Such payment would be in full and final settlement of the sums awarded in both Adjudications and on the basis that the Enforcement Proceedings are brought to an end by withdrawal, discontinuance, stay or other appropriate procedural mechanism …

The principal reason that the offer is expressed in this way is that your clients cannot adjudicate the same matters twice and for that reason your clients cannot seek enforcement of both Awards. Indeed, in the event that the offer is not accepted, our clients reserve their position to argue that because of

that fact neither Adjudication Award is properly enforceable to oppose enforcement of both sets of proceedings on that basis …"

37.
This offer was not accepted as such by YCMS. Notwithstanding, the Defendants paid the sum directed to be due pursuant to this Second Decision.

The Third Adjudication

38.
A further dispute arose between the parties which was described by the Adjudicator in the Third Adjudication (Mr J Smalley) as follows:

"… the essence of [the dispute] was the value to be included in the Final Certificate as the adjusted Contract Sum."

In this Adjudication the Defendants were the Referring Party. Essentially the argument was that the Final Certificate valuation was such that there had been an over-payment.

39.
In the Third Adjudication there was a challenge to the jurisdiction of the Adjudicator relating to whether or not any material dispute had crystallised. I was not addressed about the substance of the jurisdictional challenge.

40.
The Decision was summarised in Paragraph 11.01 of the Decision dated 7 January 2009:

"My decisions on redress are tailored to that requested in the Referral … I order, direct and declare as follows:-

.1 The Final Account in total of the adjusted Contract Sum is £1,144,562.36 … This sum excludes VAT.

.2 The Responding Party shall pay to the Referring Party under IFC 98 clause 4.6.1.3 the sum of £17,890.74, being the balance due to the Referring Party … This Sum excludes VAT. The payment is to be made within 28 days of the date of my Decision – reflecting the payment period prescribed by clause 4.6.1.3.

.3 The Court has not, at the date of my Decision, ordered enforcement of the First Award (in Adjudication 1), and there is therefore no requirement for me to consider the effects of those proceedings on my Decision…

.5 I … apportion my entire fee to the Responding Party. I direct the Responding Party to reimburse the Referring Party for the payment that the Referring Party is making against my interim/final invoice. The payment to be made is £8,238.75 plus VAT. The payment shall be made by the Responding Party within seven days of me confirming that I have received payment for my fee from the Referring Party …"

41.
On 8 January 2009, the Adjudicator, Mr Smalley confirmed to the Parties that he had received the Defendants' cheque for £9,680.53 and therefore indicated that the payment by YCMS of his fees was to be made by no later than 15 January 2009. These sums have not been paid by YCMS and indeed the sum of £17,890.74 is not yet due for payment.

These Proceedings

42.
YCMS issued proceedings on 3 July 2008 seeking recovery of £59,906.36 plus interest in relation to the First Decision (as Revised). I was told that the reason for the delay in bringing matters on in relation to any summary judgment application was attributable to the Parties' attempts to resolve their issues.

43.
The Particulars of Claim claim in the alternative, if the Adjudicator was not empowered to "rectify" his Decision, the sum directed to be paid in the First (unrevised) Decision.

The Issues

44.
The Defendants oppose enforcement on four grounds:

(a) It is said that the First Award was made outside the Adjudicator's jurisdiction because the Adjudicator purported to award the sum due under Interim Certificates up to and including Certificate 14 (which had been issued after the Adjudication Notice and after the Parties expressly declined to extend the Adjudicator's jurisdiction to include an award of sums due under Certificate14).

(b) It is argued that the purported revision of the First Award was not valid.

(c) If the First Award (in its revised or unrevised state) is enforceable it is said that it is duplicated by the Second Award and because the Second Award was paid, in effect YCMS will be paid twice if anything is allowed to them pursuant to the First Award.

(d) The Defendants should be permitted to set off the sums awarded to them under the Third Decision.

The Law

45.
There is little authority of relevance so far as the first jurisdictional issue is concerned. What can properly be said is as follows:

(a) It is necessary to analyse with some care what has been referred to adjudication; put another way analysis needs to be done as to what the dispute is that has crystallised and has been referred to adjudication.

(b) It is open to the defending party in adjudication to put forward a defence which has not been raised before. There is nothing in the Housing Grants Construction and Regeneration Act 1996 ("HGCRA") which prevents a defendant from raising any defence. It may of course be that the defence raised is decided by the Adjudicator to be unarguable either in law or on the facts but that does not mean that the defendant should or can be barred from raising any such defence.

46.
I now turn to the authorities which address the issue of when and in what circumstances and subject to what restrictions an Adjudicator may revise his Decision. The first case was a decision of HHJ Toulmin CMG QC in **Bloor Construction (UK) Ltd v Bowmer and Kirkland (London) Ltd** [2000] BLR 314. That was a case where an Adjudicator amended his Decision within two and a half hours because his First Decision had failed to include payments on account already made. The learned judge

decided that a term should be implied into the contract referring the dispute to adjudication that the adjudicator might correct an error arising from an accidental error or omission. At page 319 he said:

“It is clear that the error in this case falls into the category of the slip. [The Adjudicator] was giving effect to his first thoughts and intentions in his amended ruling. In my view, in the absence of any specific agreement to the contrary, a term can and should be implied into the contract referring the dispute to adjudication, that the adjudicator may, on his own initiative or on the application of a party, correct an error arising from an accidental error or omission. The purpose of the adjudication is to enable broad justice to be done between the parties. Parties acting in good faith will be bound to agree at the start of the adjudication that the adjudicator could correct an obvious mistake of the sort which he made in this case.

Clearly, there must be a time limit within which such an amendment can be made, but in this case the amendment was made within three hours of the communication of the original decision. This must in the circumstances of this case be within any acceptable time limit. I bear in mind that both parties agree that the revised decision corrected a manifest error and that there is no suggestion that Bloor was prejudiced by the amendment.

I note that the time limits under section 57(3) of the Arbitration Act 1996 stipulate a period of 28 days within which any application for the correction of an arbitrator’s award must be made. I am not prepared to say that such a long time limit is necessarily appropriate for an adjudication.

An additional reason for holding that the slip rule applies is the lack of ability of the High Court to correct obvious errors in adjudication except in very restricted circumstances, even where such errors cause manifest injustice.”

The Judge went on to say:

“The primary reason for my decision is that, in the absence of a specific agreement by the parties to the contrary, there is to be implied into the agreement for adjudication the power of the adjudicator to correct an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision which he has reached, provided this is done within a reasonable time and without prejudicing the other party …”

47.
The contract was in the JCT Standard Form 1980 edition which called upon the Adjudicator “within 28 days of his receipt of the referral … to … reach his decision …”

48.
The same judge returned to the adjudication “slip rule” (as I shall call it) in **CIB Properties Ltd v Birse Construction** [2005] BLR 173, in particular at paragraphs 33 to 35:

“33. I conclude, therefore, that the law before this case is that in relation to a slip or alleged slip there are two questions: (1) is the Adjudicator prepared to acknowledge that he has made a mistake and correct it? (2) is the mistake a genuine slip which failed to give effect to his first thoughts? If the answer to both questions is ‘Yes’ then, subject to the important question of the time within which the correction is made and questions of prejudice, the court if the justice of the case so requires give effect to the amendment to rectify the slip.

34. Having considered the matter again, I adhere to my decision in Bloor. It found some limited support from Dyson J in Ed McNuttall v Sevenoaks District Council [decided 14April 2000] a few days after Bloor when he concluded in relation to the decision in Bloor:

'In my view, putting the matter at its lowest, it is at least arguable that it is right.'

35. The decision in Bloor is, however, of very limited and narrow application …"

49.
In the **CIB Properties** and in the **Bloor**cases, HHJ Toulmin CMG QC referred to and relied upon Sir John Donaldson's analysis of what amounted to a slip under old court rules in the case of **R v Cripps ex parte Muldoon** [1984] QB 686:

"It is a distinction between having second thoughts and intentions and correcting an award to give effect to first thoughts or intentions which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assesses the evidence wrongly or misappreciates the law the resulting award or judgment will be erroneous but it cannot be corrected under section 17 (of the Arbitration Act 1950) or under the old Order 20 Rule 11. It cannot normally be corrected under section 22 (where the arbitrator has made a mistake). The remedy is to appeal if the right of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip but this is a natural form of self-exculpation."

The learned judge also quoted with approval the commentary in Mustill & Boyd on Commercial Arbitration at page 406:

"This [the Arbitration Act 1996] enables the arbitrator to make an award on a claim which he has inadvertently overlooked such as an award of interest or to correct errors of accounting or arithmetic such as attributing a credit item to the wrong party but the section does not give the arbitrator licence to give effect to second thoughts on a matter on which he has made a conscious judgment.'

50.
So far as the adjudication "slip rule" is concerned, the following can be said:

(a) An adjudicator can only revise a decision if it is an implied term of the contract by which adjudication is permitted to take place that permits it. It does not follow that, if it is purely a statutory arbitration under the HGCRA (if there is no contractual adjudication clause), such implication can be said to arise statutorily.

(b) If there is such an implied term, it can and will only relate to "patent errors". A patent error can certainly include the wrong transposition of names or the failing to give credit for sums found to have been paid or simple arithmetical errors.

(c) The slip rule cannot be used to enable an adjudicator who has had second thoughts and intentions to correct an award. Thus for example, if an adjudicator decides that the law is that there is no equitable right of set off but then changes his mind having read some cases feeling that he has got that wrong, such a change would not be permitted because that would be having second thoughts.

(d) The time for revising a decision by way of the slip rule will be what is reasonable in all the circumstances. In the **Bloor** case, the Adjudicator revised his decision within several hours and before the time for issuing a decision had been given. It will be an exceptional and rare case in which the revision can be made more than a few days after the decision. The reason for this is that, unlike a court judgment or an arbitration award, a principal purpose of the 1996 Act is to facilitate cash flow. If

an adjudicator was able to revise his decision, say, 21 or 28 days later that would necessarily slow down and interfere with the speedy enforcement of adjudicators' decisions. That would in broad terms be contrary to the policy of the Act.

51.
So far as the possibility of setting off one adjudicator's decision against another, this was considered by Jackson J (as he then was) in **Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd**[2006] EWHC 741 (TCC). Having reviewed the authorities, he said at paragraph 43:

"… Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues. I reach this conclusion both from the express terms of the Act, and also from the line of authority referred to earlier in this judgment."

Discussion

52.
I turn first to the issue of whether the Adjudicator in the First Adjudication exceeded his jurisdiction by purporting, so it is argued, to find sums due pursuant to Certificate No. 14. One first analyses what was the dispute referred to adjudication by YCMS. That is clear from the Referral (set out in part earlier in this judgment): essentially the disputed claim was for sums including VAT which had been certified but remained unpaid by mid-September 2007. As a matter of fact, it is clear that this included the sum certified pursuant to Certificate No. 13 (£59,906.36) together with £72,672.36 certified and unpaid on what on analysis appears to have been Certificate No. 12. Thus, Certificate No. 14 (which had not been issued before the First Adjudication commenced) can not, as such, have been in issue or part of the crystallised dispute referred by YCMS to this adjudication.

53.
However, the Defendants, for better or for worse, ran the defence in the First Adjudication that Certificate No. 13 was not a valid or effective certificate at all and that Certificate No. 14 properly and accurately represented the maximum which was due to YCMS; effectively, they wanted it taken into account, including the fact that the money certified by it was paid. It was thus the Defendants who brought into the arena of the First Adjudication Certificate No. 14. It was a wholly arguable defence and might even have succeeded before another adjudicator. The Adjudicator in the First Adjudication was bound to have regard to this defence and, in effect, adjudicate upon it. He took the view that Certificate No. 13 was a wholly valid certificate which should have been paid.

54.
When considering adjudicators' decisions, one needs to bear in mind that, adjudicators are not always lawyers. Many decisions do not read as if they were drafted by an experienced Chancery practitioner. The fact that the Adjudicator in the First (Unrevised) Decision refers in Paragraph 5.1 to the fact that Certificate No. 14 had been issued was simply an (apparently correct) factual observation which was material to determining how much had been paid by the Defendants at the time that the Decision was to be issued. I do not consider that that reference can begin to undermine the jurisdictional basis on which he issued his Decision.

55.

The Adjudicator's reference in Paragraph 7.1 to the "balance of the sum due, certified up to and including Interim Certificate No. 14, of £25,942.74 plus the VAT", does not on analysis suggest that he was deciding as such that money was due pursuant to Interim Certificate No. 14. The body of the Decision makes it clear that Certificate No. 14 had been paid during the period of the Adjudication. This directive part of the Decision simply allows for the fact that the Certificate No. 14 defence has been run and that the sum due and paid pursuant to it (which in gross terms was significantly less than had been certified in Certificate No. 14) had, wholly properly, been taken into account. It follows that I do not consider that this (Unrevised) Decision was outside the Adjudicator's jurisdiction.

56.
For similar reasons, on a jurisdictional basis, I do not consider that the revised paragraphs of the First Decision can be challenged on jurisdictional grounds. In Paragraph 5.1(c) the Adjudicator simply refers to the fact that during the course of the adjudication £18,348.15 was paid pursuant to the very Certificate No. 14 which the Defendants themselves had put up in the adjudication by way of defence. The Adjudicator was in a potentially difficult position. If he did not mention Interim Certificate No. 14 at all, he might, with some justification, have been criticised by the Defendants for not addressing one of their defences.

57.
The next issue relates to whether the Adjudicator was entitled to revise the First Decision. I have formed the view that the Adjudicator was not entitled in all the circumstances to revise the First Decision as he did:

(a) It is clear that in the First Decision (Unrevised) the Adjudicator made an inexplicable arithmetical error. Having decided at Paragraph 5.1(d) that the sum due was £132,578.70 and at Paragraph 5.1(e) that £91,020.51 had been paid, he then deducted £106,635.96 (for some unaccountable reason) from the sum due to leave a balance of £25,942.74. Applying his logic, the sum which he should have found due was £132,578.70 less £91,020.51, namely a balance of £41,558.19 (which is exactly the figure which YCMS said in its letter of 29 October 2007 to the Adjudicator was the correct figure).

(b) If the Adjudicator had revised his Decision to produce this figure £41,558.19, the correction (subject to time) would have fallen within the ambit of the adjudication slip rule and its legitimate application.

(c) However, what the Adjudicator seems to have done in his revision was to decide that the net sum certified in Certificate No. 14 should be taken into account both in terms of a gross sum due as well as a sum paid. This was in effect another and a serious error for the Adjudicator to make because he overlooked the fact that Certificates 13 and 14 effectively and necessarily duplicated themselves because Certificate No. 14 was for a lesser sum than that certified in Certificate No. 13. Put another way, by allowing £18,348.15 in the sum invoiced and due column for Certificate No. 14, he was necessarily duplicating what was in the same column for Certificate No.13, because Certificate No 13 was overall for a greater sum than Certificate No.14. Thus, arithmetically if one takes the sum certified in Certificate No. 14 both in the sum invoiced and sum paid column whilst also allowing the gross sum certified as due in Certificate No. 13, the sum due on those figures is bound to be overstated by the amount certified as due in Certificate No. 14.

(d) I must conclude that the Adjudicator thought carefully about the changes which he introduced arithmetically. He had been pointed clearly by YCMS to the arithmetical error. He decided (and it was clearly in my judgment second thoughts) that he needed to bring in the sum due and sum paid on Certificate No. 14. He thus rejected any correction of a simple arithmetical error (which would have

produced a total due to YCMS of some £41,000) in favour of a further calculation, the logic of which must be known only to the Adjudicator.

(e) In the ordinary course of events the operation of the slip rule does not result in any prejudice to either party because the Tribunal is simply putting right a mistake which it has made which it would not otherwise have made. Here, the Defendants are materially prejudiced by the amendment because the Adjudicator simply got it wrong the second time round.

58.
Ms Chambers on behalf of the Claimant has sought to argue that arithmetically, bar a few pence, the Adjudicator got the figures, eventually, right. But her calculations were predicated upon the basis that one did not take into account the sum paid on 8 October 2007 in relation to Certificate No. 14. On that basis, her calculations are not correct.

59.
An ancillary issue was raised by Mr Hussain on behalf of the Defendants that because the Adjudicator did not give his clients the opportunity to be heard on the possible correction there was a material breach of the rules of natural justice. If I had had to decide that, I would not have decided that there was any such material breach. The correct operation of the slip rule involves an adjudicator putting right his or her own slip. It will not usually be necessary for the parties to be heard.

60.
If I had decided that the Adjudicator had been seeking to correct a genuine slip, I would have held that the revision was made within a reasonable time in all the circumstances. It was issued within two days of the publication of his First Decision and reasonably promptly after a possible error had been pointed out to him by YCMS. A “slip” will usually (as here) be something which can relatively simply and speedily be put right and a period of 48 hours cannot in my judgment be said to be excessive. I am supported in that view by the very fact that the Defendants’ agents Abacus a day later were asking for corrections to the Decision which presumably they believed were capable of correction within a short period after 1 November 2007.

61.
I now turn to the question of the Second Decision. The problem for the Defendants is that they paid the sum decided to be due by the Second Decision, ultimately, without demur and without the benefit of the sort of settlement which they had been seeking in their letter of 14 July 2008 (set out above). It was paid out at a time when the Defendants had not paid out the sum decided to be due by the First Decision.

62.
On analysis, the Defendants’ argument is predicated upon the fact that the sum of £75,312 plus VAT ordered to be and actually paid by the Defendants necessarily duplicates the sum of £25,942.74 certified within Certificate No. 13. I do not consider that the Defendants have begun to establish an arguable case on the facts to support that. They would need to have done an exercise which compared precisely what was covered by the sum decided to be due in the Second Decision (£75,312) with what had been certified in Certificate No. 13 (and possibly Certificate No. 14). They chose not to exhibit the Scott Schedule forming Appendix B to the Second Decision which set out the Adjudicator’s Findings and Opinion with respect to each item which made up the sum of £75,312 which he decided was due. There is no such analysis in any of the witness statements put in by the Defendants. Accordingly there is no realistically arguable defence in this regard.

63.
Finally, I turn to the Third Decision. These Courts have from 1998 onwards taken the view that Adjudicators' Decisions are to be enforced summarily and expeditiously unless there is a valid jurisdictional or natural justice ground which renders enforcement inappropriate. There is, perhaps unfortunately, nothing in the HGCRA which legislates for setting off one adjudicator's decision against another. It is in those circumstances that the dictum of Jackson J in the **Interserve**case is so apposite. It is not accepted by YCMS that the Third Decision is enforceable. Because the decision has only relatively recently been issued, YCMS reserve their position so far as enforceability is concerned. It took a jurisdictional objection during the Third Adjudication and it may seek to rely on that in any enforcement proceedings in relation to the Third Decision.

64.
It follows from my views above that YCMS have established that the First Decision should be enforced. I see no good reason to depart from the approach adumbrated by Jackson J in the **Interserve** case. I do not consider that the fact that a Third Decision has been reached which on its face allows to the Defendants a net recovery is a special circumstance which justifies departing from the general rule that valid adjudicators' decisions should be enforced promptly. Things might be different if there were effectively simultaneous adjudications and decisions. There is no suggestion that YCMS or the Defendants are in financial difficulties and will not be able to pay the sums said to be due on the First Decision or said to be due the other way on the Third Decision. There is no prejudice to the Defendants in having to honour the First Decision, which should have been honoured some 14 months ago, albeit I accept it was not the Defendants' fault as such that proceedings for enforcement were delayed against them.

The VAT Issue

65.
The Adjudicator directed in his First (and unrevised) Decision that the Defendants should pay "£25,942.74 plus the VAT which may be due on the sum certified under Interim Certificate no 14". This seems to have been another mistake by the Adjudicator because the VAT on Interim Certificate No.14 had been paid. It is difficult to see what he had in mind. However, the dispute between the parties undoubtedly included whether and if so to what extent YCMS was entitled to VAT on the certified sums which it claimed.

66.
YCMS argue that it is entitled to VAT as a matter of course because, once the Adjudicator decided in the First (unrevised) Decision that a sum was due for work done, the full 17.5% then due as VAT was recoverable under the building contract. The Defendants argue otherwise to the effect that the Adjudicator adjudicated upon the VAT and rightly or even wrongly (as in this case) his decision on what VAT is recoverable is binding.

67.
I have formed the view that the Defendants are right. Binding adjudicators' decisions are to be enforced, even if the adjudicator is wrong on the facts or the law, because the contract or the HGCRA makes the decisions binding until and unless the final dispute resolution process (arbitration or the Court) decides other wise. Here, the Adjudicator for no good logical reason decided that VAT was due in respect of the sum found to be due (£25,942.74) in effect only up to the amount due in respect of Certificate No.14. (£15,615.45). 17.5% of £25,942.45 is £4,539.98 whilst that for the lower sum is £2,732.70. Therefore the lower sum is due for VAT.

68.

There will be summary judgment for YCMS in the sum of £28,675.44 (inclusive of VAT). I will hear the Parties on the question of interest and costs.