Neutral Citation Number: [2009] EWHC 2890 (TCC)

Case No: HT-09-402

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17 November 2009

Before :

THE HONOURABLE MR JUSTICE AKENHEAD

- -

Between :

ALLIED P & L LIMITED **Cla**

- and -

PARADIGM HOUSING GROUP LIMITED **Defe**

- -

- -

Calum Lamont (instructed by **Davies Arnold Cooper**) for the **Claimant**

Christopher Camp (instructed by **Owen White**) for the **Defendant**

Hearing date: 5 November 2009

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JUDGMENT

Mr Justice Akenhead:

Introduction

1.
This case raises issues arising out of an adjudicator’s decision, in particular whether there was a crystallised dispute and if so what it encompassed, whether any part of the adjudicator’s decision can be enforced or severed and whether any effective reservation was made as to the jurisdiction of the adjudicator during or before the adjudication.

The factual background

2.
Allied P & L Limited (“Allied”) is a building contractor which was engaged in about May 1997 by Paradigm Housing Group Ltd (“Paradigm”) to construct some 40 dwellings and other works at 95, London Road, Bishop's Stortford, Hertfordshire. The construction contract provided for interim payments based upon a monthly "Notice of Payment" issued by the Employer’s Agent repayment to be made within 15 Working Days thereafter. Subject to any entitlement to extension of time, it seems that Allied was obliged to complete the work by 15 April 2008.

3.

Clause 10.1 of the contract addressed determination:

“Without prejudice to any other rights or remedies which the Employer may possess if the Contractor shall default in any one or more of the following respects that is to say:

10.1.1 if without reasonable cause it wholly suspends the carrying out of the design or construction of the Dwellings before completion thereof

10.1.2 if it fails to proceed regularly and diligently with the performance of its obligations under this Agreement

10.1.3 it refuses or neglects to comply with a written notice from the Employer’s Agent requiring it to remove defective works or improper materials or goods and by such refusal/neglect the works are materially affected

Then the Employer may give to the Contractor notice by Registered Post or Recorded Delivery specifying the default. If the Contractor shall continue such default for nine Working Days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not) the Employer may within six Working Days after such continuance or repetition by notice served by Registered Post or Recorded Delivery forthwith determine the employment of the Contractor under this Contract PROVIDED that such notice shall not be unreasonably or vexatiously given or served. Upon determination of the Contractor shall vacate the Property and remove all plant and machinery from the same.”

Clause 10.2 provided that Paradigm would thereafter be under no liability to make any further payments until it had practically completed the dwellings in question.

4.
There was an adjudication clause which materially provided as follows:

“16.1 If any dispute or difference arises under this Agreement either party may refer it to adjudication in accordance with the provisions of this Clause 16…

16.4.1 Where pursuant to this Clause 16 a party requires a dispute or a difference to be referred to Adjudication then that parties shall give notice ("the notice of adjudication") to the other party of his intention to refer the dispute or difference briefly identified in the notice of adjudication. Within 7 days from the date of the notice of adjudication…the party giving notice of intention shall refer the dispute or difference to the Adjudicator for his decision ("the referral") and shall include within that referral particulars of the dispute or difference together with a summary of the contentions on which he relies a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other party."

5.
The various meeting minutes in 2008 show that the work was delayed. The reasons and responsibility for such delays remained and remain in issue between the parties. At a meeting held on 27 January 2009, the Allied representative indicated that final completion would be 12 weeks from that time.

6.
On 29 January 2009 the Employer’s Agent issued its Notice of Interim Payment No 15 in the gross sum of £2,418,727 which after allowing for retention of 5% and previous payments left a net sum to be paid of £30,229. That sum was payable within 15 working days but was not paid. The evidence

does not reveal whether Allied forthwith complained about non-payment or about the gross sum certified. However on 1 May 2009, Paradigm's solicitors issued a "Notice of Withholding Payment" in relation to Interim Payment No 15. The reasons for withholding payment were said to be:

"1. That Allied failed to complete the contract by the contractual completion date, and no extension of time has been sought or agreed.

2. That the failure to complete has been caused by Allied's suspension of the design and construction of the dwellings without reasonable cause.

3. That Allied have failed to proceed regularly and diligently with the performance of its obligations under the Agreement.

4. That Allied have failed to complete the site, the access road and the installation of the utilities.

5. That Allied have failed to resolve the wrong positioning of the sub-station and the loss of car parking spaces for Paradigm.

6. That Allied have failed to complete the necessary S278 works to secure access from the site, causing Paradigm potential losses in respect of the cost of completing traffic lights and bridge repairs required by the S. 278 Agreement.

7. That Allied have wrongly used the site as a base for their works on neighbouring sites.

8. That Allied have failed to provide evidence of the Power of Attorney under which the Bank of Scotland has executed a Deed of Variation of the Section 106 Agreement, as required by the Local Authority.

9. That the above breaches have or will cause Paradigm to suffer damages and costs in completing the contract considerably in excess of any monies due under the contract to Allied. The losses include…

Paradigm require Allied to remedy these omissions and faults within 10 working days from the date of service of this Notice, and if such remedies are complete, then the withholding of the stated account will end."

7.
On 8 May 2009, Allied's Quantity Surveyors wrote complaining that Interim Payment No 15 had not been made; if payment was not made within five working days, Allied would then consider itself at liberty to determine the contract.

8.
On 12 May 2009, Allied's solicitors wrote in some detail in response to the Notice of Withholding Payment. Allied denied in effect that it was in breach of contract, for instance asserting that there had been no suspension of the design and construction as alleged.

9.
On 14 May 2009, Mr Morris of Allied e-mailed Mr Main of Paradigm complaining that there had been no payment. He indicated that one of the principal reasons for delay had been the failure of an electricity company to install electricity supplies to programme. Finally, he said this:

"This job can be completed diligently, but only once Paradigm honour the contract they have breached. We have not been paid anything since August 2008, some nine months ago."

10.
On 19 May 2009, Paradigm's solicitors served a notice (the "First Notice") purportedly under Clause 10.1 on Allied. That notice identified seven complaints which were in effect the same as those set out in the Notice of Withholding Payment of 1 May 2009; the suspension and failure to proceed regularly and diligently allegations were elided within one complaint. It called upon Allied to remedy each of these alleged breaches and stated:

"You have 9 working days from receipt of this Notice to rectify the breaches and if those are not rectified within this time limit the contract will terminate in accordance with Clause 10 thereof."

In an accompanying letter of the same date, they wrote to Allied's solicitors about the construction of hoarding around the site saying also:

"The contractual obligations your client has is [sic] to complete the development, which they have singularly failed to do, despite numerous warnings…

We agree that all outstanding issues should be either discussed around the table on a without prejudice basis, and in default that any current disputes be referred to either the court or arbitration. We can discuss details of this later this week…"

11.
On 26 May 2009, Allied's solicitors wrote two letters to Paradigm's solicitors, the first complaining that payment should be made in accordance with the terms of the contract. This clearly related to Interim Payments No. 15. The second letter said this:

"We refer to your letter dated the 19th May 2009 in which you purport to give Notice alleging breach of the Agreement.

On behalf of Allied…we are replying.

The Notice is in identical terms of the Notice withholding payment and the issues raised have already been answered. A further copy of our letter dated 19th May is attached.

We would further assert that a number of the matters referred to in the Notice are matters that are not within the control of Allied…who are the Contractor. In particular we will address this point to numbers 4, 5 and 7 of your Notice. These are matters not in any way connected to our clients as the Contractor. It is denied that there has been any breach of the Agreement at all and your clients are not entitled to terminate the Agreement."

12.
Paradigm's solicitors replied on 27 May 2009

"…I note what you say about certain aspects of the Notice, but I do not accept that as being correct. In any event, there are many breaches which are set out in the Notice which relate specifically to work, or lack of it, undertaken by Allied on site.

You mention payment of monies due under the Contract, but I would remind you that in accordance with Clause 10.2 the employer is not under any duty to make any further payment of the contractor until the contractor has reached practical completion. Even then, an account as to losses and expenses would need to be drawn up to address your client's failure under the Contract. As the Contract may be terminated if the Notice is not complied with, the sensible way to deal with payments

is in accordance with Clause 10 and have a final account which would give full credit to any certified invoices…"

13.
On 3 June 2009, Allied's solicitors responded to that letter:

"My clients have already implemented the arbitration process due to your client's failure to meet payments in accordance with the Contract…

To put it quite simply it is not accepted that there are any breaches on our clients part and and invited [sic] your clients to terminate the Contract which we would now suggest it is sensible to await the arbitration determination and see where we go from there."

The English seems to have gone awry but it seems clear that Allied was saying that there were no breaches which entitled Paradigm to terminate.

14.
On 4 June 2009, Paradigm's solicitors served a Notice of Determination (the "Second Notice") in these terms:

"We, Paradigm…give you Allied…Notice that you continue to be in default of the Agreement…despite our Notice to you dated 19th May 2009.

Details of the continued breaches are:

1. You have not recommenced construction work, nor have you agreed to a programme to reach practical completion that is acceptable to Paradigm. You have not even submitted a programme for consideration.

2. You have not recommenced construction work, and have only undertaken very minor decorating. You have not sought permission to delay or postpone the works.

3. You have continued to use the site as an office, store and operating base for works on a neighbouring site.

4. You have failed to comply with the requirements set out in the Notice of 19th May 2009 numbered 1 to 7 within the required period.

TAKE NOTICE that in accordance with Clause 10 of the Contract Paradigm consider to have been determined by Notice and they require you to immediately vacate the site."

Paradigm ejected Allied from site on that day.

15.
There is a factual issue which I cannot resolve on this summary judgement application as to whether there was any further relevant communication between Allied and Paradigm before Allied commenced the adjudication process in July 2009. Allied say that Mr Morris sent to Mr Main of Paradigm an email dated 17 June 2009 in these terms:

"It is with extreme concern and with a measure of disbelief that I have received notification of determination via Owen White…

We must therefore advise that following your failure to release the said certified payment, and in addition, ignore our replies to the alleged charges of default, we disagree with your action of securing

the site and ejecting us from the same. We have been advised by Counsel to advise Paradigm that we will be preparing an action to recover all sums outstanding and any associated losses via the adjudication process. This is likely to involve a very substantial sum, comprising firstly, but not exclusively, the unpaid certificate, costs of works since certificate 15, and most importantly the fact that Paradigm have incorrectly indetermined [sic] the contract. In addition, I am informed, there is also retention due and loss of profit…

Should you wish to revoke your action and work with us as promised, we will take no further action. If you do not however, we must put Paradigm on notice that we will seek adjudication to protect our position particularly in relation to the incorrect determination of the contract…"

It is disputed however that this was sent or sent to and received by Mr Main.

16.
On 6 July 2009, Always Associates, a claims consultant, served a Notice of Adjudication on behalf of Allied on Paradigm. Materially, it stated:

"NATURE OF DISPUTE

On the 05 June 2009, [Allied] was ejected from the site…at around nine o'clock in the morning. At about 11 o'clock…[Allied] received [the] letter from [Paradigm's solictors] dated the 03 June 2009, purporting to, in accordance with the terms of the Contract, determine the Contract. [Allied] avers that [Paradigm] has wrongfully determined the Contract and has therefore by ejecting [Allied] from the Site and, by wrongfully determining the Contract, repudiated the Contract. [Allied] therefore seeks recovery of monies for works and variations that were carried out and not paid for and for the payment of damages for losses arising as a direct consequence of [Paradigm's] repudiatory breach of the Contract.

DECISION SOUGHT

The redress and/or relief sought in this adjudication are set out below. The Adjudicator will be requested to determine and decide that:-

(i) [Paradigm] has wrongfully determined [Allied's] employment under the Contract and has therefore repudiated the Contract.

(ii) [Allied] is entitled to payment in the sum of £248,016.80 or such other sum as the Adjudicator shall deem proper; being the balance between the sum due under the Contract as at the date of the repudiatory breach and the monies that have been paid to [Allied];

(iii) [Allied] is entitled to payment of damages for losses, in the sum of £30,456.40…incurred as a direct consequence of the repudiatory breach of the Contract;

(iv) [Allied] is entitled to payment in the sum of £8,567.15…of its expectation interest in the Contract i.e. the profit it would have earned on the Contract, had the Contract had been performed…"

There then followed claims for interest and costs. Three suggested non-legal adjudicators' names were proffered.

17.
Paradigm's solicitors responded to this Notice by letter dated 10 July 2009:

"…We consider that an appropriate adjudicator in this matter would be a legal adjudicator, i.e. a barrister with construction experience, rather than a surveyor. The issues in dispute are not technical ones…

We would also bring to your attention the fact that we have not had a letter of claim from your client, and therefore issuing a Notice of Adjudication is premature.

We also reserve our position in respect of the jurisdiction of the adjudicator, bearing in mind that the contract is now at an end, and will properly be the subject of either legal proceedings or arbitration. We are quite happy for either to take place, but put you on notice that we reserve our position on challenging the adjudicator's jurisdiction…"

18.
An adjudicator was properly appointed, Mr Derek Pye, a chartered surveyor and qualified barrister. On 10 July 2009, Allied served its Referral Notice which provided detail and evidence to support the various assertions raised by it. 20 appendices were attached including the correspondence referred to above, an Application Payment 16, a "Claim for Extension of Time", Value of the Works at repudiation and detailed breakdown of consequential losses.

19.
The Response was served by Paradigm on 27 July 2009. It was clearly drafted by Paradigm's solicitors. It attached witness statements, correspondence and a chronology, amongst other things. It addressed in detail the substance of the matters referred to adjudication but also sought to summarise its response at Paragraph 4:

"4. In summary, for the reasons set out below, and subject and without prejudice to Paradigm's rights in respect of jurisdictional objections raised in [their solicitors'] letter dated 10th July 2009 to Always Associates, (Appendix D) Paradigm submits that :-

4.1 The Adjudicator has no jurisdiction to determine Allied's claim for the reasons set out in [the] letter dated 10th July 2009 and as set out herein, Paradigm fully reserves its rights in respect of those jurisdictional objections, and this Response is served subject to and without prejudice thereto.

4.2 The dispute concerns the determination of the build contract and the consequences that flow from it. These losses have not yet crystallised and with no ongoing contract, the dispute is not a matter which is best decided by adjudication due to the contested nature of some of the evidence. Paradigm believe that this dispute would be best dealt with either by a Court or by Arbitration when such evidence can be fully tested. Further, Paradigm have never received a Letter before Referral setting out the matters now raised by Allied."

Paragraphs 4.3 to 4.9 address the merits of Allied's claims.

20.
Allied submitted a lengthy Reply to the Response. It addressed the contents of Paragraph 4.1 and 4.2. As only a jurisdictional issue is now raised on the "Letter before Referral" issue, it is unnecessary to set out the other submissions. At Paragraph 24, Allied said:

"As regards [Paradigm's] assertion that the Adjudicator does not have jurisdiction because [Allied] did not send a letter, [Paradigm] has not stated as to why the failure to send such a letter would in any way affect the jurisdiction of the Adjudicator. Furthermore, [Paradigm], through its solicitors, and presumably after appropriate legal advice, decided to determine, albeit wrongly, [Allied's]

employment under the Contract. It is to be presumed therefore that [Paradigm] was fully aware of the risks of the course of action which it took and so cannot now claim to be surprised when it finds itself having to account for its actions in this adjudication. For the avoidance of doubt, adjudication is not subject [to] the Civil Procedure Rules Construction Pre-Action Protocol."

21.
The adjudicator issued his decision on 3 September 2009 after various extensions of time were agreed. He addressed the contents of Paragraph 4.1 and 4.2 of the Response as follows:

"41. Paradigm has raised three jurisdictional points…

41.1 that Allied requested the RICS to nominate an adjudicator prior to the contractual 7 day time period…

41.2 that losses have not yet crystallised and because the Contract is not ongoing it is not a matter best decided by adjudicator…

41.3 that Paradigm has never received a letter from Allied prior to the Referral setting out the matters now raised.

42. Allied resists these challenges and I reject them principally for the reasons set out below:-

42.1…

42.2…

42.3 Paradigm received the Notice of Adjudication, to which I have already made reference in this Decision, prior to the Referral."

22.
He then went to address Allied's claim in detail. He set out in detail the history much of which is set out above. He found that in formal terms the First and Second Notices were "effectively served" (Paragraph 84). He found that the grounds relied upon in the Second Notice were invalid because amongst other reasons the comparable grounds in the First Notice were not established on the evidence (Paragraphs 89 to 127). He dismissed a further argument from Paradigm that the Second Notice amounted to a valid notice to determine at common law (Paragraphs 119-127). He found in logic that, as the First and Second Notices were invalid, and given the ejection of Allied from the site, there had been a repudiation by Paradigm accepted by Allied leaving the site (Paragraphs 128 to 131). He then addressed quantum and found that £274,279.35 was the principal sum due which included the sum certified but unpaid on Interim Payment No. 15, a sum for the outstanding balance, damages and loss of profit. He awarded that sum and interest against Paradigm and in effect that Paradigm should pay £13,800.35 for his fees.

23.
On 9 September 2009, Paradigm's solicitors wrote to Allied saying that the decision was invalid because "the dispute which you referred had not yet arisen".

24.
Proceedings were issued on 9 October 2009 by Allied to enforce the decision and a summary judgement application has been pursued.

The issues

25.
Following the abandonment by Paradigm of an argument that a stay of execution should be ordered, the only argument arises out of the assertions made by Paradigm in its letter of 10 July 2009 and at Paragraph 4.2 of its Response that no “letter of claim” had been sent. Essentially, Paradigm argue that this should be taken to mean that Paradigm was asserting that no dispute had arisen in relation to all or parts of what was referred to adjudication by Allied; there would have to be some sort of claims or assertions, for instance about what happened between the First and Second Notices; the dispute could not include the money claims which were never raised before the Notice of Adjudication or any issue as to whether there had been an effective termination on 4 June 2009.

26.
Allied say that there were clearly disputes about the First Notice, first, as to whether the alleged breaches were established at all and, secondly, as to whether there was any entitlement to terminate on the basis of the First Notice. It says that it must have been obvious that if Paradigm terminated there would be claims for unpaid work done, damages and loss of profit. If it is wrong, it argues first that any parts of the decision addressing the dispute over which the adjudicator had jurisdiction are severably enforceable and, secondly, that Paradigm acceded to the jurisdiction of the adjudicator and that it made no effective reservation.

The law

27.
It has been said that the Court must be astute in vetting jurisdictional challenges to adjudicators’ decisions (see e.g. **Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2005] EWCA Civ 1358). That does not mean that the Court’s starting point is anything other than impartial and it will consider carefully every jurisdictional challenge on its merits. If the challenge is wholly unjustified or unarguable, the losing party may face a more stringent costs order.

28.
There has been a substantial amount of law over the past five years as to what a dispute is and has to comprise before it is referable to adjudication. One needs to take account of the fact that Parliament had provided for a speedy means of resolving construction contract disputes by way of adjudication. Temporary resolution of disputes in the short term has been preferred to provide certainty to contracting parties for better or for worse.

29.
One needs to bear in mind also the following:

(a) Disputes can arise in a plethora of ways and over different periods of time. There is no formula by which one can say that a dispute has or has not arisen.

(b) The types of dispute are “Protean” (as was said in one case) or infinite in extent or quality. Parties on a multi million contract can have a dispute about £1 or £100m; disputes do not even have to relate to money at all but can relate merely to contractual interpretation or a legal issue. Indeed, disputes can relate to future as well as to past events.

(c) One must analyse what if any dispute has been referred at the time that the procedure to refer, laid down in the contract or by statute, is initiated.

30.
There are some matters of principle which have been established by the authorities:

(a) To enable a dispute or difference to arise, there must be a claim, an assertion or adoption of a position by one party which is expressly or by implication rejected or at least not accepted by the other (see e.g. **Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd** [2009] EWHC 2218 (TCC). The claim, assertion, rejection or non-acceptance does not need to be in writing or to be in any form or necessarily be detailed.

(b) The claim, assertion or adoption of the position must be communicated to the other party. It can not be enough to create a dispute that one party simply believes in its own mind (without any communication to the other) that if it was to make a claim it would in all probability be rejected by the other party.

(c) One needs to look at the history and the context in which the dispute is said to have arisen but the law adopts an inclusive interpretation as to what amounts to a dispute (see **Amec Civil Engineering Ltd v The Secretary of State for Transport** [2005] BLR 63 and **Bovis Lend Lease ltd v The Trustees of the London Clinic** [2009] EWHC 64 (TCC). The Court should not adopt an over legalistic analysis of what the dispute between the parties are ; instead it will determine in broad terms what the disputed claim, assertion or position is. In **Cantillon Ltd v Urvasco Ltd** [2008] EWHC 2218 (TCC), it was said at Paragraph 55:

“There has been substantial authority, both in arbitration and adjudication, about what the meaning of the expression "dispute" is and what disputes or differences may arise on the facts of any given case. Cases such as **Amec Civil Engineering Ltd -v- Secretary of State for Transport** [2005] BLR 227 and **Collins (Contractors) Ltd -v- Baltic Quay Management (1994) Ltd** [2004] EWCA (Civ) 1757 address how and when a dispute can arise. I draw from such cases as those the following propositions:

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

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

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

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

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.”

(d) It follows from the above that if a basic claim, assertion or position has been put forward by one party and the other disputes it, the dispute referred to adjudication will or may include claims for relief which are consequential upon and incidental to it and which enable the dispute effectively to be

resolved. Thus, even if the claim did not as such seek a declaration or discretionary interest or costs, it is so connected with and ancillary to the referred dispute as properly to be considered as part of it. There must be limits to this which can be determined by analysing what the essential dispute referred is.

31.
There is Court of Appeal authority to the effect that where the dispute resolution clause refers to a dispute or “difference”, the term “difference” is less hard edged than “dispute”. For instance, in the **Amec** case. Lord Justice Rix said at Paragraph 62:

“…I agree that the word "difference" probably goes wider than the concept of a "dispute.”

He went on at Paragraph 65 to say, correctly in my view:

“The words "dispute" and "difference" are ordinary words of the English language. They are not terms of art. It may be useful in many circumstances to determine the existence of the dispute by reference to a claim which has not been admitted within a reasonable time to respond; but it would be a mistake in my judgement to gloss the word "dispute" in such a way. I would be very cautious about accepting that either a "claim" or a "reasonable time to respond" was in either case a condition precedent to the establishment of the dispute.”

Little turns on the verbal distinction between the two words in this case.

32.
It has long been established in the relatively short period of time in which the Housing Grants Construction and Regeneration Act 1996 ("HGCRA") has been in force that it is necessary for a party challenging the jurisdiction of the adjudicator to reserve its position in relation to its challenge; for instance, although not cited in argument, this issue was raised and commented upon by Mr Justice Dyson as he then was in **The Project Consultancy Group v The Trustees of the Gray Trust** [1999] BLR 377 at Paragraphs 14 and 15. Having reserved its position appropriately and clearly, that party can safely continue to participate in the adjudication and then, if the decision goes against it, to challenge its enforceability on jurisdictional grounds in the Court. If it does not reserve its position effectively, generally it cannot avoid enforcement on jurisdictional grounds. I say generally because there might be unusual circumstances in which a jurisdictional challenge can be mounted when there has been no reservation; for instance, if the party making the challenge did not know or could not reasonably have ascertained the grounds of challenge before the decision was issued. It is however difficult to envisage circumstances in which a jurisdictional challenge on the grounds that there is no dispute should not and can not be the subject of a reservation of rights.

33.
It must follow that there may be numerous types of jurisdictional challenge and there can also be different types of reservation. One can reserve generally or specifically. I will leave open the issue as to whether a general reservation as to jurisdiction without any hint or suggestion as to what the grounds are can be effective; it may be so indefinite as to be a meaningless and ineffective reservation but it may be that in a particular context a general reservation may suffice. In this case however, Counsel both accepted, properly and correctly in my judgement, that, if a specific reservation was made on one ground and it was established that the ground in question was an invalid jurisdictional objection, the party in question must be taken to have acceded to the jurisdiction only subject to the specific failed ground; in those circumstances, the parties will be taken to have submitted to the jurisdiction even if there are other good grounds which existed but were not mentioned.

34.
The final legal matter to consider is the issue of severability, that is if the adjudicator has jurisdiction as to part of what is referred to him or her but no jurisdiction over other parts, will the Court enforce that part over which he or she did have jurisdiction? In the **Cantillon** judgement, the following was said at Paragraph 65 after a review of the previous cases on the topic:

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

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

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

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

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

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

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

35.
One can take a simple example where there is a dispute about Claim 1 involving £5,000 but the referring party refers Claims 1 and 2 and Claim 2 (for £10,000) is wholly different from Claim 1. Assuming that the responding party effectively reserves its position on Claim 2, the decision which allows both claims is impugnable in part. Unless the decision is irretrievably un-severable, verbally or mathematically, the decision on Claim 1 will be enforceable; there may be elements of the decision such as the award of costs which are sufficiently abstruse as to be un-severable and therefore unenforceable in practice.

Discussion

36.
There can be no doubt from the history set out above that prior to the Second Notice and the ejection of Allied there was a dispute between the parties as to whether grounds existed to justify termination by Paradigm. The same breaches relied upon and set out by Paradigm in the First Notice were in dispute even when the First Notice was served. They had been raised by Paradigm’s solicitors in the Withholding Notice of 1 May 2009 rejected by Allied’s solicitors in their letter dated 12 May 2009. The First Notice of 19 May 2009 was itself specifically challenged by Allied’s solicitors in their letter dated

26 May 2009. The extent of the challenge was twofold that it was “denied that there has been any breach of the Agreement at all” and that Paradigm was “not entitled to terminate the Agreement.” The lines were drawn the following day when Paradigm’s solicitors wrote saying that they “note what you say about certain aspects of the Notice, but…do not accept that as being correct”.

37.
One can therefore say on analysis that in context there was by 3 June 2009 a referable dispute as to whether there were any breaches which justified termination which was being threatened by the First Notice. However, when one analyses what was said and done in the preceding period, it is impossible to extract any claims, assertions or taking of positions which could give rise to a dispute in relation to the financial consequences or entitlements which would or might arise from the threatened termination. Thus, there is nothing in the correspondence or witness evidence in this period which demonstrates or even hints that Allied were claiming or threatening to claim damages for unlawful termination or for the types of payment which would flow from an unlawful termination or accepted repudiation. It is true of course that Allied were in dispute with Paradigm about the non-payment of Payment No. 15 but that was a dispute about whether or not there was any justifiable reason for non-payment and not as to whether Payment No. 15 was or would be due upon an unlawful termination.

38.
Counsel for Allied argues that it must have been obvious to Paradigm that there would be a claim for the outstanding value of unpaid work and for damages if there was to be an unlawful termination. Whilst one can imply from conduct or even silence that a claim or assertion made or position taken is disputed, it will be a very rare case, if in logic ever the case, that a claim, assertion or position of the party can be implied from silence. The fact that Paradigm may or must have known that there would be the usual financial consequences flowing from the termination procedure which it invoked if it turned out to be unlawful is broadly immaterial in determining what the ambit of the dispute was as at the time of the Second Notice. That is because the dispute in any given case, as here, is what it is. It would of course have been open to Allied to intimate or assert a claim for the financial consequences of what it expected to be an unlawful termination, but it did not do so in any event prior to the Second Notice. There is nothing logically or intrinsically unacceptable or wrong in there being a dispute about liability only; indeed, there have been a number of adjudication enforcement cases before the Court which are concerned with decisions solely about liability.

39.
As I can not resolve on this summary application the factual issue as to whether or not the e-mail of 17 June 2009 was sent to or received by Paradigm, I must proceed on the basis that nothing material was intimated, claimed or asserted by Allied before the Notice of Adjudication in relation to the quantum consequences of the termination.

40.
Since the parties agreed a procedure by the adjudication clause in the contract as to how disputes were to be referred to adjudication, and since the Notice of Adjudication is the first step in the adjudication process, the Court must look at the position, so far as any crystallised dispute is concerned, as it was at the date of that Notice, namely 6 July 2009. One can not say at least under the terms of the contract in this case that the Notice of Adjudication itself can be classified as a claim or assertion which is then by implied conduct converted into a dispute before the Referral.

41.

In my view, the dispute, which had crystallised and which was an important part of the dispute or disputes addressed in the Notice of Adjudication, was whether there were any breaches which justified termination which was being threatened by the First Notice and whether those breaches were continuing or being repeated up to the Second Notice. It did not include any or any alleged entitlement to money or damages. The position would be different if the e-mail of 17 June was sent to and received by Paradigm.

42.
The fact that the Notice of Adjudication purports to add on claims for the financial consequences of termination does not in itself give the Adjudicator jurisdiction to deal with them. However, as the Adjudicator decided unequivocally that there were no material breaches of contract justifying termination, that part of his decision was made within jurisdiction because there was a dispute about it which was at least part of what was referred to him. It was open to him to find as he did that the unlawful termination was repudiatory conduct in those circumstances because that finding was ancillary and incidental to the dispute which had crystallised.

43.
However, the matter does not end there because I have formed a clear view that there was in effect and in practice no valid or effective jurisdictional reservation made by Paradigm on the grounds that no dispute had crystallised in relation to the financial consequences of the unlawful termination as asserted by Allied. One needs to analyse what was said and what was not said by Paradigm and its advisers:

(a) Their solicitor's letter of 10 July 2009 does not reserve a jurisdictional objection in relation to quantum matters or indeed on the grounds of non-crystallisation of any dispute. The fact that Paradigm had “not had a letter of claim from” Allied is not a jurisdictional point at all; it is more a complaint or criticism that there has been no formal claim beforehand. There is of course no requirement under the adjudication clause or in the HGCRA for there to be such a formal claim beforehand. It follows that their complaint that the issue of a Notice of Adjudication was premature was also unfounded. The language of the letter suggests that the solicitors were aware of the need to reserve their position in relation to jurisdictional matters because they go on to reserve “their position in respect of jurisdiction of the adjudicator” on a specific ground, albeit one that was totally unjustified and is no longer pursued. The fact that they did not use the language of reservation in relation to the "letter of claim" point supports the view that there was no intention to make a jurisdictional reservation with regard to that point.

(b) Turning to the Response, the cross-reference to and incorporation of the “jurisdictional objection” in their solicitor's letter of 10 July 2009 is ineffective because that letter, for the reasons given above, did not reserve Paradigm’s position on jurisdiction in relation to what, if any, dispute had crystallised. If one was construing Paragraph 4.2 of the Response as a contractual document or statutory instrument, it would in context not purport to be a jurisdictional objection at all. The jurisdictional objection, such as it is, is contained in Paragraph 4.1. Furthermore, the first three sentences of Paragraph 4.2 on their face do not raise jurisdictional objections. The fact that the losses have not yet crystallised or that the dispute might better be resolved other than by way of adjudication can not be or have been intended to have been a jurisdictional objection. Paragraph 4 as a whole is simply a summary of Paradigm’s contentions in the adjudication, with the vast bulk of it addressing the merits. The "tacking on" of the point about the non-receipt of a "Letter before Referral" is not obviously a jurisdictional objection either. The use of capital letters suggests, if anything, a belief by the author that there was some formal requirement for such a letter. It would have been very easy in a short

sentence to summarise the objection which is now advanced before the Court. The objection could have been framed as simply as this: “No dispute has crystallised”. The wording and the fact that it was not so framed leads me to the conclusion that in any event no jurisdictional objection to that effect was intended.

(c) For the reasons given above, there is no jurisdictional requirement for a letter of claim, formal or otherwise, to be submitted by the referring party prior to the initiation of the adjudication process. Even if the reference to the "Letter before Referral" was intended as some type of jurisdictional objection, it was a bad point.

(d) The fact that in its Reply Allied believed that the "Letter before Referral" was put forward as a jurisdictional objection is immaterial. To the extent that it was a jurisdictional objection, the Reply at Paragraph 24 (see above) was wholly correct. When Allied said in that paragraph that Paradigm "has not stated as to why the failure to send such a letter would in any way affect the jurisdiction of the Adjudicator”, it was factually correct. The fact that at no stage thereafter Paradigm sought to clarify its position in this context again suggests strongly that it was not making a jurisdictional objection at all.

44.
It follows from the above that there was no objection to the jurisdiction of the adjudicator in relation to that part of the dispute or claims referred to adjudication on the grounds that all or some of those claims have not effectively been disputed. Thus, subject only to the bad jurisdictional objections which they did register, Paradigm not only did not make any effective reservation to the jurisdiction of the adjudicator but also acceded to the jurisdiction of the adjudicator to resolve all the claims which were the subject matter of the Referral. In those circumstances, the adjudicator's jurisdiction to resolve and issue a decision in respect of all those claims is un-challengeable.

Decision

45.
In these circumstances, the decision of the adjudicator should be enforced. There will be judgement for Allied. This will reflect the fact that Paradigm paid adjudicator’s fees of £13,800.35. Payment of the judgement sum, interest and costs should be within the normal period of 14 days.

Costs and Interest

46.
I have received written submissions from Counsel on issues relating to costs and interest. Interest is agreed at £4791.75 and will be payable as part of this judgement.

47.
So far as costs are concerned, Allied's total costs as claimed are £34,752.28, exclusive of VAT. As Allied is registered for VAT, it is not entitled to the VAT from Paradigm. It has to be said that this sum appears to be disproportionately large for the enforcement of an adjudication decision which, ultimately, on analysis, was not immensely complicated. The judgement above indicates that there were some 16 documents which needed to be considered in any detail, the majority of which were relatively short letters. It is rare in the TCC in London that relatively simple contested summary adjudication enforcement applications cost more than £15,000 to £20,000 and often on the simpler applications it is less than £10,000.

48.

There can be no doubt that there should be an order for costs in favour of Allied which has essentially won it application and secured a 100% judgement in its favour. I do not consider that the argument put forward by Paradigm's Counsel (that, because Allied argued through Counsel unsuccessfully that every claim which was the subject matter of the Notice of Adjudication had effectively been disputed beforehand, there should be a percentage reduction) is a good one. Allied did establish that a key element, namely liability for the unlawful termination (as found by the Adjudicator), was effectively disputed beforehand and it won on the waiver of jurisdiction argument. The fact that Counsel, perhaps over enthusiastically, argued that the financial claims must also be considered as being disputed did not materially, in my view, add to the time or cost. This is not however a case in which it can be said that Paradigm argued wholly un-arguable points. It is not therefore a case for indemnity costs.

49.
This application was complicated by the fact that Paradigm sought initially to argue that there should be a stay of execution by reason of Allied's financial position which argument, following the production of certain information by Allied and its advisers, was dropped by Paradigm. It was in my judgement wholly reasonable that Allied addressed that issue and involved accountants to do so. On the other hand, I can not say that Paradigm's position was on the financial position was when put forward initially a wholly bad one.

50.
There has been much (written) argument arising out of correspondence between the parties prior to the hearing in the context of whether or not costs should be on an indemnity basis. On a summary assessment, the distinction between the indemnity and the standard basis is less marked than on a final assessment by a costs judge. Suffice it to say that I do not consider that indemnity costs as such are payable here. The main argument relates to a "without prejudice save as to costs" letter dated 18 September 2009 from Allied to Paradigm's solicitors in which the former offered an arrangement whereby the parties were to accept the adjudicator's finding of liability but revert back to him for a further adjudication on quantum. That was not accepted. I am satisfied that this offer was ambiguous in that it appeared only to offer that the "damages claim" was to be decided by the same adjudicator; it was unclear whether the "damages claim" included all quantum matters. The fact that the claim was to be returned to the same adjudicator was in many ways a rather pointless suggestion because in practice he would probably decide much the same as he did first time round and therefore costs would be wasted needlessly.

51.
For all the reasons indicated above I am wholly satisfied that this is not a case for the award of costs on an indemnity basis.

52.
The costs bill produced by Allied is split into three categories: solicitor' costs, Counsel's fees and Disbursements. I have formed the view that it would be unreasonable for Paradigm to have to pay the full sums in each category. My assessment is as follows:

(a) Solicitors costs: there is no effective challenge to the rates used. Some 40 hours is claimed for "attendance on documents". I do not consider that it is reasonable for Paradigm to have to pay more than £3000. There are other elements such as the attendance of more than one solicitor at the hearing and unattributed "other work not included above". In all the circumstances, £9000 is a reasonable allowance in the circumstances.

(b) Counsel's fees at £7900: again this seems somewhat high for Junior Counsel of five years call for Paradigm to have to pay for in full in circumstances in which the ultimate hearing was only two hours long. In my view, a sum of £5000, including the brief and prior advice and pleading work, is reasonable.

(c) Disbursements: the court fees, application fees, photocopying and courier charges are not effectively challengeable as anything other than reasonable. I find some difficulty in some of the other charges. For instance £5,056 is claimed for Mr Mullender who is a quantity surveyor originally retained by Allied on the project; he is said to have assisted in the Claim with locating documentation, preparing witness evidence, assisting Counsel and then assisting solicitors. Given the relatively high level of work done by Solicitors and Counsel, I can not see what particularly useful work was done by this gentleman. I am certainly not satisfied that the vast bulk of it is justified as reasonably payable by Paradigm. £1,690 is claimed for previous solicitors; again it is not clear what of added value they did which could reasonably be charged to the account of Paradigm. Finally there is the sum of £4325 for accountants who were retained to assist with the stay of execution argument which was abandoned by Paradigm. This seems to me broadly to be a reasonable charge. In all £6500 represents a reasonable amount to be paid by Paradigm for disbursements.

53.
In total, therefore, I assess the cost payable by Paradigm to be £20,500.

54.
In the TCC, the practice as elsewhere is that draft judgements are circulated on a confidential basis to the legal teams of both parties for correction or inappropriate cases comment. It is common for the judges to ask for submissions in writing from those teams on ancillary matters such as costs, interest and permission to appeal. It will be common therefore for the judgement to be handed down without the need for the legal teams to appear, yet again, to argue about ancillary matters. This is the course which was adopted in this case and extensive, comprehensive and comprehensible written submissions were provided with the parties being told that they did not have to attend at the formal handing down. Notwithstanding this, the parties have appeared on the handing down. This was a wholly unnecessary exercise and each should have to pay its own costs of so doing. The whole purpose of telling the parties that it is not necessary for them to appear is to save costs and court time.