Case No: HT 09 516

Neutral Citation Number: [2010] EWHC 283 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17/02/2010

Before :

THE HON. MR. JUSTICE RAMSEY

- -

Between :

GPS Marine Contractors Limited **Cla**

- and -

Ringway Infrastructure Services Limited **Defe**

- -

- -

Mr Samuel Townend (instructed by **Wright Hassall LLP**) for the **Claimant**

Mr Justin Mort (instructed by **Barlow Robbins LLP**) for the **Defendant**

- -

Judgment

The Hon. Mr. Justice Ramsey:

Introduction

1.
This is an application under CPR Part 24 by the Claimant (“GPS”) against the Defendant (“Ringway”) for payment of sums ordered to be paid in an adjudicator’s decision dated 29 July 2009.

Background

2.
Ringway operates a facility at the White Mountain Berth on the River Thames at Dagenham where it imports aggregates by boat. That berth needed to be dredged and Ringway engaged GPS to carry out that dredging by an agreement made in May 2008. Difficulties were encountered in the form of debris and in June 2008 the parties agreed how to deal with that situation. GPS sought payment for the work in the sum of £318,613.59 of which Ringway had paid £101,385.

3.
GPS gave Notice of Adjudication on 26 March 2009 and served its Referral on 30 June 2009.

4.

Ringway challenged the jurisdiction of the Adjudicator by writing to him on 3 July 2009 setting out seven grounds of challenge in a paragraph which commenced in these terms:

"Our client does not accept that this adjudication has been validly commenced or that you have jurisdiction in respect of the referring party's claim for a number of reasons. These include the following:…"

5.
They then added at the end:

"There may well be further jurisdiction issues which we have not yet had time or opportunity to investigate. Our client's position in this respect is reserved and the above list should not be understood to be exhaustive.

In the circumstances our client does not consent to or accept your appointment as adjudicator "

6.
The Adjudicator considered those matters and notified the parties on 8 July 2009 that he had concluded that he should proceed with the Adjudication.

7.
In response on 10 July 2009 Ringway stated as follows:

"Firstly, we note that you have decided to continue with the adjudication notwithstanding our client's objections to jurisdiction. We resist the temptation to comment further on that issue. For the avoidance of doubt our client reserves its position on jurisdiction, both in respect of those matters specifically raised and other jurisdiction matters which have now become apparent or will do so. Participation in this adjudication is without prejudice to such reservation. We do not propose to repeat that reservation in every letter or submission but trust that our client's position is understood "

8.
Ringway served its Response on 16 July 2009 and in that document set out jurisdictional objections in the following terms at paragraphs 2 and 3:

"2.This document is served without prejudice to Ringway's objection to this adjudication and to the jurisdiction of the adjudicator. As previously notified to the adjudicator and to the referring party the responding party's position is reserved. Specifically the responding party reserved the right to:

(1) refuse to comply with the adjudicator's decision (including and decision as to payment of costs) on the grounds that such decision is made without jurisdiction;

(2) dispute any enforcement proceedings brought in Court either on the grounds previously identified in correspondence and/or further grounds.

3. Any issues raised below relevant to

(1) the scope of the adjudication;

(2) the jurisdiction of the adjudicator;

are put forward without prejudice to such general reservation."

9.

GPS served a Reply on 21 July 2009. Ringway served a Rejoinder on 27 July 2009 and the Adjudicator made his decision on 29 July 2009. The Adjudicator ordered Ringway to pay GPS £214,407.69 plus VAT of £31,241.67 and ordered Ringway to pay fees of £11,443.50 inclusive of VAT.

The Application

10.
Ringway has failed to pay those sums and GPS issued proceedings on 21 December 2009 leading to a hearing on 1 February 2010. Ringway served a Defence on 21 January 2010 setting out the grounds on which it seeks to defend these proceedings.

11.
GPS's application is resisted on a number of grounds which may be summarised under the following headings:

(1)
That there was a compromise or withdrawal of the dispute.

(2)
That more than one dispute was referred to the Adjudicator.

(3)
That the decision of the Adjudicator is no longer binding

(4)
That the Adjudicator's decision was obtained by fraud.

(5)
That there has been a breach of natural justice.

12.
In support of the application, GPS filed a witness statement with a number of exhibits from Matthew Phipps, a solicitor with GPS's solicitors. In response Ringway served a witness statement from Hamish Cameron Blackie, a partner in Ringway's solicitors and from John Patrick Riley, a director of Ringway. In Reply, GPS served a witness statement from John Spencer, Managing Director of GPS. Mr Cameron Blackie also served a further witness statement.

Compromise or Withdrawal

13.
Ringway says that the reference to adjudication was invalid on the basis which they plead at paragraph 7(1) of the Defence as follows: "the matters said to give rise to a dispute had been compromised by the parties at a meeting in 30 July 2008 (alternatively: the Claimant, by its director John Spencer, had agreed to withdraw its claim), in consideration for the Defendant agreeing to withdraw its own cross claim in respect of the Claimant's failure to dredge to the agreed depth;"

14.
Mr Justin Mort, who appears on behalf of Ringway, submits that the question of whether or not there was a compromise or withdrawal of the claim at the meeting on 30 July 2008 raises a triable issue which cannot be determined on this application. He refers me to the speeches of Lord Hope and Lord Hobhouse in Three Rivers District Council v The Governor of the Bank of England[2001] UKHL 16 at [94], [95] and [185]. Those paragraphs show that, as set out in CPR Part 24, the question is whether

the claim has “no real prospect of succeeding at trial” and that question has to be answered having regard to the overriding objective of dealing with the case justly. The test is not one of probability it is the absence of reality and “no realistic possibility” distinguishes between a practical probability and what is “fanciful or inconceivable”. The scope of the enquiry is set out by Lord Hope at [86] in those terms:

“I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

15.
Mr. Samuel Townend, who appears on behalf of GPS, submits that the alleged compromise or withdrawal is too vague and there is no real prospect of Ringway succeeding in that defence. Alternatively, he says that the Adjudicator was asked to and did deal with the issue which was raised as a defence in the proceedings and his decision is binding. Further, he says that Ringway did not reserve the right to challenge the jurisdiction on this ground.

16.
I shall deal with Mr Townend’s alternative contentions.

The alleged agreement at the meeting of 30 July 2008

17.
There is no document which contains or sets out the alleged agreement to compromise or withdraw the claim. The matter depends on oral evidence of what happened at the meeting on 30 July 2008. That meeting was attended by Mr John Spencer, Mr Mick Clarke and Mr Stan Rogers for GPS and Mr Pat Riley, Mr John Shaw and Mr Ian Rogers for Ringway, together with Ms Linda Potter, a director of Armac Shipping Services Limited who acted as shipping agents for ships landing materials at the Berth.

18.
In the evidence for this application there are the witness statements prepared by Mr Spencer, Mr Clark, Mr Rogers and Mr Riley and Ms Potter for the Adjudication. There are also, as set out above, witness statements from Mr Spencer and Mr Riley prepared for this application.

19.
Prior to that meeting GPS had submitted an assessment of additional sums arising in relation to the clearing of debris and also a claim for payment of measured dredging work. At the meeting Mr Riley

says that he said that Ringway would pay for silt removed as per a PLA survey and would pay more if it were proved that more silt had been removed. He says that they were not going to pursue their claim that GPS had not dredged the berth to the correct levels. He says that this was on the basis that Ringway would not entertain the claim for idle time and repairs. He states that the meeting concluded on this basis and when Mr Spencer left he said he thought that an agreement had been reached. He agrees with Ms Potter that Mr Spencer's concluding comments were "I don't want your fucking money anyway. It's tainted." She says that when Mr Spencer was told that Ringway were not prepared to pay GPS anything for the additional claim for the damage he stormed out of the meeting and in doing so said these words.

20.

In his witness statement, Mr Clarke says that the meeting ended with Ringway saying that they would not pay for anything other than the volume given by PLA at which John Spencer said "I almost don't want your fucking money, I'd be tainted like you lot." He says that no agreement was reached, much less any agreement that GPS would forego its claims. He says he did not hear anybody from Ringway say they were considering making a claim as a result of not being able to bring big ships to the berth due to a failure to achieve the dredged depth. Mr Rogers says that the meeting ended when Ringway said they would not accept liability and Mr Spencer stormed out shouting "something about being disinclined to want Ringway's money because he felt it could be tainted." He does not consider any compromise or any agreement was reached at the meeting.

21.

Mr Spencer says similarly that he stormed out when Ringway said they would not contemplate paying anything connected with the damage to the dredger. He says that there is no possible construction of the events surrounding his exit that could enable it to be construed as accepting Ringway's position. He says he went off on holiday and when he returned he invoiced Ringway for the fixed element and 3,755 m3 of dredging that Ringway could not argue about and made it clear that GPS would raise another invoice if GPS could prove that they had removed significantly more material and dredged to chart datum. That is a reference to an invoice wrongly dated 30 June 2008 which was sent after the meeting. He says: "I deliberately did not have any reference made to the damage to the Sliedrecht XIV and the claims that flowed from that and the agreement of the 2nd June because I felt, at that time, that those matters were quite separate."

22.

It was in November/December 2008 that GPS then submitted a "second interim account" for additional payment for measured work and costs arising from debris and damage. On 13 January 2009 Mr Riley responded to that claim in these terms:

"We were somewhat surprised to receive your letter given our meeting on 30th July 2008, where we refuted your claim in its entirety. We explained in some detail at that meeting why we refute your claim and our position regarding this matter remains unaltered. We draw your attention specifically to your comments at the end of the meeting where you expressed most definitely that you would not pursue the claim. Following your final comments at the meeting the invoice for measured works (calculated from PLA surveys) was paid in good faith as the full and final settlement of any monies due to you. We reiterate that our position with regard to the claim remains unchanged and no further sums are due to you. Furthermore we have had no communication from your company since the meeting and deemed this to be your acceptance of the position on this matter."

23.

In these proceedings Mr Spencer, in his witness statement, summarises the evidence and says at paragraph 12: "It is the Claimant's case that there was no compromise at the meeting on 30th July 2008 and there is no evidence, save for the witness statement of Mr Riley, the substance of which the Claimants deny, to suggest that there was."

24.
Mr Riley in his witness statement in these proceedings says that he understood that by the words used at the end of the meeting there was a clear acceptance by Mr Spencer that those claims were abandoned by GPS and so the parties had reached agreement on everything.

25.
On the basis of the evidence put in by the parties, particularly in the witness statements both in the Adjudication and for this application, I have come to the conclusion that I cannot, on this application, resolve the dispute as to whether there was an agreement made by Mr Spencer which, essentially, Ringway say is to be inferred from what was said and done at the meeting on 30 July 2008. That dispute requires oral evidence.

26.
There is a dispute as to what was said by Mr Spencer in leaving the meeting and what can be inferred from what was said. The sending of the invoice, wrongly dated 30 June 2008, by GPS is consistent with the alleged agreement and there is some limited support for the abandonment of the additional claim in the letter of 13 January 2009.

27.
I do not consider that the alleged compromise by withdrawal of the claim and acceptance of Ringway's proposal can be claimed to be fanciful. On the basis of the evidence and arguments I cannot say that Ringway has no real prospects of successfully defending the claim on the basis that it was compromised, although I currently view the case as weak. If there were a compromise then there was no dispute under the original agreement for the Adjudicator to determine at the date of the Notice of Adjudication. Any dispute would depend on the terms of the agreement to compromise or withdraw the claim.

The decision of the Adjudicator on the compromise

28.
The second limb of Mr Townend's submission is that the question of whether or not there was a compromise was raised as a defence to the claim by Ringway in the Adjudication and the Adjudicator found that the defence was not made out at pages 18, 19 and 21 of his decision.

29.
That is not challenged by Ringway but Mr Mort submits that there was a general reservation as to the adjudicator's jurisdiction and unless it is determined by the Court that the adjudicator had jurisdiction to decide the question of the compromise then any finding by the Adjudicator is not binding on Ringway.

30.
It is therefore necessary to consider Mr Townend's second contention that Ringway did not reserve the right to challenge the jurisdiction on this ground.

Ringway's jurisdictional reservation

31.
Mr Townend submits that the general reservation as to jurisdiction is not sufficient and that, as Ringway did not expressly reserve its position on jurisdiction on this ground they cannot now rely on it in order to challenge jurisdiction. He relies on the decision of His Honour Judge Thornton QC in Pillar v The Camber (2007) 115 Con LR 103 and the decision of Akenhead J in Allied P&L Ltd. v Paradigm Housing Group Ltd [2010] BLR 59. In reply Mr. Mort referred to passages in the decision of the Court of Appeal on the application for permission to appeal in Bothma (t/a DAB Builders) v Mayhaven Healthcare Ltd[2007] EWCA Civ 527.

32.
In Bothma the employer took a number of points on jurisdiction but did not take the point that the matter referred to the adjudicator covered more than one dispute. Dyson LJ at [6] observed that the employer made a general reservation of its right to take any other point as to the adjudicator's jurisdiction. Waller LJ at [14] said this:

"No point was expressly taken by the employer as to the adjudicator's jurisdiction to deal with more than one point, but unfortunately the employer made it clear that he reserved his position in relation to jurisdiction in very wide terms; so wide indeed that Mr Newman has very properly not pursued an argument that, in some way, the employer had consented to more than one point being argued or consented, or waived any question of jurisdiction on that basis. "

33.
I do not consider that the decision in Pillar v The Camber, where the party objecting to jurisdiction had raised a cross claim and conferred ad-hoc jurisdiction is of assistance on the facts of this case.

34.
In Allied P&L v Paradigm Akenhead J was considering a case where, as set out at [43(a)], there had been a reservation on a particular ground. At [33] he said this:

"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."

35.
Akenhead J did not in that paragraph deal with the position where there was a general reservation with specific reservations and left open the position on the effect of general reservations.

36.
Generally a party who wishes to do so can object to the jurisdiction of an adjudicator and may seek to do so either in general terms or by making a reservation on a specific matter.

37.

The underlying issue is whether, taking account of the particular reservation, a party by participating in the adjudication has waived its right to object on grounds of jurisdiction. If the party does not raise any objection and participates in the adjudication then, even if there is a defect in the jurisdiction of the adjudicator, that party will create an ad-hoc jurisdiction for the adjudicator and lose the right to object to any decision on jurisdictional grounds. If a party raises only specific jurisdictional objections and those jurisdictional objections are found by the court to be unfounded then that party is precluded from raising other grounds which were available to it, if it then participates in the adjudication. That participation amounts to a waiver of the jurisdictional objection and confers ad-hoc jurisdiction. Obviously this assumes that, at the relevant time when the party participated in the Adjudication, the jurisdictional objection was available. Some jurisdictional objections, for instance as to the scope of the dispute, may only become apparent during the adjudication process or at the time of the decision.

38.
Where a party raises a general reservation to the jurisdiction of an adjudicator but does not specify any particular ground for such an objection that raises potential difficulties for both the adjudicator and the other party. The adjudicator cannot investigate any specific objection and, if appropriate, decide not to proceed. The other party cannot decide whether any specific objection has merit. If so it might decide whether to take steps to remedy the situation by, for instance, starting a new adjudication. Equally, if a general reservation as to jurisdiction were to be sufficient to cover all matters that had arisen or might arise then there would, in principle, be no need for any specific objection, except to give the other party and the adjudicator a chance to consider it.

39.
Those practical difficulties suggest that the use of general reservations is undesirable but that does not answer the question whether a general jurisdictional reservation does permit a party to participate in an adjudication without thereby waiving its right to objection on jurisdictional grounds. The decision in Bothma provides strong support for the effectiveness of a general reservation. In addition in the context of arbitration, prior to the provisions of s.73 of the Arbitration Act 1996, a general reservation was held to the sufficient to preserve objection to jurisdiction by a party who participated in an arbitration. In Compania Maritima Zorroza SA v Sesostris SA, The Marques de Bolarque[1984] 1 Lloyd’s Rep 652, the respondent to an arbitration had written at the time of the nomination of an arbitrator by the claimant to say that, “without prejudice to such rights as owners may have”, they were nominating an arbitrator. Those general words were held by Hobhouse J at 660 to be a sufficient reservation of the right to object to the jurisdiction of the arbitrator and so did not confer a jurisdiction on the arbitrators which they did not otherwise have.

40.
That decision was applied by Potter J in Allied Vision Ltd v VPS Film Entertainment Gmbh [1991] 1 Lloyd’s Rep 392 where he said:

“Mr. Justice Hobhouse made clear that what matters is a clear qualification at the time of the appointment of the arbitrator and, implicitly, that if that is done then subsequent participation in the arbitration under the umbrella of the original reservation will not, without more, amount to a waiver or ad hoc submission.”

41.
I respectfully adopt that approach which seems to me to be equally applicable in the case of adjudication. The question in this case is therefore, whether the words of general reservation were sufficiently clear to prevent Ringway’s subsequent participation in the adjudication from amounting to

a waiver or an ad-hoc submission. In my judgment the words used both in the letters of 3 and 10 July 2009 and in the Response were sufficient to prevent a waiver of any jurisdictional argument, including one based on the alleged agreement of compromise/withdrawal and, as a result, there was no ad-hoc submission.

42.
In my judgment, the wording of the letter of 3 July 2009 was sufficient to reserve Ringway's position as to "further jurisdiction issues which we have not yet had time or opportunity to investigate". The letter of 10 July 2009 was sufficient to reserve Ringway's position"on jurisdiction, both in respect of those matters specifically raised and other jurisdiction matters which have now become apparent or will do so." The Response then continued that reservation and added a reservation that "issues raised below relevant to… the jurisdiction of the adjudication are put forward without prejudice to such general reservation." The issues set out in the Response included at paragraphs 40 to 45 a defence based upon the alleged compromise agreement on 30 July 2008. I read that as saying that the issue of compromise raised in the Response is being raised without prejudice as to the general reservation on jurisdiction.

43.
In such circumstances, I accept Mr Mort's submission that the decision of the Adjudicator on the submissions by Ringway that the compromise/withdrawal amounted to a defence to the claim did not clothe the Adjudicator with jurisdiction, which he did not otherwise have, to decide that issue. If therefore there was a compromise/withdrawal so that there was no dispute capable of being referred to adjudication, the Adjudicator did not have jurisdiction to decide on this defence. His decision on the compromise/withdrawal as a defence would not be temporarily binding on the parties and therefore would not preclude Ringway from being able to argue and seek a determination of that issue, as a matter going to the jurisdiction of the Adjudicator.

Conclusion

44.
On this issue therefore, I consider that although the current evidence is weak, Ringway have raised a triable issue as to the compromise/withdrawal which is not fanciful so that they have real prospects of succeeding on their defence to these enforcement proceedings.

More than one dispute referred to the adjudicator

45.
Mr Mort submits that there were two disputes: one in relation to the measured work under the May 2008 Agreement and the other for the claim associated with the debris under the June 2008 Agreement.

46.
Mr Townend submits that there is one dispute as to the sums to be paid in relation to the works carried out in respect of dredging the berth under the May 2008 Agreement, as varied by the June 2008 Agreement.

47.
Under Para 8(1) and 8(2) of Part 1 of the Scheme for Construction Contracts ("the Scheme") which applies in this case, it is only with the consent of the parties that adjudicators can "adjudicate at the

same time on more than one dispute under the same contract" or "adjudicate at the same time on related disputes under different contracts".

48.
The dispute as contained in the Notice of Adjudication which GPS sought to refer to adjudication was stated to be in these terms: "The dispute relates to the payment(s) due to the Referring Party from the Other Party for dredging works carried out at the berth and associated works."

49.
In my view that refers to one dispute. In David McLean Housing Ltd v Swansea Housing Association Ltd [2002] BLR 125, His Honour Judge Humphrey LLoyd QC had to consider whether a notice of adjudication which stated that the matters in dispute were loss and/or expense, extensions of time, valuation of variations, measured work valuation, release of retention and expenditure of provisional sums, was referring to one dispute. He cited a passage from the judgment of His Honour Judge Thornton QC in Fastrack Contractors Ltd v Morrison Construction Ltd [2000] BLR 168 at 172 where he said: "In other words, the 'dispute' is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference".

50.
Judge LLoyd concluded that when the context was examined the real dispute was about what payment ought to have been made as a result of an application for payment which contained various elements. He therefore held that the notice was valid in referring one dispute about payment to adjudication.

51.
On the other hand where disputes under the same contract, such as disputes as to extension of time or the date for completion and also disputes as to sums due under an application for payment, which are not dependent on one another, are referred to adjudication that would amount to two disputes: see Bothma per Dyson LJ at [10] and [13].

52.
In this case I consider that Mr Townend is correct in his submission that the dispute was as to payment for works carried out in respect of dredging the berth. That is one dispute. However is it a dispute under two agreements or under one, the May 2008 agreement as varied by the June 2008 agreement?

53.
The May 2008 agreement, it is common ground between the parties, consists of an email of 8 May 2008 in which GPS set out a mobilisation charge, a unit rate for dredging/disposal and an estimated duration and start date, together with a Method Statement.

54.
When the debris was discovered there was a meeting and GPS' email of 2 June 2008 set out the agreed terms. I accept Mr Townend's submissions that the June Agreement varied the May 2008 Agreement, both as to the rate payable and as to the detail of the Method Statement. I do not consider that the Referral demonstrates otherwise. It is true that it refers to "disputes" on the front page and refers to the "Contract" and the "Supplemental Agreement". That does not in my view change the substance of the dispute in the Notice of Adjudication or in the Referral which is the dispute as to payment under the May 2008 Agreement, as varied by the June 2008 agreement. That is still a dispute under one contract between the parties.

55.
I therefore reject Ringway's contention that more than one dispute under one contract was referred to the Adjudicator.

Decision no longer Binding

56.
Mr Mort refers to the Adjudicator's decision at page 11 where he deals with the "status of the Method Statement" and concludes that the Method Statement was a statement of intent, rather than a contract document and that GPS was not obliged to adhere strictly to it. Mr Mort submits that this finding is contrary to the submissions made by the parties in the Adjudication and in these proceedings. He refers me to paragraphs 2.7 and 2.15 of the Referral and paragraph 17 of the Response and also to paragraph 3 of the Particulars of Claim and paragraph 3 of the Defence in these proceedings. On that basis he says that the decision of the Adjudicator in relation to the Method Statement is agreed to be wrong and therefore his decision should not stand, in particular, in relation to the measured work claim. He refers me to the decision of His Honour Judge Seymour QC in Galliford Try v Michael Heal Associates (2003) 99 Con LR 19 and to paragraph 23(2) of the Scheme.

57.
Mr Townend says that on Ringway's case, at its highest, what happened is that the Adjudicator made an error of law or of fact as to one of the contractual documents which does not give rise to a ground to prevent enforcement of the Adjudicator's decision. He submits that paragraph 23(2) of Part I of the Scheme does not apply as there is no final determination of "the dispute" in relation to the claim for money for dredging work.

58.
The starting point for Ringway's submission is the fact that the Adjudicator did not accept the common position of the parties in relation to the Method Statement. Under the Scheme, as under s. 108 of the Housing Grants, Construction and Regeneration Act 1996, the Adjudicator may take the initiative in ascertaining the facts and the law. He evidently did not accept the common position that the Method Statement was a contract document. I consider he was entitled to do so and Ringway make no complaint as to the Adjudicator's finding in that respect.

59.
Rather Ringway say that given that finding and given that, contrary to that finding, the parties in these proceedings have agreed, by the exchange of pleadings, that the Method Statement is a contract document, the decision is no longer binding. This submission is based on the provisions of paragraph 23(2) of Part I of the Scheme which provides: "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provided for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

60.
That submission raises the question of the effect of the court making a final determination of an issue or the parties agreeing on an issue in terms which contradict the finding of an adjudicator on that particular issue. I find nothing in Galliford Try, where there was a question of whether there was a relevant contract, which assists on this question.

61.

When the Adjudicator makes a decision on a dispute then, under paragraph 23(2) of the Scheme that decision is binding until "the dispute is finally determined by legal proceedings…or by agreement between the parties" Equally under paragraph 21 of the Scheme the parties are required to comply with the decision "immediately on delivery of the decision".

62.
Where a party seeks to challenge an adjudicator's decision it usually does so either by resisting an application by the other party to enforce that decision or by bringing its own proceedings to have a final determination of the dispute decided by the Adjudicator.

63.
On an application to enforce an adjudicator's decision, the fact that the party resisting enforcement establishes an error of fact or law does not deprive the decision of its effect as being a temporarily binding determination of the dispute: see for instance Bouygues (UK) Ltd v Dahl-Jensen [2000] BLR 522; C&B Scene Concepts Designs v Isobars Ltd [2002] BLR 93 and Levolux AT Ltd v Ferson Contractors(2003) 86 Con LR 98. It is therefore not enough to raise on an application for summary judgement of an adjudication decision the fact that there has been an error of fact or law.

64.
There are cases where a party might bring proceedings under the CPR Part 8 for a declaration on a particular issue which arises in relation to a dispute which is referred to adjudication. Those proceedings might be brought either as parallel proceedings to the adjudication or as further proceedings after the adjudicator had made his decision. However generally if the issue under Part 8 deals with one issue which concerns a matter of fact or law within the adjudicator's decision that will not permit a party to avoid the consequences of the adjudicator's decision. It will only be if there is an issue which enables the court to come to a final determination of the dispute that the provisions of paragraph 23(2) and s.108 (3) of the Act will lead to the adjudicator's decision losing its temporary binding nature and being replaced by the court's final determination. Whilst an issue which does less than that may assist the parties in coming to a settlement or "final determination" of the dispute by agreement as a result of negotiation, mediation or other form of ADR, it will not affect the temporarily binding effect of the adjudicator's decision.

65.
Thus, for example, if a dispute arises on the question whether an instruction amounts to a variation of the works under a construction contract and the adjudicator construes the contract documents and finds that it is a variation and by a decision awards the value of that variation, then proceedings under Part 8 which determined that the instruction was not, on a true construction of the contract, a variation might permit the court to come to a final determination of the dispute. If however the challenge is to one issue in the adjudication or one finding of the adjudicator which does not permit the Court to come to a final determination of the dispute then the adjudicator's decision on that dispute will still be temporarily binding on the parties.

66.
In this case, the parties have not reached agreement on the dispute as to payment due for dredging works and the court cannot determine that dispute. At most the parties are agreed that the adjudicator made an error of fact or law but that does not affect the temporarily binding nature of his decision.

67.

I note that the only relevant part of the Method Statement is the final paragraph which provides as follows as to measurement for dredging: "At the conclusion of the work a post dredge survey will be carried out from which a calculation of the volume of material removed will be made". The Adjudicator did however base his calculation of quantities on the post-dredging survey. It is not clear that any agreement that the Method Statement is a contract document makes any difference to the decision. On that basis the court cannot come to any final determination and the agreement of the parties cannot affect the temporarily binding effect of the decision.

68.
It follows that Ringway's challenge on this basis fails.

<u>Decision Obtained by Fraud</u>

69.
Mr Mort submits that there is a triable issue that the adjudicator's decision was obtained by fraud and is therefore unenforceable. The allegation is pleaded not on the basis that GPS "acted with deliberate dishonesty" but that GPS "acted recklessly as to the truth of statements made in support of its claim in the adjudication which, so far as is material, was then upheld by the adjudicator."

70.
This allegation is based on the presentation of GPS's claim for the costs of labour which formed part of the claim for "costs arising due to damage to dredger" in the sum of £209,439.28 as set out in paragraph 8.1(a)(iv) of and Appendix 30 to the Referral. That appendix consisted of the letter of 28 November 2008 which included £9,342.76 as "Labour charges at cost (exclusive of BUP crew costs) calculated as follows: Rate of pay + 12.2% NI + 13% associated OH."

71.
In the letter of 28 November 2008 it was stated: "We have now been able to review all the costs associated with the recent dredging campaign at White Mountain Jetty Dagenham and we are pleased to submit a second interim account." Ringway say that the statement in that letter contained within it a further implicit statement that the costs referred to in the calculation appended to the letter had in fact been incurred by GPS and had been calculated as a result of the review.

72.
They say that, having now seen the relevant timesheets, the hourly rates and hours spent on labour set out in the calculations are incorrect and that GPS ought to have known that they were incorrect. They refer to the Adjudicator's decision at page 23, where he says: "A full schedule of hours claimed and rates charged has been provided and Ringway had the opportunity to question these prior to the adjudication but, because of its outright rejection of GPS's claim, did not do so. Now the rates (which include statutory additions) appear to have been accepted but Mr. Riley and Mr. Shorthall queried the hours." He refers to calculations by Ringway of the time claimed of some 62 man-days and sets out reasons before concluding "I therefore accept the time claimed".

73.
At page 22 of the decision the Adjudicator says this:

"In its Response Ringway contends that GPS had provided little evidence to substantiate elements of its claim. Certainly such evidence as was provided up to and including the Referral was limited to the make up of labour hours and materials. Some further detail is contained in the Reply.

GPS makes a sweeping dismissal of the need to substantiate its claim but it should be aware that any claimant must be prepared to provide reasonable substantiation of its claim whatever the agreement giving rise to the claim might say or not say in that respect. That said, the tight timescale of adjudication generally prevents a thorough examination of the supportive detail of claims of any substance."

74.
As the Adjudicator says in the passage just quoted, Ringway's case as set out in paragraphs 49 to 56 of the Response was essentially that GPS had failed to provide evidence of costs and there were two possibilities: that the evidence was inconsistent with the claim or that there was no evidence. Ringway invited the Adjudicator to disregard all items of costs which were not supported by evidence.

75.
In the Reply on 21 July 2009, GPS stated at paragraph 53(iii) that the amount of documentation and detail referred to by Ringway was unreasonable and unnecessary in order to prove the quantum of the claim. However they said at paragraph 53(iv) that: "Nonetheless, without prejudice to the GPS primary position that there was no requirement to provide the detail now requested and notwithstanding the point that no such request has been made in the 8 months following the submission of its interim account, GPS is willing to provide as much evidence as it can reasonably collate in the very short period allowed for this Reply. This includes a Saturday and Sunday when some of the information is difficult to collate."

76.
The annex to the Reply contained at Annex 13 some 15 individual timesheets for operatives of GPS who carried out the relevant work.

77.
Ringway then submitted a Rejoinder to that Reply on 27 July 2009 which the Adjudicator rejected and which I deal with below in relation to the allegation of breach of natural justice. In that Rejoinder Ringway set out at paragraphs 57 to 59 a Response to the timesheets and said "When one looks at the 'evidence' provided by GPS now for the first time it appears to be materially deficient and inconsistent with GPS's claim." At paragraph 57(8) they said that "the claim identifies workers as having been working on days when, according to the time sheets, those workers were off work … this appears to be a deliberate attempt to recover costs not in fact incurred" and at paragraph 57(9) that "the hourly rates shown in the time sheets are not consistent with the hourly rates claimed." They concluded at paragraph 58 by saying: "In summary it is not surprising that GPS is reluctant to demonstrate actual costs incurred: it has no or no adequate record of the costs incurred. Such records as it has are in fact inconsistent to the costs claimed which appear to be surmised by those advancing the claim."

78.
In these proceedings Mr Spencer in his witness statement on behalf of GPS says that he admits that "there were some mistakes in the detail of the amount claimed as set out in my letter dated 28th November 2008 and in the Referral Notice on a full analysis of the timesheets, but having carried out this exercise I note that they are almost all in Ringway's favour." He sets out at Exhibit B1 an analysis which concludes that 22.5 hours were overcharged and 161.5 hours were undercharged, leaving a net undercharge of 139 hours. That is not challenged by Ringway.

79.
He explains that he was unable to devote sufficient time to putting the claim together accurately enough and set out what was done in paragraph 44 of his witness statement, referring to the two

examples relied on by Ringway at paragraphs 11(7)(a) and (b) of the Defence. He explains the position as follows:

“In putting together the Referral Notice, I just asked my office staff what rates we paid and I put the claim together based upon details of the personnel on site provided by another employee, Mr Viernes. I knew the type of work each of the people did and charged Ringway according to the rates my office staff had given me for each grade of worker. I did not, at that point, go through every timesheet. I do not accept that in failing to do this I have been fraudulent. The hourly rates in fact paid were not, as it alleged at 11(7)(a), typically less than the rates claimed. In the example in 11(7)(b) Mr Stuckvynski was off that day but he was replaced by a Mr Skalski who in fact worked a 15 hour [not] a 10 hour shift. If there were minor errors in the rates because one individual was paid at a very slightly higher or lower rate to that paid to other similar operatives, then that was accidental. In the overall analysis we forgot to charge for the labour used in fabricating the grilles and there was a substantial undercharge for the labour on the hours booked. Therefore the value claimed in the Referral was understated. ”

80.
What then is the position in relation to the Ringway’s allegation of fraud? The effect of alleging fraud in the context of adjudication decisions was considered by Akenhead J in SG South Limited v King’s Head Cirencester LLP[2009] EWHC 2645 (TCC) where he said this at [20] and [21]:

“20. Some basic propositions can properly be formulated in the context albeit only of adjudication decision enforcements:

(a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.

(b) If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgement, it must be supported by clear and unambiguous evidence and argument.

(c) A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former.

(d) Addressing this latter case, one needs to differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it. Examples of the first category are where it is later discovered that the certificate upon which an adjudication decision is based is discovered to have been issued by a certifier who has been bribed or by a certifier who has been fraudulently misled by the contractor into issuing the certificate by a fraudulent valuation. Examples of the second category are fraud on another contract or cross claims arising on the contract in question which can only be raised by way of set off or cross claim. Whilst matters in the first category can be raised, generally those in the second category should not be. The logic of this is that it is the policy of the 1996 Act that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims; put another way, enforcement should not be used to facilitate fraud; fraud which does not impact on the

claim made upon which the decision was based should not generally be deployed to prevent enforcement.

21. In formulating and applying these propositions, courts need to be aware and take into account what goes on construction sites up and down the country. On numerous occasions, contractors and subcontractors and even consultants will submit bills or invoices which are or are believed by the recipient to overstate the entitlement. Whilst there are some "cowboy" and fraudulent builders who prey on the public, it will only rarely be the case that one can presume fraud to have taken place where an invoice or bill is overstated. The claiming party may believe that it is entitled to what it is claiming; there may be a simple and honest mistake in the formulation of the claim; the claim may be based on a speculative but arguable point of law or construction of the contract. In none of these cases can it be said that there was fraud on the part of the claiming party. The Court should be astute and cautious on adjudication enforcement applications in assessing pleas of fraud by the party against whom the adjudication decision has been made. I doubt very much whether there will be any significant number of challenges to enforcement on the basis of fraud."

81.
I was also referred to the decision of Teare J in Enka Insaat v Banca Popolare [2009] EWHC 2410 where there as an allegation of fraudulent demands on guarantees. He set out the test as being whether there was a real prospect that a party could establish at trial that the only realistic inference was that the other party could not honestly have believed in the validity of the demand: see the decision at [24] and [40].

82.
It can be seen that this is a case where Ringway was aware of the inconsistency between the invoices and the claimed figures during the course of the adjudication and put forward a case based on that inconsistency. At that stage it did not allege fraud. Ringway's new case on fraud depends on inferences to be drawn from the very inconstancies which formed part of Ringway's submissions in the Rejoinder. Nothing further has arisen.

83.
As Ringway had raised the inconsistencies in the adjudication then, like any other matter raised in the adjudication, they cannot later rely on that matter to challenge the findings of fact or law of the adjudicator so as to resist enforcement. In my judgment a party cannot reconstitute a case based on an inconsistency and then by alleging fraud seek to rely on the same matters to resist enforcement of the decision of the Adjudicator.

84.
As Akenhead J said in SG South Limited if the behaviour, acts or omission are raised and adjudicated upon in the adjudication, the decision without more is enforceable. In this case Ringway raised the inconsistencies in the Rejoinder which the Adjudicator refused to take into account. Ringway raises a separate issue of whether the adjudicator acted in breach of the rules of natural justice in refusing to take into account that Rejoinder. That means that the Adjudicator did not, in this case, adjudicate on the question of the inconsistency. However, where a party is aware of a matter and does not raise it during the adjudication, it cannot then raise it to seek to challenge enforcement. I consider that the same should apply to allegations of fraud. That party always has the opportunity to deal with the matter in court or arbitration when it seeks a final determination. If new matters come to be known after the adjudication and before enforcement then, provided they are properly supported, they might

form a basis for resisting enforcement as set out by Akenhead J at [20(c)] and [20(d)] in SG South Limited.

85.
In deciding the issue of whether Ringway's allegation of fraud based on inconsistencies can be raised as a defence to enforcement, it seems to me that I should approach the case on the basis that Ringway were aware of the inconsistencies during the adjudication but did not raise them in an effective way. If the Adjudicator was in breach of the rules of natural justice in failing to allow them to put in a Rejoinder then the fact that Ringway were not able to raise the question of inconsistencies will go to the question of the materiality of the breach. If, however, the Adjudicator was not in breach of the rules of natural justice then the fact that Ringway was unable to deploy their contention of inconsistencies cannot mean that they can now raise that contention, reformulated as fraud, to challenge enforcement of the decision. Otherwise a party could challenge enforcement on the basis of matters they knew about at the time of the adjudication but failed to deploy.

86.
I therefore find that Ringway were aware of the inconsistencies during the adjudication and, subject to my findings on breach of natural justice, cannot now raise those matters, reformulated as fraud, to seek to resist enforcement.

87.
Even if that were not right, the question is whether there is a real prospect that Ringway would establish at trial that the only reasonable inference from the evidence is that GPS were reckless so as to be deceitful in putting forward the claim. The evidence shows that there were timesheets on which they did not base the claim. Rather they based the claim on details of personnel on site and rates paid. The fact, which is not challenged, that the claim underestimated the hours shown on the timesheets is powerful evidence that there was a absence of fraud. Why would a party deceitfully seek to put forward a claim for fewer hours than might be made on the basis of the evidence in timesheets? It seems to me to be fanciful to say that GPS were acting dishonestly having no honest belief in the truth of what they were putting forward. This is a case where there were inconsistencies between the timesheets and the claims but I do not accept that there is a real prospect that Ringway will establish at trial that GPS were reckless, in the sense set out in Derry v Peek(1889) 14 App. Cas 337, in putting forward the claim.

88.
As I have said when Ringway put in the Rejoinder they did not seek to allege fraud based on the facts. Even now at paragraph 30 of his submissions Mr Mort says that he is not making an allegation either of deliberate dishonesty or dishonest conduct by Mr Spencer.

89.
Therefore, I do not consider that Ringway have established that they have real prospects of successfully defending the enforcement of the adjudicator's decision in relation to the cost of labour on the basis that the award was procured by fraud.

Natural Justice

90.
It is clear that the Adjudicator did not take into account Ringway's submissions in the Rejoinder but it is necessary to consider the circumstances in which he took that position. The background to the service of the Rejoinder is as follows.

91.

The Adjudicator first wrote to the parties on 1 July 2009 to say that he had received the Referral and that his decision was due on 29 July 2009. On that basis he said the Response should be delivered on 11 July, GPS should reply within 4 days but that any Reply should be "restricted to any relevant matters raised by Ringway that are not considered in the referral."

92.

As set out above, by letter dated 3 July 2009 Ringway raised a number of jurisdictional issues upon which the Adjudicator requested submissions from GPS which were provided on 7 July 2009 and from Ringway which were provided on 8 July 2009. He then considered the submissions and decided on 8 July 2009 to proceed with the Adjudication. In giving that decision he said that because of the delay the Response should be delivered by 14 July 2009. On 10 July 2009 Ringway sought an extension to 17 July 2009. An extension was granted until 15 July 2009 and the Response was served on GPS on 16 July 2009 but received by the Adjudicator only on 17 July 2009. GPS were then granted an extension of time until 21 July 2009 to serve a Reply. It was served on that date.

93.

Ringway then stated in a letter of 22 July 2009 that they anticipated that they would want to put in a further submissions to deal with certain aspects of the Reply. They mentioned technical issues, errors concerning comments on their Response and legal points. The adjudicator responded on 22 July 2009 to say:

"It was not my intention that there would be any submissions after the Reply and Ringway, wrongly, has taken upon itself to assume that it may do so. That said I accept that parties to adjudication do feel the need to keep making further comment but the timescale does not permit this.

Having considered again GPS's communication of 9th July I do not intend to request an extension as it would be wrong to deny Ringway an opportunity to comment on the Reply solely as a means of obtaining an extension from GPS."

94.

It is not clear what the Adjudicator meant by his last comment but GPS had said on 9 July 2009 that they could not grant an extension of time because the key personnel would not be available beyond 24 July 2009. They said that they would be prepared, though, to grant the Adjudicator an extension provided that Ringway did not make any submissions or representations after 12:00 noon on 23 July 2009.

95.

In the event, despite what the Adjudicator had said and without permission from the Adjudicator, Ringway served a Rejoinder on 27 July 2009. Later that day the Adjudicator wrote in these terms:

"I do not know how Ringway thinks I can accommodate such a submission only two days before my Decision is due. I advised on 22nd July that its assumption that it could make a further submission was wrong.

The time for my Decision has already been restricted due to the jurisdictional challenge, Ringway's delay in submitting its Response and the short extension for GPS's Reply. Nevertheless it is effectively complete except for quantum calculations and final check."

96.

On 28 July 2009 Ringway wrote to the Adjudicator saying that he was bound to take account of the Rejoinder and GPS wrote to say that there was new material in the Rejoinder to which they had no opportunity to respond. The Adjudicator sent his decision to the parties on the next day, 29 July 2009.

97.
Mr Mort submits that the Adjudicator was wrong to refuse to take Ringway's case as set out in the Rejoinder into account. He says that the Adjudicator allowed a large volume of evidence to be adduced at a late stage, in particular evidence to support the larger part of GPS' case. He refers to paragraph 7(2) of Part 1 of the Scheme and says that the documents should have been included with the Referral but instead were served with the Reply. He submits that in the circumstances Ringway was entitled to comment and to have the comments, at least, noted by the Adjudicator.

98.
Mr Townend submits that the Reply responded to matters raised in the Response as the Adjudicator had directed. He says that the additional documents attached to the Reply were needed because the Response was the first time that Ringway had ever responded to the detail of GPS's case. He says that the documents were not material as the Adjudicator based his decision on a global view of the labour claims.

99.
The approach of the courts to contentions of breach of the rules of natural justice raised in proceedings for enforcement of adjudicators' is that they should only be made in the plainest of cases where the adjudicator has gone about the task in a manner which is obviously unfair, as set out by Chadwick LJ in the Court of Appeal decision in Carillion Construction Ltd v Devonport Royal Dockyard [2006] BLR 15 at paragraphs 85 to 87.

100.
In Cantillon Ltd v Urvasco Ltd [2008] BLR 250 at [57] Akenhead J summarised the principles as follows:

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

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

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

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

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

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd -v- The Camden Borough of Lambeth was concerned comes into play. It follows that, if either party has

argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

Was there a breach of the Rules of Natural Justice?

101.
As Dyson J said in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93 at 97 "the timetable for adjudication is tight… . Many would say unreasonably tight and likely to result in injustice. Parliament must be taken to have been aware of this." It follows that the procedure by which a party is given a full opportunity to deal with the other party's case is necessarily restricted. As the sentence makes clear at paragraph 13(g) of Part I of the Scheme, the Adjudicator shall decide the procedure to be followed and may "give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with."

102.
In this case, at the outset the Adjudicator directed a procedure by which there was to be a Response and a Reply. The Reply was to be "restricted to any relevant matters raised by Ringway that are not addressed in the Referral." That procedure was a conventional approach. I do not consider that it can be said that such a procedure failed to comply with the rules of natural justice.

103.
There was a delay caused by the jurisdictional objections and the Response only reached the Adjudicator on 17 July 2009. GPS served its Reply by 21 July 2009. When on 22 July 2009 Ringway wrote to say that it would be putting in a submission on 27 July 2009, the Adjudicator made it clear that he had limited the submissions and that Ringway had assumed, wrongly, that it could make a submission in response to the Reply.

104.
The element of the Reply on which Mr Mort has concentrated his submissions is the time sheets attached to the document. In the Rejoinder Ringway pointed out the inconsistencies between GPS' claim and the timesheets and that GPS accept that the labour claim has not been based on actual records but says nothing other than that GPS has not explained the discrepancies. There is no allegation of fraud. There is no other part of the Rejoinder relied on by Mr Mort.

105.
I do not consider that the Adjudicator's action can be categorised as a breach of the rules of natural justice. The Reply was confined to matters raised in the Response. In the Reply GPS said that they did not need to submit timesheets but did so without prejudice to that contention because of comments made in the Response. Therefore GPS complied with the directions of the Adjudicator and they were entitled to submit additional documents responding to the Response.

106.
I consider that, in the context of a rapid summary procedure leading to a temporarily binding decision, the Adjudicator was entitled to and needed to limit the number of rounds of submissions. As he observed, parties to adjudication feel the need to keep making further comment on what the other party has said but the timescale in adjudication does not permit this. The wish of Ringway to serve a rejoinder two days before the date for the Adjudicator's decision was something which the process had not and could not allow. First, the Adjudicator's timetable was a fair one. Secondly, a rejoinder, even in litigation, requires permission. There was nothing raised by Ringway in its letter of 22 July

2009 which should have persuaded the Adjudicator to allow Ringway to serve a rejoinder. Thirdly, the Adjudicator had made it clear that permission was not given for a rejoinder but, despite that and without putting forward any new ground for doing so, Ringway simply served the document. They did not, for instance say that there was any crucial new aspect on which they sought to rely. Fourthly, the service of the Rejoinder on day 26 of the 28 period for the Adjudicator's decision clearly could not be allowed. As a matter of fairness GPS, the claimant party, indicated that they wanted to put in what would have been a surrejoinder and they would have been entitled to have the "last word". Fifthly, the period of 28 days need not be extended by a party and this is not a case where the Adjudicator could not fairly determine the claim within 28 days.

107.
In my judgment, the time period simply did not allow Ringway to be able to make a further response to the Reply. This, in my view has to be accepted as part of the rapid process, as Dyson J observed. There was nothing obviously unfair in the process in this adjudication in not permitting Ringway to put in submissions by way of the Rejoinder which the Adjudicator had not made part of a procedure which was otherwise fair and had fairly stated could not be served. Nor was there anything obviously unfair in not permitting Ringway, as the Responding party, to put in further submissions two days before the Adjudicator was due to make his decision.

108.
In the circumstances, I do not consider that what happened can be elevated to a breach of the rules of Natural Justice and there is no basis for Ringway to resist enforcement on this basis.

109.
Nor do I consider that the relevant submission in the Rejoinder can be said to be material. It pointed out inconsistencies in the evidence which was before the Adjudicator, without analysing the effect of the inconsistencies. On analysis the timesheets show, on the evidence before me and as stated above, that the claim understated the hours compared to the timesheets.

Conclusion

110.
In the circumstances, apart from the question of whether there was a compromise/withdrawal, I do not find that, despite Mr Mort's skilful advocacy, the other grounds raise matters which have a real prospect of success.

111.
In relation to whether there was a compromise/withdrawal I consider that Ringway has established a real but weak prospect that they can successfully defend the enforcement on this basis and therefore that GPS are not entitled to summary judgment. However the issue is a short one which can be resolved without difficulty and will need to be resolved if the parties cannot reach agreement. Subject to submissions from counsel I propose that directions should be given for a short hearing at an early date to determine the issue.

112.
I do not consider that it is appropriate for me to grant summary judgment for part of the claim because, on one possible outcome of the alleged compromise, the parties agreed the method for payment as part of that agreement. However, as I have said I consider the evidence of a compromise/ withdrawal to be weak but not fanciful and in those circumstances I consider that Ringway should

lodge the sum claimed in court, as a condition of being given permission to defend and pending the outcome of the determination of the issue of compromise/withdrawal.

113.
I now invite submissions on ancillary matters and necessary directions.