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Case No: HT-11-511

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 26th January 2012

Before :

MR JUSTICE AKENHEAD

- -

Between:

HERBOSH-KIERE MARINE CONTRACTORS LIMITED **Cla**

- and -

DOVER HARBOUR BOARD **Defe**

- -

- -

Samuel Townend (instructed by **SNR Denton UK LLP**) for the **Claimant**

Jessica Stephens (instructed by **Speechly Bircham LLP**) for the **Defendant**

Hearing date: 20 January 2012

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JUDGMENT

Mr Justice Akenhead:

1.
In the First World War, a former cargo ship, the Spanish Prince, having been appropriately converted, was deliberately sunk by the Admiralty close to the entrance to Dover Harbour. The purpose was to hinder or prevent German U-Boats firing torpedoes into what was at that time a strategically important and recently constructed harbour. During the Second World War, having been damaged by a bombing raid, the rermains of another vessel, the War Sepoy, were sunk alongside the Spanish Prince. In April 2010, the Dover Harbour Board (“DHB”) employed Herbosch-Kiere Marine Contractors Ltd (“HKM”) by contract ("the Contract") to provide the equipment including barges, personnel and supervision to remove the remains of the Spanish Prince, together with some debris from the War Sepoy. The project was completed somewhat late and issues arose between the parties in relation to the final account; to a substantial extent at least, these issues related to the delays, their causes and the financial credits or debits attributable thereto. HKM instituted, as it was entitled to do, adjudication proceedings against DHB in October 2011 which were contested by the latter, and, in these court proceedings, HKM seeks to enforce the adjudicator’s decision in its favour. DHB contests these proceedings on the basis that the adjudicator significantly exceeded his jurisdiction or failed to follow the rules of natural justice because he adopted, it is argued, a method of assessing the financial compensation due for the delays which had been put forward by neither party before or during the adjudication.

The Background

2.
HKM are specialist marine contractors which clearly has experience, often with the use of heavy lifting barges, of seabed excavation, dredging and clearance. The contract between the parties was in the standard form of International Wreck Removal and Marine Services Agreement, sometimes known as “Wreckstage 99”. Part 1 of the pro-forma Contract comprised 18 filled in boxes, Box 7 of which described the nature of the services to be provided:

“To provide marine equipment, personnel and supervision as detailed within Annex I to remove and dispose part of the vessel wreck Spanish Prince and associated field of debris. As detailed within Annex II VESSEL to be removed entire length down to a minimum -8.5m datum, accordingly some remains of the wreck and other associated debris will remain on the seabed on completion and works. No contaminated or special waste including Asbestos, is included within the agreed works…The works are to be monitored against the agreed works programme…”

The "Lump Sum Price" was said in Box 10 (a) to be £1,787,912 but this "figure is subject to change for reasons noted within this agreement". Box 13 identified that certain "Extra Costs" might be payable under various contract clauses and in the context of the "risk register" and "pain/gain assessment”.

3.
Although it is not part of this Court’s function to construe the clauses in Part II of the Contract, it will be helpful to set out several clauses:

“7. If the Contractor is delayed in performing its obligations under this Agreement due to adverse weather or sea conditions or due to any other reason outside the control of the Contractor, including the effect of any risk noted within the contract Risk Register, the Contractor shall receive from the Company additional time and compensation

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per working day or pro rata - at the rates set out in Annex 1, for the time the Contractor is delayed in commencing or continuing the services with the progress…”

19.1 The works will be deemed complete once the Company certifies the works had been completed…

19.2 A pain/gain share of time related costs is incorporated within this agreement, based on the agreed contract programme of works…

19.3 Additional time awarded to the Contractor under the terms of this agreement for weather delays or additional instructed works and the like, will be added to the contract programme of works, and all time to be paid at the agreed resource rates noted within Annex I. the programme will be regularly updated by agreement to indicate any extended Contract completion date, facilitating the assessment of Pain/Gain share based on the final completion date.”

There was also an adjudication clause, Clause 23 which called for the adjudication to be conducted under the Institute of Civil Engineers procedure.

4.
Annex 1 contained a breakdown of the Lump Sum Price materially including the following three elements:

“Barge 1 resource 60 days @ £8097	£485,820

Barge 2 resource 64 days @ £11120	£711,680
Supervision resource 64 days at £2615	£167,360”

There then followed a breakdown of what each such "resource" comprised such that, for instance, Barge 2 comprised not only the barge itself but also, amongst other things, a crawler crane, a demolition grab and a tug boat and crew.

5.
The contractual “Pain/Gain” formula appears (without the Court making any finding on this) to involve the correlation between delay and the resources rates for Barges 1 and 2 and the supervision. This formula appears to have been one which was designed to reward HKM if it finished earlier than it should and the opposite if it finished culpably late.

6.
It seems to have been common ground that the works started in late June 2010, albeit there may well have been some issue as to whether the work should have started in early June 2010. There is no dispute that there was some delay caused by weather or sea conditions and by the finding of asbestos within the wreck, although the extent of the delay was very much in issue. Again, it was common ground at least in the court proceedings that the barge, comprised within the description of Barge 2 in the Contract (the “Waasland”), was demobilised by HKM in late September 2010, albeit that the tugboat (called the "Multicat”) remained until about 23 October 2010. The works as a whole were completed on 15 December 2010. Again it seems to have been common ground that the original contract completion period was some 64 days. Thus, arguably the project overran by some three months.

7.
Disputes arose on the final account between the parties. On 23 June 2011 HKM put forward to DHB the final version of the account stating: “in a final effort to move the account forward, we list below the following discrepancies with some narrative explaining why we contend that extensions of time generally should be increased by DHB”. The prose part of this letter is undoubtedly concerned with what HKM believed was their extension of time entitlement. It addresses delays attributable to Weather ("Variation No. 2"), Asbestos ("Variation No. 3"), Stone Fill ("Variation No. 4"), Bombing of Boilers (“Variation No. 5") and Quay/Waste Operations. The letter went through every month from June to December 2010 highlighting when and why additional extensions were required. The letter concluded by enclosing for the attention of DHB HKM’s final account dated 23 June 2011 including the items and adjustments noted earlier in the letter. The gross sum of £3,946,365.91 was claimed leaving, after payments, a balance of £905,588.34 said to be due.

8.
The attached final account claimed the Lump Price items as well as the Variations, although the Asbestos claim was split into two with one being called Asbestos and the other being called “Asbestos-disrupted works". There is no doubt that the calculations for money claimed against these various delay or disruption Variations is done on a resource by resource basis. An example is the Weather Variation:

“Barge 1 resource	days 41.4	8,097.00	335,350.75
Barge 2 resource rate (£11,120 less multicat £2350	days15.7	8,770.00	137,762.08
Multicat (identified separately to barge 2)	days 22.4	2,350.00	52,581.25
Supervision	days41.4	2,615.00	108,304.58

Quay waste operations to endof October	days 29.2	3,480.00	101,616.00”

The “Pain/Gain” assessment is also set out on a resource by resource basis so, for instance it does not apply in relation to Barge 2 as from 26 September 2010 when it was demobilised. Similarly the Multicat tug features until 15 October 2010 when it was demobilised.

9.
The response from DHB came on 13 July 2011 in the form of a letter and further valuation. That one-page valuation addresses the delays which DHB is accepting again on a resource by resource basis, it being accepted, at least for the weather and the stone fill that the Multicat rate can be extracted and used separately. For all items for which delay is accepted, supervision at the full rate is allowed for the longest delay affecting operations. Thus, in the same way as HKM claimed the full supervision rate for the whole period of delay for Barge 1 even though Barge 2 was delayed by less, so too did DHB allow the full supervision rate for the longest period of delay relating to the two Barges. This response led to an additional £162,024.25 being certified and paid by DHB to HKM

10.
There is no suggestion that there were any further material exchanges between the parties. But it is clear that by October 2011 HKM had decided to seek adjudication.

The Adjudication

11.
HKM served its Notice of Intention to Refer Dispute to Adjudication" on 24 October 2011. Paragraph 4 sets out the “Nature and Brief Description of the Dispute":

“4.1. A dispute has arisen between the parties under the Contract. The dispute concerns the value of:

4.1.1. the final account for the Contract; and to

4.1.2. outstanding sum to be paid by DHB to HK (being the difference between the value of the final account an amount certified and paid to date by DHB).

4.2. By letter dated 23 June 2011…HK submitted a claim for payment by DHB to HK of the sum of £905,588.34 being the difference between the value of the final account as assessed by HK (£3,946,365.91) and the amount previously certified and paid by DHB to HK (3,040,777.57).

4.3. DHB responded to HK’s letter of 23 June 2011 on 7 July 2011 setting out in brief its position on the principal issues in dispute. This was subsequently followed by a letter dated 13 July 2011 from DHB to HK, which contained details of a valuation exercise undertaken by David Harrison of DHB and in which DHB valued the account as a July 2011 in the sum of £3,202,801.82.

4.4. A further payment was made by DHB to HK pursuant to DHB’s letter of 13 July 2011 in the sum of £162,024.25…

4.5. Accordingly, DHB, without any contractual basis, has rejected HK’s claim for the sum of £743,564.09, which HK considers remains outstanding in respect of the final account.

4.6. As a result of DHB’s rejection of its claim, HK is entitled to and does seek the redress/award set out further below.”

In Paragraph 5.1, HKM stated that the "dispute arose in England, when DHB by its letters of 7 July 2011 and 13 July 2011 rejected HK's assessment of the value of: (i) the final account and (ii) the outstanding amount due to HK from DHB."

12.
The redress sought was for a determination that the correct value of the final account was the sum of £3,838,241.96 and that it was entitled to be paid the sum of £635,440.14. It will be seen that these figures are somewhat less than those referred to in Paragraph 4 of the Notice but as appears hereafter they reflect the findings of the expert, retained by HKM, Mr Bourke, which were less largely because his delay assessments were less than those of HKM.

13.
There followed the Response of DHB on 31 October 2011. With this was served an expert quantum report from Mr Rudman. The prose part of the Response is primarily concerned with the terms of the contract and the delay. It contained an explanation as to certain inefficiency and disruption said to be attributable to HKM. In conclusion, it is stated that the overall valuation of the works executed by HKM was £2,930,647.22, allowing for a deduction for inefficiency on the part of HKM. There is an attached breakdown in Appendix 3 which calculates the amount due in relation to the delay or disruption in effect on exactly the same basis as HKM had put forward; indeed the breakdown expressly compares what HKM is claiming by way of delay against each individual resource. Mr Rudman seeks to support this financial assessment.

14.
Although there was a Reply and Rejoinder, they add nothing of relevance to the matters in issue in this case.

15.
The adjudicator issued his decision on 5 December 2011, some short extension of time having been agreed for this. The decision in its Introduction refers to the contract, its date, the parties and the fact that the "primary claim of the Dispute concerns the Parties' alternative values of the Final Account". He sets out the fact that HKM's total assessment of the Final Account (£3,838,241.96) is "as ascertained by…Mr Bourke in his Report…" In Chapter 2, he addresses "The Adjudication, Generally" and confirms that there is accepted to be a dispute and that there had been no jurisdictional challenges. He confirms that he has received the Referral and Response together with the attached documentation including the two reports and sets out effectively verbatim the relief sought by HKM. Chapter 3 addresses what he calls "General Issues", stating that the contract period was 64 days and that the contractual start date was 7 June 2010. At Paragraph 3.4, he states that the works were completed on 14 December 2010 recording the earlier dates when the Waasland and Multicat were demobilised. Perhaps presaging where he may have made an error, he wrongly sets out Clause 7 of the Contract in that he talks of there being time related compensation not for the "Contractor" being delayed but for the "Contract" being delayed. In considering at Paragraph 3.8 the evaluation of the Pain/Gain he asked himself: "What is the applicable "resource rate"?" and goes on to accept that supervision is a resource; he assesses the Pain deduction at £63,978 based on the daily rate of £21,326. This rate is derived, he said, as follows:

"I would therefore interpret the value of resources to consist of plant plus personnel ie £485,820 + £711,680 + £167,360 = £1,364,860. To obtain a daily rate the total resource rate should be divided by the original 64 day anticipated contract duration. This gives a daily rate of £1,364,860 divided by 64 which equals £21,326 per day."

These lump-sum figures were derived from the Barges 1 and 2 and supervision totals in the lump-sum contract sum (see above).

16.
At Paragraphs 4, 5, 6 and 7, he addresses the issues as to what delays were caused respectively by weather, asbestos, stone levels and the bombing of boilers. At Paragraph 8 he addresses a valuation issue (the multibeam surveys). At Paragraph 9 he addresses the claim for prolongation of the Quay-Side Set Up", decides the delay and moves on to the quantum by calculating it by reference to time related items.

17.
At Paragraph 10 the adjudicator calculates the amounts due on the final account. At Paragraph 10.2.2 he assesses the extensions of time due at 74 days. This is broken down as to weather (30 days), asbestos direct delay (16), asbestos disruption (8 days), stone fill removal (8 days), stone fill disruption (11 days) and the bombing boilers (1 day). At Paragraph 10.2.2 he says that he has "calculated the total daily resource rate in Annex 1 to be £21,326, (My subsection 3.8)". He treats the bombing boilers delay separately and then allows 73 days at £21,326 per day as the amount due to HKM in respect of the delays; that is a total of £1,556,798. That amount is carried through to the summary at Paragraph 10.5 along with the Pain/Gain assessment, amongst other things. He finds therefore that the total final account assessment is £3,704,422.37, from which the amount paid to date is accounted for leaving a net amount due to HKM of £501,420.45, together with £1016.89 interest plus VAT. He ordered each party to pay half his costs, which indeed they have done.

18.
The decision was not honoured by DHB and thus it was that HKM issued the current proceedings.

The Proceedings and the Argument

19.
HKM issued proceedings in the TCC on 14 December 2011 and its Particulars of Claim set out the background to the adjudication and the substance of the decision and claimed the sum of £502,437 plus VAT. Its application for summary judgement was supported by two witness statements from Mr Akinbode which largely tell the story as set out above and exhibit many of the documents referred to above. Against that, DHB submitted one witness statement from Mr O'Connor, its solicitor.

20.
Essentially, HKM says that there is no valid challenge to jurisdiction or on the basis of natural justice and that the decision should be enforced. On the other hand, DHB argues that the adjudicator exceeded his jurisdiction because the dispute was defined by the correspondence in late June and July 2010 and HKM's claim and entitlement was being put forward by both parties on exactly the same basis, albeit for differing periods of delay; thus, money was only claimed in respect of a given resource, for instance Barge 1, for the period of delay specifically relating to that resource. What the parties were not doing either beforehand or even during the adjudication, it is argued, was proceeding on the basis of applying a composite overall rate to the overall delay. DHB alternatively argues that the adjudicator acted materially unfairly in that he never suggested to the parties prior to the issue of his decision that a composite rate should be applied to the overall delay. DHB through the evidence of Mr O'Connor (in particular Exhibit MOC 8) seeks to demonstrate that it makes a material difference to the effect that the adjudicator could well have come to a figure at least £200,000-£300,000 less than he did if he had applied the agreed methodology. HKM in response argues that the essential dispute between the parties was the overall disputed final account and that, even if the

adjudicator arguably used the wrong methodology, mere mistakes do not undermine the enforceability of the decision. I will address the legal arguments under the Law section of this judgement below.

The Law

21.
It is now well established that mere mistake of fact or law on the part of the adjudicator in his or her decision does not give grounds to challenge the enforceability of the decision (see for instance **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 522). The Court of Appeal in **Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2006] BLR 15 also suggested that judges should deal relatively robustly with challenges on jurisdictional or fairness grounds:

“85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".

86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions…

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.”

22.
However, these points were developed in the decision of this Court in **Cantillon Ltd v Urvasco Ltd** [2008] BLR 250:

“53. Whilst that case is, obviously, not authority for the proposition that a "good" challenge to a decision on jurisdiction or natural justice grounds will be excluded on some statistical basis, a

challenge on these grounds must be plain, clear and relatively comprehensible. In a case such as the present, the Adjudicator, albeit experienced, had a mass of conflicting evidence and argument to take on board. The Court should not take an over-analytical approach to questions of jurisdiction and natural justice arising in adjudications under the HGCRA 1996…

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 or 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…

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."

Neither Counsel has suggested that these various approaches are anything other than correct.

23.
I would add only this observation. When there is an issue before the Court as to what dispute has been referred to adjudication, one needs to bear in mind that in practice, particularly on developing

disputes for instance on a final account, one will need to look at the dispute as it has developed. Thus, if by the time that the adjudication process is started by way of the Notice of Adjudication, the amount previously in issue has been reduced and the arguments on any given issue have been modified or limited, it will usually be the dispute as developed which is being referred to adjudication. As has been said on a number of occasions in the past, the scope of disputes can be "as broad as it is long". Disputes may be very wide and cover myriad issues; on the other hand, disputes may be very narrow and involve one or more limited and discreet issues. It simply depends on the relevant history between the two parties on any given construction contract.

Discussion

24.
The first step must be to analyse what dispute was referred to adjudication. In this case, one needs to go primarily to the Notice of Adjudication. This sets out in relatively simple and comprehensible language not only the nature and description of the dispute but also when it arose. Although Paragraph 4.1 states that the dispute concerns the value of the final account, Paragraphs 4.2 to 4.5 and 5.1 explain that the dispute has arisen in relation to the letter dated 23 June 2011 sent by HKM to DHB as challenged by the latter's responses dated 7 and 13 July 2011. The Notice, rightly, identifies that the dispute effectively crystallised when DHB rejected HKM's assessment of the final account as set out in its letter dated 23 June 2011. That is borne out by the contents of the letters themselves and indeed the Referral which followed a week later.

25.
It is therefore to those letters to which one turns. The parties have not put before the Court the letter of 7 July 2010 and I assume therefore that it adds nothing to what is contained in the letter of 13 July 2011. The dispute undoubtedly related to the final account for the project but it was explained, clarified and limited, necessarily, by the terms of the letter of 23 June 2011. That letter (in the context of the delay related money claims for weather, asbestos, stone fill, bombing of boilers, quay/waste operations and the pain/gain assessment) was clearly and expressly predicated and put such that it was to be evaluated on the basis of the extent to which individual sets of resource (Barge 1, Barge 2, Multicat, supervision and quay/waste operations) were delayed by those events, using the specific resource rates in or those derived from Annex 1 to the Contract. The letter of 13 July 2011 in effect accepts the basis of assessment but challenges the delay periods.

26.
What is clear, in my judgment, is that the dispute did not encompass any assertion by either side that the appropriate method of assessment was simply a determination of the overall delay multiplied by a composite rate comprising or relating to the three resource rates (for Barge 1, Barge 2 and supervision). Whether it was legally right or wrong, albeit certainly with some logic, both parties adopted the individual resource rates and applied them to the resources but only to the extent that the resources were actually delayed by the events relied upon. That depended on whether they were on site when a particular delay occurred; thus, if weather delayed operations in November 2010, neither the tugboat nor the Waasland was on site and therefore neither was affected by November weather. Similarly, the pain/gain assessment was calculated by reference to the individual resource rates rather than a composite rate encompassing all resources.

27.
In my judgment, it is not an over-analytical approach to establish that the scope of the dispute was defined by reference to the specific letters relied upon by both parties as defining the dispute. The

analysis is, as appears above, a relatively simple one. This was not a case in which what was being referred was some very general amorphous final account dispute. What was being referred was a specific final account claim, calculated on a certain basis in relation to delay related matters, to which there was no dispute broadly about the method of assessment, namely on a resource by resource basis, calculated at the contract rates. I do not say that it would be impossible for a more general final account dispute to arise in theory; for instance a contractor might put forward claims on a specific basis but add in the alternative other more general bases for those claims; that may all be disputed and can therefore be referred to adjudication. However, that is not what happened here.

28.
The case can equally be considered as one involving a basic breach of the rules of natural justice. What one had here is a clearly and relatively simply defined dispute, in the context of the delay issues which was based purely on the application of the contract resource rates (with an extrapolated rate for the tug) to the delay caused to each individual resource by the delay events, such as asbestos. Whilst one can understand that the adjudicator was not alerted to there being any jurisdictional issues raised by either party, what should and indeed must have been clear is that both parties were proceeding in the Referral and the Response (and beforehand) on the basis of the individual contract resource rates being applied to the delay attributable to each resource as a result of the events relied upon. Neither party had either suggested or even hinted at the need or desirability for the application of a composite overall rate to the total delay.

29.
The way in which the adjudicator decided of his own initiative to assess the quantum relating to delay and to pain/gain assessment does, arithmetically, make a very real difference. I can take as an example HKM's adjudication claim relating to weather delays which totals £ 587,110 and I compare this to what in effect the adjudicator found:

Resource	Days claimed	Rate claimed	Total claimed	Adj'or days
Barge 1	38.5	8,097	311,734.50	30
Barge 2	14	8,770	126,288	30
Multicat	20.6	2,350	52,640	30
Super-vision	38.5	2,615	108,261	30

If he had applied the resource rates claimed and in the case of Barge 2 and the Multicat limited to what HKM was actually claiming in the adjudication, the totals would have been:

Resource	Days allowed	Rate claimed	Total due
Barge 1	30	8,097	242,910
Barge 2	14	8,770	122,780
Multicat	20.6	2,350	48,410
Super-vision	30	2,615	78,450

30.
The total therefore which the adjudicator would have got to, if he had followed not only the undisputed method of assessment but also the maximums claimed by HKM, would have been £ 492,550 for the weather related delays. In reality he allowed 30 days times his composite rate of £21,326, which totals £639,780. By following his own route, the adjudicator has allowed over £147,000 more than was effectively being claimed, once he had decided that only 30 days overall

delay had been caused by the weather. Another example is the stone fill disruption which HKM claimed 11.2 days delay to Barge 1 and supervision but nothing in respect of Barge 2 (doubtless because it had already been demobilised) and 7.8 days in relation to the Multicat; the adjudicator allowed 11 days at the full composite rate, in effect allowing compensation for Barge 2 which was not being claimed for and 3.2 days of delay to the tug which were not claimed for.

31.
Similar considerations apply in relation to all the heads of delay found by the adjudicator. Overall he appears to have allowed in effect over £350,000 more than was being claimed, once one feeds into the calculation the delays actually found by him as having been caused by the various events. Although I have not been able to do the calculation, if the pain/gain assessment was done on the same basis as adumbrated by both parties as opposed to on a composite rate basis, I have no doubt that a different pain figure would have resulted.

32.
Mr Townend for HKM forcefully argues that the Court should not refuse to enforce the decision because the adjudicator in the result, in fact or in law, is wrong or has made an error. Whilst the principle which he puts forward is unchallengeable, and although it could be said that the adjudicator has arguably gone wrong in fact or in law in assessing the financial entitlement as he did, it is not that which is the subject of legitimate criticism. What he can be criticised for is deciding something not only on a basis which was not argued in the adjudication proceedings but also without giving either party the opportunity to address the point. Of course, I do not want to be over-critical of the adjudicator who had a relatively short period of time to decide what at least in delay terms was factually heavy and I do not want to speculate why he chose the method of assessment which he did; as I have said earlier, given that he (twice) incorrectly transposed the wording of Clause 7 of the Contract into his decision, that may have played a part.

33.
In essence, and doubtless for what he believed were good and sensible reasons, the adjudicator has gone off "on a frolic of his own" in using a method of assessment which neither party argued and which he did not put to the parties. In some cases, this may not be sufficient to prevent enforcement of the decision where the "frolic" makes no material difference to the outcome of the decision. Thus, an adjudicator who refers to a legal authority which neither party relied upon, may have his or her decision enforced nonetheless if the application of that legal authority obviously makes no difference to the outcome. The breach of the rules of natural justice has to be material. Here, for the reasons indicated above, the breach is material and has or has apparently led to a very substantial financial difference in favour of HKM but necessarily against the interests of DHB.

34.
It follows from the above that the adjudicator’s decision can not be enforced because not only has he exceeded his jurisdiction by addressing and finding a method of assessment which formed no part of the dispute referred to him but also he has breached the rules of natural justice, doubtless unwittingly, by deciding the case not only on the basis not argued by either party at any stage but also without giving each party the opportunity to make submissions at least on the method of assessment which the adjudicator considered that he should adopt.

Decision

35.
For the above reasons, HKM’s Claim must be dismissed.