

Neutral Citation Number: [2013] EWHC 2722 (TCC)

Case No: HT-13-285

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 5 September 2013

**Before:**

**MR JUSTICE AKENHEAD**

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**Between:**

**CG GROUP LIMITED**

**- and -**

**BREYER GROUP PLC**

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**Anneliese Day QC** (instructed by **Trowers & Hamlins LLP**) for the **Claimant**

**James Bowling** (instructed by **Speechly Bircham LLP**) for the **defendant**

Hearing date: 23 August 2013

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**JUDGMENT**

**Mr Justice Akenhead:**

1.

In these proceedings, the Claimant, CG Group Ltd ("CG") seeks to enforce the decision of an adjudicator issued on 3 July 2013. The Defendant, Breyer Group PLC ("Breyer") challenges the enforcement on two related grounds, lack of jurisdiction and breach of natural justice, alleging that the adjudicator decided the elements of CG's disputed claim on a basis that was not part of the overall dispute or that he did not give the parties and in particular Breyer the opportunity to deal with that basis of argument.

**Factual Background**

2.

Breyer was a main contractor engaged to carry out work at Carradale House, 1-88, St Leonards Road London, E14. By a sub-contract made in April 2012, Breyer engaged CG to carry out interior refurbishment works to kitchens and bathrooms in a number of the apartments at this development. It seems to be common ground that the sub-contract incorporated a sub-contract order from Breyer and its standard sub-contract conditions (amongst other documents). Clause 8 contained payment provisions:

“(a) The Sub-Contractor shall submit to the Contractor no later than 3 working days before an interim payment is due a written statement of his gross valuation in such form and such details that the Contractor may reasonably require and as a minimum in the format and Written Statement of Gross Valuation in order to enable the Contractor to check and verify the amount stated in the gross valuation.

(b) The gross valuation shall be the value of the Sub-Contract Works properly executed and ascertained in accordance with clauses 11 and 12 thereof together with goods properly fixed and commissioned in the Sub-Contract Works.

(c) The Sub-Contractor’s gross Application shall be submitted to the Contractor at fortnightly or calendar monthly intervals as noted in the Sub-Contract Order, from the commencement of the Sub-Contract Works on site. The Payment Due Date shall be two weeks or one month as corresponds with the payment interval stated in the Sub-Contract Order, from the commencement of the Sub-Contract Works on site and thereafter at fortnightly or monthly intervals (as stated in the Sub-Contract Order) until the Sub-Contract Works are completed on site. In the event of failure by the Sub-Contractor to submit a gross valuation in the prescribed format and by the payment due date, the Contractor shall be under no obligation to make payments until the subsequent payment due date.

(d) Not later than 5 working days after the Payment Due Date the Contractor will submit to the Sub-Contractor a Notice of Payment specifying the amount to be paid to the Sub-Contractor and the basis on which that amount is calculated.

(e) The Final Date for Payment shall be 21 or 35 days (as stated in the Sub-Contract Order) after the Payment Due Date...

(h) Notwithstanding anything to the contrary in the Sub-Contract and without prejudice to the other rights and remedies, the Contractor shall be entitled to withhold, deduct from or set off against moneys due under the Sub-Contract, provided that no money shall be withheld, deducted or set off without details having already been sent to the Sub-Contractor under a Withholding Notice no later than three days before the Final Date for Payment. The Withholding Notice must specify:

(I) The amount proposed to be withheld and the ground for withholding payment; or

(II) If there is more than one ground, each ground and the amount attributable to it.”

3.

Provision was made by Clause 16 of the Sub-Contract Conditions for determination of the Sub-Contract by the Contractor for default. In those circumstances the Contractor was to "be liable to pay only for such work as has been by that date properly executed and shall be entitled to recover any loss or expense caused by such determination."

4.

CG started work in or about April or May 2012 but by the end of the year there were problems on site and there were disputes about the periodic valuations and payments. It is common ground that CG stopped their work over the Christmas holiday period and there was a meeting between representatives of the parties on 3 January 2013. Again, it was and is common ground that there was some agreement or understanding that CG would not come back to work although their work was incomplete. The disagreement goes to the basis on which this agreement or understanding was reached with CG saying that there was a mutually agreed termination with no obligation on it to

complete the works and with it being entitled to be paid appropriately for the work carried out to date by it. Breyer's position is that there was in effect a repudiation which it accepted.

5.

On 23 January 2013, CG submitted to Breyer a "Draft Final Account" which identified a total of £457,366.29 as the value of work. This included VAT but allowed for deductions for retention and main contractor's discount. Against sums previously certified, there was a net sum of £187,720.95 said to be due. There were some discussions between the parties over the following fortnight but on 6 February 2013 produced its own valuation which purported to show that CG had been overpaid by some £184,000 including VAT.

### **The Adjudication**

6.

CG served a Notice of Adjudication on 8 May 2013. After referring to the Sub-contract, the Notice addressed the "Background to the Dispute":

"6. Following commencement of the works CG has made several applications for payment. In response to the applications, Breyer has consistently undervalued CG's works. Having lost confidence in Breyer's methods of evaluation and in consideration of the potential of future cash flow issues, CG approached Breyer to propose that the sub-contract be terminated by mutual consent.

7. On or around 3rd January 2013, CG's Bob Beach met with Breyer's Trevor Drury at which meeting it was agreed that the sub-contract would terminate by mutual consent. In exchange for CG winding down operations and not completing the contract scope, Breyer gave a commitment to carry out a fair valuation of works carried out up to CG's last works on site on 21<sup>st</sup> of December 2012.

8. Subsequently, CG issued its Draft Final Account to Breyer on 23rd January 2013. Breyer has not accepted CG's valuation and has failed to make payments in the sum claimed and, in breach of the contract payment terms, has failed to give proper and timely payment notices. Therefore a dispute exists as to CG's entitlement to payment under the contract.

9. Further, in so far as the contract payment terms do not comply with the [Housing Grants Construction and Regeneration Act 1996](#), ("the Act") the provisions of the Scheme apply.

10. In breach of Breyer's obligations under the Contract, Breyer has failed to pay sums due by the final date for payment and has failed to issue valid payment notices.

11. The dispute therefore concerns CG's entitlement to payment by Breyer for construction works carried out at Carradale House.

### **THE DECISION SOUGHT**

12. CG seeks a decision and directions that:

(i) the gross value of the Draft Final Account is £462,544.72 including VAT, or such other sum as the adjudicator decides;

(ii) the net value of the Draft Final Account is £192,899.38, including VAT, or such other sum as the adjudicator decides;

(iii) the gross sum of £462,544.72 including VAT in respect of CG's Draft Final Account became due to payment, without abatement or set off, on 9<sup>th</sup> February 2013 or on such date, and in such amount, as the adjudicator decides;

(iv) the net sum of £192,899.38 including VAT in respect of the Draft Final Account became due for payment, without abatement or set off, on 9<sup>th</sup> February 2013 or on such date and in such amount as the adjudicator decides;

(v) that CG is entitled to release of all retention in the gross sum of £20,448.98 excluding VAT or in such amount as the adjudicator decides;

(vi) a declaration as to when the release of retention is due for payment..."

Claims were also identified for interest and the payment of the adjudicator's fees and expenses and to payment within seven days.

7.

The adjudicator (Mr Richard Silver) having been appointed, CG then served its Referral Notice on 15 May 2013. Various documents including witness statements were attached. Relevant parts are as follows:

"THE DISPUTE

7. The dispute concerns CG's entitlement to payment by Breyer for works carried out at Carradale House.

8. In breach of Breyer's obligations under the Sub-Contract, Breyer has failed to pay sums due by the final date for payment and/or has failed to issue valid payment notices.

TERMINATION OF THE SUB-CONTRACT WORKS

...10. On or around 3<sup>rd</sup> January 2013, CG's Bob Beach met with Breyer's Trevor Drury where it was agreed that the Sub-Contract would terminate by mutual consent. In exchange for CG winding down operations and not completing the contract scope, Breyer gave a commitment to carry out a fair valuation of the works carried out up to CG's last works on site, i.e. up to 21<sup>st</sup> December 2012...

11. CG claims its entitlement to payment for works carried out from commencement up to the last day on site and/or date of termination in accordance with the mutual agreement to terminate and based on the Sub-Contract conditions.

THE SUB-CONTRACT CONDITIONS...

Payment

16. The Sub-Contract payment terms are set out in the Sub-Contract Order, paragraphs 6.13-6.15 of the Pre-Contract Minutes...as well as paragraph 8 of the Sub-Contract Conditions. These are briefly summarised as follows...

17. Breyer's Sub-Contract Order states...

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Agreed Payment Terms: Monthly

18. Breyer's Sub-Contract Order...

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6.13 period: 35 days

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Valuation monthly

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First payment as a payment schedule

19. [Clauses 8(a), (c), (d), (e) and (h) of the Sub-Contract Conditions were summarised]

21.... Some months after works had commenced, Breyer asked CG to increase the level of resources and in return offered to revise the payment dates from monthly to fortnightly payments. Breyer confirmed the agreement in an e-mail dated 3<sup>rd</sup> September and issued a revised payment schedule on 6th September 2012.

22. However, in respect of application for payment nr 6 for works carried out up to 23<sup>rd</sup> November 2012, Breyer subsequently sought to abandon the agreement to change to fortnightly payments and instead revert back to monthly payment application dates and the payment schedule.

23. There are clear inconsistencies and discrepancies between the payment provisions in the Sub-Contract Order, Pre-Order Quality Plan, the Sub-Contract Conditions, the Payments Plan and the later "fortnightly" payment plan. Furthermore, there are no express payment terms which contemplate the party's [sic] mutual agreement to terminate the Sub-Contract and "walk away". There is therefore uncertainty as to which, if any, of Breyer's payment provisions and payment due dates apply to CG's application for payment "Draft Final Account" issued after the mutual agreement to terminate the contract on 3<sup>rd</sup> January 2013. In the absence of certainty, CG submits that the payment provisions of the Scheme apply and should be incorporated in their entirety...

26. Where payment provisions do not comply with Section 110A subsection 1 of the Act the relevant provisions of the Scheme are implied into the Sub-Contract as follows [Sections 9(1) to (5) of the Scheme are then set out].

27. As there is uncertainty/ambiguity in regard to the occurrence of the final date for payment, paragraph 8 of the Scheme is implied into the Sub-Contract as follows [Sections 8(1) and (2) of the Scheme are then set out].

28. As there is no express period for the giving of "pay less notice" paragraph 10 of the Scheme is implied into the Sub-Contract [reference is then made to the wording of paragraph 10 which requires this notice to be given "not later than seven days before the final date for payment..."]

29. Based on the Scheme payment provisions and the date of 23<sup>rd</sup> January 2013 when CG submitted its Draft Final Account, CG refers to the following table which sets down the payment due date and the final date for payment.

Completion Date	CG Application	Valuation/ Due Date	Payment Notice	Final Date Payment	Pay less Notice
21-Dec-12	23-Jan-13	23-Jan-13	28-Jan-13	09-Feb-13	02-Feb-13

30. CG claims its entitlement to payment based on the merits of its application and/or Breyer's failure to issue a valid Payment Notice and/or Payless Notice within the Scheme's statutory timescales. As a result of Breyer's failure to issue a valid Payment Notice and/or Payless Notices, CG's application for payment became the Default Payment Notice. Accordingly the sum applied for by CG in its Draft Final Account became due for payment by no later than 9<sup>th</sup> February 2013. In the absence of a valid Payment Notice and/or Payless Notice, payment to CG is due in full, in the sum applied for, without abatement or set off.

31-63 [These paragraphs summarise CG's case on the merits of the Draft Final Account]

64-66 [These paragraphs address retention which are not in the result controversial]

74. CG seeks a decision and directions that:

[The terms of the relief sought in paragraph 12 of the Notice of Adjudication were repeated verbatim.]”

8.

On 29 May 2013, Breyer served its Response, material parts of which are as follows:

“5. That CG asserts it relies on the Sub-Contract documents for its entitlement to payment is noted.

6. Notwithstanding that CG does not identify which of its submitted applications it contends have not been paid. Notwithstanding also that the payment being sought by CG is not an interim payment, which becomes due under and pursuant to clause 8 of the Sub-Contract. It is a valuation and payment (if any) resulting from a supplemental agreement to determine the CG Sub-Contract. Consequently it is a payment which is akin to that which becomes due upon determination as referred to in clause 16(a) of the Sub-Contract Conditions. Moreover by reference to paragraph 17 of the statement of Mr Beach... it was Breyer and not CG who was tasked with evaluating the CG works (properly executed) at the time of the determination.

The Dispute

7. That the dispute concerns the CG claimed entitlement to payment is noted.

8. Breyer denies it is in breach of any obligation under the Sub-Contract to pay CG or that it has failed to issue a valid payment notice.

Termination of the Sub-Contract Works

9-11 [This sets out Breyer's case on termination, namely that CG repudiated the Sub-Contract; Breyer accepted that CG was entitled to be paid for all works properly executed at the time of the determination but asserted that it was entitled to set off or abate.]

Payment

16. Although not relevant to the current dispute, it is admitted that the payment terms as [they] relate to periodic stage payments are set out in clause 8 of the Sub-Contract Conditions...

19. Although not relevant to the current dispute the cited clause 8 valuation and payment procedures are noted and admitted insofar as they relate to periodic stage payments...

22... For the sake of certainty the reason why fortnightly payments to CG were stopped was [that]... CG failed to meet its progress requirements and therefore failed to keep its part of the bargain...

23. The CG commentary at paragraph 23 is denied in its entirety. With reference to the individual CG contentions:

(i) There are neither inconsistencies nor discrepancies in the various contract documents in respect of the payments terms and the CG commentary does not identify any. In any event even if there were the alleged discrepancies (which is denied), the payment terms of the Sub-Contract Conditions would prevail.

(ii) What CG refers to as an 'application for payment' and/or a 'Draft Final Account' has no place under the determination agreement. The determination agreement did not provide CG with a right to make unilateral payment applications and/or to unilaterally submit what is purported to be a 'Draft Final Account'...

(iii) It is denied that the Scheme applies to any payment (either way) resulting from the post determination in valuation of the CG account...

28...until such time as the amount of any 'post determination' payment (either way) can be ascertained and/or determined, there is no requirement for Breyer to issue either a payment notice or a payless notice...

CG's Accrued Rights to Payment under the Contract

31-64 [These paragraphs address Breyer's case as to the generality of the valuation]

75-95 [These paragraphs address Breyer's arguments as to the specific evaluation]

98. Therefore as CG has previously been paid the sum of £224,704.45 leaving an overpayment of... [£271,045.38]"

9.

Within a few days, CG served a Reply to the Response, relevant parts of which are:

"4. Paragraph 6 is denied. CG has made clear which payment it is seeking and the date that the payment became due. Mr Drury and Mr Beach's mutual agreement that both parties would 'drop hands' created a novel ad hoc payment regime. It did not create a payment procedure "akin to that which becomes due upon determination under clause 16(a)"...

16. In accordance with a "drop hands" agreement incomplete works would be valued fairly and it follows logically that CG would not be levied with the costs of engaging others to complete partially executed works...

25. Paragraph 23(ii) is misconceived. It is CG's position that none of the diverse payment terms, and/or express sub contract conditions, employed by Breyer applied to what Breyer has defined in this paragraph as a "determination agreement", hence the statutory payment provisions apply. Breyer merely issues a bare denial that the statutory payment terms would be implied. Breyer claims that the ad hoc agreement resulted in there being no firm payment due date. There is no record of such an agreement and Breyer is unable to refer to any legal basis for such a construction of the terms of the "drop hands" agreement...Similarly, Breyer is unable to identify any legal basis denying CG the right to submit its assessment of the Final Account...

29. Despite Breyer's bare denials there are clearly inconsistencies and discrepancies between the payment provisions in the Sub-Contract Order, Pre-Order Quality Plan, the Sub-Contract Conditions, the Payment Plan and the later "fortnightly" payment plan. Furthermore, there are no express

payment terms which contemplate the party's [sic] mutual agreement to terminate the Sub-Contract which Breyer has itself referred to as the "termination agreement". Therefore there is uncertainty as to which, if any, of Breyer's payment provisions and payment due dates apply to CG's application to payment "Draft at final Account...In the absence of certainty, CG submits that the payment provisions of the Scheme apply and should be incorporated in their entirety..."

10.

On 21 June 2013, Breyer served a Rejoinder, which stated (inter alia) as follows:

"4...(ii)...It is therefore the Breyer case that regardless of whether a determination is by default resulting from the list of matters identified in clause 16(a) or by consent, the subsequent settlement of the account needs to be settled in the same way as that identified in clause 16(a)

(iii) ...What Breyer said (and repeats) about clause 16(a) is merely that what became due following the determination was a one off final payment that is "akin" (emphasis added) to that referred to in clause 16(a) and not an interim payments made under and pursuant to clause 8. The short point is that notwithstanding the reason for the determination, the CG account is then required to be finalised. Hence following a determination there is no longer a right to or requirement for further monthly stage and/or interim payments..."

25. The CG contentions at paragraph 25 of the Reply that the statutory scheme applies to payments becoming due following the determination of the CG contract are denied. This being for the simple reason that by reference to section 109 of the Construction Act, the payment provisions of the statutory scheme only apply if the contract fails to provide an adequate mechanism in respect of the entitlement to 'stage or periodic' payments following the determination of the contract. Breyer therefore continues to rely on its submission at paragraph 23(ii) and (iii) of the Response. As a further point Breyer does not say that post the determination CG was not entitled to submit what it calls its assessment of the 'Final Account'. The submission of the document however did not provide CG with a right to an interim payment under clause 8 of the contract or a (stage) payment under the Scheme for Construction Contracts..."

11.

On 3 July 2013, the adjudicator produced his decision, material parts of which are as follows:

#### "TERMINATION OF THE SUB-CONTRACT WORKS

21. CG says it claims its entitlement to payment for work carried out from commencement up to its last day on site and/or date of termination in accordance with the mutual agreement to terminate and based on the Sub-Contract conditions..."

25. Both parties therefore admit that on 3 January 2013, they entered into a supplemental agreement for determination.

26. What is in dispute is what were the terms and/or effect of that supplemental agreement.

27. I disagree with Breyer that having reached an agreement with CG on 3 January 2013 it can be said that CG committed a repudiatory breach which Breyer elected to accept. Two such propositions are clearly mutually exclusive. Breyer cannot on one hand have jointly reached an 'an agreement' with CG for CG not to complete the Works, whilst on the other hand unilaterally elected to accept CG's repudiation.



28. Insofar as Breyer admits that there was a supplemental agreement and which accords with the assertions of CG I decide that they Contract was not determined by reason of CG's alleged repudiation.

29. To the contrary I decide that the parties agreed that CG was not to complete any further work at was to leave site on the date of the agreement, on 3 January 2013.

32. I accept that the parties did not intend to terminate the Sub-Contract, but rather that it was CG's employment that was intended to be terminated.

34. I do not agree with Breyer, however, that the terms of clause 16(a) were to apply to the termination.

37. In summary to the foregoing either side that the parties entered into a supplemental agreement to the effect that CG was to leave site as of the 3 January 2013 and was not required to complete any further works, but that the Sub-Contract was not to be terminated and therefore its terms continue to apply.

42. I decide the gross value of the Draft Final Account is £457,366.29 including VAT.

46. It follows that I decide that the net value of the Draft Final Account is [£187,720.95] including VAT.

47. For the reasons further particularised below, I decide that this net sum became due for payment in the sum applied for by CG and which became the notified sum.

55. CG says there are clearly inconsistencies and discrepancies between the payment provisions in the Sub-Contract Order, Pre-Order Quality Plan, the Sub-Contract Conditions, the Payment Plan and the later "fortnightly" payment plan. Furthermore, there are no express payment terms which contemplate the parties' mutual agreement to terminate the Sub-Contract and "walk away". CG says there is therefore uncertainty as to which, if any, of Breyer's payment provisions and payment due dates apply to CG's application to payment "Draft at final Account"...In the absence of certainty, CG submits that the payment provisions of the Scheme apply and should be incorporated in their entirety.

56. CG says that section 110A of Part 8 of the Construction Act 2009 sets out essential payment terms are a construction contract as follows:-

[Sections 110A, 110B and 111 are then set out verbatim]

57-60 [These paragraphs set out the arguments of CG in relation to the application of the Scheme]

61. CG says it claims its entitlement to payment based on the merits of its application and/or Breyer's failure to issue a valid Payment Notice and/or Payless Notice within the Scheme's statutory timescales. CG says a result of Breyer's failure to issue a valid Payment Notice and/or Payless Notice, CG's application for payment became the Default Payment Notice. Accordingly, says CG, the sum it applied for in its Draft Final Account became due to payment by no later than 9<sup>th</sup> February 2013. CG says in the absence of a valid Payment Notice and/or Payless Notice, payment to CG is due in full, in the sum applied for, without abatement or set off.

62-73 [These paragraphs set out Breyer's arguments about CG's entitlement to payment]

65. As to payment terms Breyer denies there are inconsistencies or discrepancies in the various Contract Documents in respect of the payment terms. In any event, Breyer says that even if there were the alleged discrepancies, the payment terms of the Sub-Contract Conditions would prevail...

67. Breyer also denies that the Scheme applies to any payments resulting from the post determination evaluation of the CG account...

79. The Breyer Sub-Contract Conditions states that Interim Payments are to be monthly or fortnightly as noted in the Sub-Contract Order.

80. The Sub-Contract Order states that Interim Payments are to be monthly.

81. I, therefore, decide that Interim Payments under the Sub-Contract would be monthly as both parties accept.

82...the Parties did agree to revise the period of Interim Payments to fortnightly although for the reasons below, I do not think this to be relevant to the current dispute.

83. The Sub-Contract Conditions states at clause 8 [(c)] that the "Payment due date shall be two weeks or one month as corresponds with the payment interval dated in the Sub-Contract Order, from the commencement of the Sub-Contract Works on site and thereafter at fortnightly or monthly intervals (as stated in the Sub-Contract Order) until the Sub-Contract Works are completed on site."

84. Following the agreement to terminate the Sub-Contract Works on site were complete.

85. It follows that I decide that the due date was the date of termination pursuant to the Sub-Contract Order being 3 January 2013.

86. Clause 8(d) of the Sub-Contract Conditions provides that Breyer was, not later than 5 working days after the Payment Due Date, to issue to CG a Notice of Payment specifying the amount to be paid to CG and the basis on which it was calculated.

87. In my view Clause 8(d) complies with the requirements of 110(A)(1) [sic] of the Construction Act 2009, and which requires a payer to give a compliant Payer Notice, not later than five days after the payment due date, of the sum considered to be due and the basis upon which that sum is calculated.

88. Such notice was, therefore, to be issued 5 days after the agreement to terminate on 3 January 2013 and hence by 8 January 2013. Breyer, however, failed to issue any such Payer Notice/Notice of Payment.

90. Pursuant, therefore to S.110(b)(3) [sic] of the Construction Act the amount applied for by CG becomes the Payee's Notice in default of Payer's Notice.

91. Further, the final day of the payment, pursuant to S.110(b)(3) [sic] was postponed by the number of days between when the Payer's Notice ought to have been issued and when the Payee's Notice in Default was issue being 15 days.

92. As to the final date for payment, the Sub-Contract Conditions state at clause 8(c) that this should be twenty one days or thirty five days as stated in the Sub-Contract Order after the payment due date.

93. The Sub-Contract Order, however, does not specify whether the final date for payment is to be twenty one days or thirty five days after the payment due date and indeed does not refer to the final date for payment at all.

94. Insofar as the Sub-Contract is uncertain as to what is the final date for payment, I agree with CG that paragraph 8 of the scheme is implied into the Sub-Contract to the effect that it is 17 days from the date when the payment became due, subject to the deferment of 15 days as detailed at paragraph 91 above.

95. In that the payment became due on 3 January 2013 I decide that the final date for payment was therefore 4 February 2013.

96. Insofar as the Sub-Contract does not comply with the requirements of s.111(3) I agree with CG that the scheme is implied into the Sub-Contract to the effect that Breyer was permitted to issue a Payless Notice not later than seven days before the final date for payment.

97. It follows that Breyer was required to issue any Payless Notice not later than 28 January 2013 if it sought to pay a sum less than the notified sum. Breyer, however, did not issue any Payless Notice by 28 January 2013.

98. Insofar as Breyer did not issue a Payless Notice it was obliged to pay the notified sum being as per CG's Draft Final Account application.

99. It follows from the reasons given above that I decide that:

i. the gross sum of £457,366.29 including VAT in respect of CG's Draft Final Account became due for payment on 3 January 2013 and without abatement or set off on 29 January 2013; and

ii. the net sum of £187,720.95 including VAT in respect of the Draft Final Account became due for payment on 3 January 2013 and without abatement or set off on 29 January 2013."

12.

This was reflected in Paragraph 140 of the decision.

### **The Proceedings**

13.

Breyer did not pay the net sum said to have been due. On 29 July 2013, CG issued enforcement proceedings in the TCC. Witness statements were exchanged. Essentially, Breyer argues that, on analysis, the adjudicator decided the case on a basis that had not been argued and that therefore he had no jurisdiction to decide the case as he did; even if he did, it argues that he was materially in breach of the rules of natural justice because at the very least Breyer should have been given the opportunity to address the point and because it would have had compelling arguments that the adjudicator was wrong as a matter of law. The point which it is said was not effectively before the adjudicator or argued in the adjudication was that the provisions of Clause 8 were actually applicable, CG having, it is said, "nailed its colours to the mast" in saying that the Scheme applied to provide a payment regime post-determination.

14.

CG argues that there can be no jurisdictional challenge because the overall dispute was broadly defined as being whether Breyer had failed to pay what is being claimed in the Draft Final Account. It goes on to say that there was no breach of the rules of natural justice because, broadly, he decided the adjudication on a point which was well within what the parties put before him.

### **The Law**

15.

The TCC has recently considered the types of challenge that are made in this case. In **ABB Ltd v Bam Nuttall Ltd** [2013] EWHC 1983 (TCC), the Court referred to the warning given to courts by Lord Justice Chadwick in **Carillion Construction Ltd v Devonport Royal Dockyard Limited** [2005] EWCA 1358:

"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. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present."

16.

It is unnecessary to reiterate what was said in ABB about what is needed to establish a sufficient breach of natural justice to prevent enforcement of a adjudicator's decision. In summary, a material breach of the rules of natural justice must be established. It is clear that the decision an adjudicator who substantially decides a dispute on the basis of a legal point which has not been raised or covered by either party will not usually be enforced.

17.

When considering jurisdictional challenges based on an assertion that the adjudicator decided something which was not referred to him or her, it is obvious that the Court will have to analyse what the question or dispute referred to him or her was. That can involve sometimes a detailed analysis of what happened between the parties before the adjudication was initiated, albeit sometimes one can see from the Notice of Adjudication or from the Referral what is being referred to adjudication.

18.

In **Primus Build Ltd v Pompey Centre Ltd** [2009] EWHC 1487 (TCC), Mr Justice Coulson addressed a case where the claiming party had amongst other things claimed for loss of profit at 3% based on the:

“3% construction and management fee percentage identified in the contract. Pompey took a variety of points in opposition to the claim, including the submission that the 3% fee did not represent Primus's actual loss of profit, if any, caused by the omission. The adjudicator awarded Primus loss of profit calculated at a rate of 1.3%, which was a figure that he, the adjudicator, had calculated from the profit to sales ratio identified in the set of Primus's accounts which had been provided as part of Primus's reply. It was not a percentage that was expressly stated in the accounts” (Para.27).

Paragraph 35 of the judgment summarises the judge’s conclusion:

“Accordingly, I find that both parties were agreeing that, to use Primus's own word, the accounts should be "ignored". Thus I conclude that the adjudicator did not have the jurisdiction to consider those accounts or make any findings based upon them. The parties had reached a similar sort of agreement to that reached by the parties in **Shimizu** and for the same reasons the adjudicator ought not to have gone beyond that agreement.”

19.

This decision is wholly comprehensible. If the parties are effectively telling the adjudicator that they are agreed that a particular state of affairs was inapplicable, the adjudicator has no jurisdiction to decide the case on the basis of that state of affairs. It is not absolutely clear from the report of this case but it can be inferred that the disputed claim as referred to adjudication was based on the contractual management fee percentage. The judge also decided that the adjudicator was in breach of the rules of natural justice for failing to “go back to the parties with his new calculation” (Para. 37)

20.

Disputes referred to adjudication may be very widely drawn or very narrowly. Thus, parties might be in dispute about a whole final account encompassing 1000s of challenged items of work or they might be in dispute about what a minor sub-sub-clause of the contract means. The Court needs to analyse what was the referred dispute in any given case to see whether it is broad, circumscribed or narrow.

## **Discussion**

21.

On the face of the adjudicator’s decision, it would be difficult to see how any challenge on the basis of jurisdiction or indeed of breach of natural justice and rules could be maintained. The adjudicator, judged on the face of the decision alone, decided that, based on a combination of Clause 8 of the Sub-Contract Conditions and the Scheme:

(i) the due date for payment was 3 January 2013 (Para. 85);

(ii) Breyer should have given a Payer Notice by 8 January 2013 (Para. 88);

(iii) CG served its Payee’s Notice through its Draft Final Account on 23 January 2013;

(iv) the final date for payment was 4 February 2013 (Para. 95);

(v) because no Payless Notice was served by 28 January 2013 (5 days before 4 February 2013), CG was entitled in effect and in law to be paid for the net sum applied for in its Draft Final Account (Paras. 88 and 95- 98).

22.

I use the expression "on the face of the adjudicator's decision" because the adjudicator set out what he understood were the arguments of the parties and made his decision accordingly. At Paragraph 65, he sets out his understanding of Breyer's arguments that there were no inconsistencies or discrepancies in the contract documents in relation to payment terms and, even if there were, payment terms applied. Essentially, Mr Bowling for Breyer argues that Breyer did not actually argue that the payment terms of the Sub-Contract Conditions applied in the circumstances of this case, where there had been either a repudiation (Breyer's case) or a mutually agreed ending of the contractual relationship (CG's case). It is really this issue upon which on analysis he relies for his challenges on jurisdiction and natural justice grounds.

23.

I reject the submission that there is or can be an effective challenge on the jurisdiction. The Notice of Adjudication which effectively initiated the adjudication process puts CG's case on a simple basis that:

"8...CG issued its Draft Final Account to Breyer on 23<sup>rd</sup> of January 2013. Breyer has not accepted CG's valuation and has failed to make payments in the sum claimed and, in breach of the contract payment terms, has failed to give proper and timeous payment notices. Therefore a dispute exists as to CG's entitlement to payment under the contract.

9. Further, in so far as the contract payment terms do not comply with the [Housing Grants Construction and Regeneration Act 1996](#), ("the Act") the provisions of the Scheme apply.

10. In breach of Breyer's obligations under the Contract, Breyer failed to pay sums due by the final date for payment and has failed to issue valid payment notices".

24.

Neither party has suggested that factually the dispute which had crystallised up to that point was anything other than a broadly disputed claim for the net sum resulting from the Draft Final Account. Within that dispute were disputed assertions as to whether the Scheme provisions could be applied and as to whether Breyer had given appropriate notices in time. On that basis, the adjudicator had jurisdiction to answer in effect the question which was referred to him, namely: what, if anything, was due for payment to CG in relation to its Draft Final Account. That jurisdiction was not cut down by the Referral which under its definition of the "Dispute" identified this broad issue.

25.

The real issue is one which relates to the challenge on natural justice grounds. Mr Bowling's argument can be simply stated as follows:

(i) In the Referral, CG nailed its colours to the mast in relation to its arguments and did not materially change its position in the adjudication thereafter.

(ii) Those arguments were predicated upon an assertion that, because there were inconsistencies or discrepancies within the Sub-Contract documents, the Scheme applied. So far, he would accept that this was within the adjudicator's jurisdiction.

(iii) The operation of the Scheme was argued by CG to result in a payment due date of 23 January, a final date for payment of 9 February and a Payless Notice date of no later than 2 February 2013. Therefore, since no Payless Notice was served by 2 February 2013, in effect by default (or what he called the statutory "smash and grab" regime) CG was entitled to what it claimed in the Draft Final Account. He would accept that this argument was within the adjudicator's jurisdiction.

(iv) He goes on to argue that it was this argument which was addressed by Breyer in the Response and Rejoinder.

(v) The adjudicator, he says, came up with an approach which neither party had argued, namely a payment due date of 3 January, a final date for payment of 4 February and a Payless Notice date of no later than 28 January 2013. Therefore, since no Payless Notice was served by 28 January 2013, CG was entitled to what it claimed in the Draft Final Account.

(vi) He says that this was a breach of the rules of natural justice because his client was not given an opportunity to respond to that construction of clause 8(c). It would be a material breach of the rules of natural justice because it would have had a number of good or at least respectable arguments as to why the adjudicator was wrong to adopt this approach to clause 8(c).

26.

The burden is clearly on the party seeking to avoid enforcement on natural justice grounds to show that there was a breach of the rules.

27.

The exchanged submissions (and evidence) set the agenda for an adjudicator's decision. Put another way, adjudicators need only address the factual and legal issues as adumbrated in the exchanged submissions and evidence. They can not be criticised on natural justice grounds if they do that. Jurisdictionally, adjudicators must address the dispute (or question) referred to them but they must also address all defences. Thus, even if the defending party on a payment claim against it raises a set off relating to defects which have never been raised before, the adjudicator needs to address and rule upon it, even if it is simply a rejection on the basis factually that it was never raised before or legally that there was no timeous withholding notice.

28.

It is clear that the Referral Notice was predicated upon the wholesale incorporation of the Scheme and upon more detailed arguments (a payment due date of 23 January, a final date for payment of 9 February and a Payless Notice date of no later than 2 February 2013). This was repeated essentially in the Reply.

29.

It therefore follows that one must search the Response and Rejoinder to see whether (deliberately or possibly by accident) Breyer actually pointed the adjudicator in the direction down which he actually went. Breyer's primary argument was, assuming that their repudiation defence failed, that the valuation process to be followed was "akin to" what would follow on a Clause 16 determination for default by CG (see for example Paragraph 6 of the Response). It did argue (for example, in Paragraph 16) that, although it was not "relevant to the current dispute", Clause 8 did contain the payment terms in relation to periodic stage payments.

30.

However, it is in Paragraph 23(i) of the Response that Breyer argued that there were no inconsistencies or discrepancies in the contract documents in relation to payment terms and that even if there were the alleged discrepancies "the payment terms of the Sub-Contract Conditions would prevail". It goes on to argue (in Paragraph 23(ii) of the Response) however that CG's application for payment or the Draft Final Account "had no place" under the agreement, if such it was, of 3 January 2013 and (in Paragraph 23(iii) of the Response) that the Scheme did not apply to the post-determination evaluation of the CG account.

31.

In my judgment, the adjudicator was acting in accordance with the rules of natural justice or at the very least it has not been established that he was not so acting. My reasons are as follows:

(a) The dispute referred to him was wide enough to enable him to decide what payment if any was due to CG in relation to the Draft Final Account and in effect what was due for the work carried out in the period leading up to the termination on 3 January 2013.

(b) Whilst it is true that the Referral Notice put forward a specific approach substituting and based on the Scheme arrangements, there were extensive issues raised on the written submissions between the parties which provided in effect a variety of permutations upon which the adjudicator had to decide. These included (assuming that the termination was by mutual consent rather than repudiatory):

(i) Did the Scheme apply in whole or in part?

(ii) Were there any discrepancies or inconsistencies at all between the various contract documents in relation to the payment terms?

(iii) Was there anything in the Sub-Contract terms which legislated for what was to happen if the parties reached a mutual agreement relating to termination, albeit with no expressed agreement about the payment consequences?

(iv) Were the payment terms in the Sub-Contract Conditions relevant?

(v) Was there anything which could be implied or inferred about payment from the mutual agreement to terminate?

(c) It was, at least, misleading for Breyer to assert as it did in Paragraph 23 (i) of the Response that even if there were discrepancies about payment within the Sub-Contract documents "the payment terms of the Sub-Contract Conditions would prevail". Those payment terms are on any account the very Clause 8 terms upon which the adjudicator relied to reach his decision; the adjudicator actually referred to this argument in Paragraph 65 of the decision.

(d) It is not a very big or obviously unfair step for the adjudicator to take in those circumstances to conclude that Clause 8(c) (set out partly verbatim in the Referral Notice) pointed him in the direction to enable him to determine the payment due date; the fact that he was right or indeed wrong in this view is not in itself a breach of the rules of natural justice. The rest very much follows with reliance on Clause 8(d) to identify when Breyer was contractually required to issue a Payer Notice or Notice of Payment. He then goes on partly to accept what was always an argument from CG that the Scheme was implied into the Sub-Contract to produce a final date for payment and the date by which a Payless Notice had to be served.

(e) It behoves courts who are considering challenges on the grounds of breach of the rules of natural justice to have regard to the constraints under which adjudicators operate when faced with what are often complex legal arguments. It should not be the case that the Court should have to carry out a relatively minute examination of all the arguments and contentions put forward by the parties in the adjudication to seek to determine whether the final permutation in the exact form as found to apply by the adjudicator (being one of many open to him or her to find) was or was not specifically highlighted by a party. If the permutation as found is covered by the presented arguments, it should be a rare case for a natural justice breach to be found



(f) It was suggested in one case that the Courts should maintain a scepticism (albeit one assumes a healthy one) about challenges on natural justice grounds, save in a clear case. I certainly do not consider this to be such a clear case, or a least one approaching the clear cases established in the **ABB** and **Primus** decisions or indeed in some of the cases referred to in those judgments such as **Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board** [2012] EWHC 84 (TCC).

(g) The fact that there may have been (possibly good) arguments which Breyer could have deployed if it had realised that the adjudicator might decide as he did is not material because those arguments could have been deployed in any event as the permutational finding reached was open to the adjudicator once he accepted the very point which Breyer put forward which was that, whether or not there were contractual discrepancies, " the payment terms of the Sub-Contract Conditions would prevail".

### **Decision**

32.

It follows that the challenge to the enforcement of the adjudicator's decision fails. There should be judgment for CG for the amounts claimed.

33.

Following the closing of the oral arguments, Breyer, its solicitors and/or Counsel felt it necessary to make some further submissions said to arise out of something which Counsel for CG had said in her oral submissions on the day of the hearing. That was most unfortunate because it was always open to Counsel for Breyer to make the points during the hearing that were later put forward in writing. Once those further written submissions were made, I felt that I could not ignore them and invited submissions from Counsel for CG which arrived the following afternoon. This meant that, due to other commitments, I could not complete the judgment in the week after the hearing and it has had to wait until the following week. Particularly in the case of adjudication enforcements, which are intended and timetabled to be brought on promptly, this practice is to be discouraged in the interests of expedition and to avoid parties seeking to have second or more "bites of the cherry". In the result, the point raised was a relatively minor and peripheral one with which I have not even have had to deal in this judgment as it simply does not arise.