Case No: HT-13-307

Neutral Citation Number: [2013] EWHC 2879 (TCC)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

The Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 02/10/2013

**Before**:

**THE HONOURABLE MR JUSTICE STUART-SMITH**

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**Between:**

| | |
|---|---|
| **KNN Coburn LLP** | **Claimant** |
| **- and -** | |
| **GD City Holdings Limited** | **Defendant** |

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**Mr Riaz Hussain** (instructed by **Collyer Bristow**) for the **Claimant**
**Ms Rebecca Drake** (instructed by **Fenwick Elliott**) for the **Defendant**

Hearing date: 19 September 2013

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Judgment

**The Honourable Mr Justice Stuart-Smith:**

Introduction

1. The Claimant ["KNN"] wishes to enforce the decision made on 1 March 2013 of Mr Mathew Bastone acting as an adjudicator. His was the third adjudication arising out of a contract that ended acrimoniously, the adjudicator on the previous two adjudications being Mr Philip Eyre. The Defendant ["GD City"] resists the application for summary judgment on four grounds.

Ground 1: Late Issuing of Decision

*The Issue*

2. The adjudicator's decision was issued on 1 March 2013. GD City contends that time runs from 31 January 2013 so that the adjudication had to be made on 28 February. KNN contends that time runs not from 31 January but from 1 February 2013 so that the decision was issued in time. Alternatively, if time would otherwise have run from 31 January 2013 KNN submits that the time for issuing the decision was effectively changed to 1 March 2013.

*The Factual Background*

3. The facts relevant to this issue may be shortly stated. On 31 January 2013 KNN's solicitors sent an email to Mr Bastone to which was attached a soft copy of the document which described itself and was described by KNN in the covering letter as "the Referral". The Referral referred to and was clearly intended to be read in conjunction with six appendices to which reference was made in the body of the Referral itself. The covering letter with which the Referral was sent to Mr Bastone told him that a hard copy of the Referral together with documents in support had been sent to him by guaranteed next day delivery. He was told that the emailed letter with its enclosure had been copied to GD City's solicitors and that a hard copy "of the Referral" would be sent by them by courier. KNN's solicitors also sent a letter to GD City's solicitors on 31 January 2013 which said "We enclose by way of service a copy of the Referral. A hard copy together with enclosures will be sent by courier."

4. On the same day, 31 January 2013, Mr Bastone responded to the email he had been sent by KNN's solicitors saying "I acknowledge receipt of the Referral Notice by email today. I note that a hard copy of the referral, with supporting documentation, is following by guaranteed delivery tomorrow. I shall await receipt of the full copy of the referral before issuing any directions."

5. On 1 February 2013, KNN's solicitors sent hard copies of the referral notice and the appendices to Mr Bastone. The appendices were:

   i) The construction contract: Appendix 1;

   ii) Mr Eyre's decision in the previous adjudication, dated 31 December 2012[1]: Appendix 2;

[1] Paragraph 2 of the Referral stated that the annexed decision was dated 21 June 2011, but this appears to have been an error.

iii) A summary of GD City's Final Account: Appendix 3;

iv) Notice of non-completion under clause 2.29.1 of the contract dated 8 January 2013[2]: Appendix 4;

v) A detailed breakdown of KNN's calculation of liquidated damages: Appendix 5;

vi) A letter dated 8 January 2013 from KNN's solicitors to GD City's solicitors enclosing the notice of non-completion and requesting confirmation that the liquidated damages would be paid and subsequent correspondence: Appendix 6;

vii) A Notice of Adjudication issued on behalf of KNN on 25 January 2013: Appendix 7.

6. GD City's solicitors wrote to Mr Bastone on 1 February 2013 objecting to his acting, on the grounds that the previous adjudications had already addressed the issue being referred to him in the current adjudication so that he did not have jurisdiction and should resign. They also raised a "threshold issue" which does not require to be addressed in further detail here. The letter concluded "We confirm that in the light of the above we are not preparing a Response pending your reply. We await hearing from you."

7. Mr Bastone wrote to the parties on 1 February 2013 stating that the adjudication provisions for the Scheme for Construction Contracts (England and Wales) Regulations 1998 ["the Scheme"] applied and giving directions. He wrote:

> "Under the Scheme I am required to reach a decision in this matter not later than twenty eight days after the referral, excluding bank and public holidays. Taking Friday 1 February 2013 as day zero, I calculate day twenty eight as falling on Friday 1 March 2013.
>
> I shall allow the parties to make the following submissions:
>
> - GD City may submit a response to the referral, by 4.00 pm on Tuesday 12 February 2013;
> - KNN Coborn may submit a reply to the response, by 4.00 pm on Tuesday 18 February 2013.
>
> I look forward to receiving the parties' further submissions by the dates set out above."

8. Late on 1 February 2013 KNN's solicitors sent submissions in reply to GD City's jurisdictional and threshold challenge, to which GD City's solicitors responded on 4 February. On 5 February 2013 Mr Bastone rejected GD City's challenge. He concluded that "I shall, therefore, continue with this adjudication. I look forward to receiving the parties' further submissions on the dates set."

[2] There is confusion about the date of the notice of non-completion in the Referral: paragraph 22 refers to it as having been sent on 8 January 2012 and, elsewhere, 8 January 2013. The latter date appears to be correct.

9. On 7 February 2013 GD City's solicitors wrote to Mr Bastone. They started by saying that their letter was written "without prejudice to our client's contention that you do not have jurisdiction to consider the alleged dispute purportedly referred to you by KNN Coborn Limited." They then asserted that his letter of 5 February constituted a breach of natural justice and "a clear expression of bias." They continued:

> "Notwithstanding the fact that we consider you do not have jurisdiction in any event, your final determination, without hearing submissions from our client, fundamentally undermines any jurisdiction that you might have and makes any decision unenforceable.
>
> Our client's participation in this purported adjudication is wholly without prejudice to our client's position as set out above and as set out in previous correspondence.
>
> We will be serving a response without prejudice to our client's position however, we expect that this may not be provided to you until close of business on Wednesday of next week 13 February 2013."

10. On 7 February 2013 Mr Bastone responded to GD City's accusations of bias, which he rejected. He went on to say that "I look forward to receiving GD City's response which, I note, will be one day later than directed. I shall, therefore, allow KNN Coborn until 4.00 pm on Wednesday 20 February 2013 in which to submit a reply."

11. It is common ground, as Ms Drake for GD City accepted, that from then on both parties acted in accordance with the timetable established by Mr Bastone's letter, though neither wrote or otherwise expressly stated that it would do so or that the timetable was accepted. The net effect of GD City's objection to Mr Bastone acting, therefore, was that it thereafter took a full part in the adjudication process; but, as a result of its prior reservation of the right to object to Mr Bastone's jurisdiction and its assertion that he had shown bias that rendered any decision unenforceable, its participation was without prejudice to those reservations and objections.

12. The adjudication proceeded on the timetable that Mr Bastone had laid down and he made and issued his decision on 1 March 2013. On receipt of the decision, GD City's solicitors wrote to Mr Bastone asserting that the date of the Referral was 31 January 2013 when a copy of the Referral was served by email and courier. The solicitors wrote:

> "As you will be aware any adjudicator's decision is to be published and communicated to the parties within 28 days of the date of the Referral Notice unless and extension of time is granted, 28 February 2013. You have issued a decision dated 1 March 2013 clearly reached and published on 1 March and therefore one day late."

13. After exchanges of emails between the solicitors, Mr Bastone emailed them on 4 March 2013 stating:

> "I did not receive a full copy of the referral by email on the 31st of January – merely the frontispiece. Proper service of the referral, i.e. with a copy of the contract and supporting documents - as per my directions – was not made until the following day."

14. GD City's solicitors responded the same day, taking issue with Mr Bastone's description of what he received on 31 January as a frontispiece and stating:

> "As you are well aware it is my client's view that you did not have jurisdiction in the first place and my client invited you to resign therefore at no time did my client assent in word or deed to your timetable. My client's involvement was and remains on a wholly without prejudice basis and with my client's rights fully reserved."

*The Legal Framework*

15. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 provides that:

> "(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose dispute includes any difference.
>
> (2) The contract shall —
>
> (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
>
> (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of such notice;
>
> (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred …"

16. The relevant provisions of the Scheme are paragraphs 7 and 19 which, so far as material, provide as follows:

> "7(1) Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudicator, refer the dispute in writing (the 'referral notice') to the adjudicator.
>
> (2) A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.

> (3) The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs (1) and (2), send copies of those documents to every other party to the dispute."
>
> …
>
> "19(1) The adjudicator shall reach his decision not later than –
>
> (a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or
>
> (b) forty two days after the date of the referral notice if the referring party so consents, or
>
> (c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree."

*Submissions*

17. GD City's submission is that the provisions of Paragraph 19(1) of the Scheme are clear: the adjudicator shall reach his decision not later than twenty-eight days after the date of *the referral notice mentioned in paragraph 7(1)*. Paragraph 7 of the scheme draws the distinction between the referral notice itself, which is the subject of paragraph 7(1), and the documents which are to accompany it (namely the construction contract and the other documents upon which the referring party intends to rely), which are the subject of paragraph 7(2) and are not themselves the referral notice within the meaning of paragraph 7(1). The document sent to Mr Bastone on 31 January 2013 referred to itself simply as "Referral". It was, however, in a form that was recognisably that of a referral notice within the meaning of paragraph 7(1), including the references to supporting documents by way of Appendices. Accordingly, GD City submits that the "Referral" sent on 31 January 2013 was "the referral notice mentioned in paragraph 7(1)" so that the twenty eight day period referred to in paragraph 19(1) runs from 31 January 2013.

18. GD City draws support for its submission from the initial response of Mr Bastone on 31 January 2013, which it submits was an unequivocal recognition that he had been sent "the referral notice" within the meaning of paragraphs 7(1) and 19(1). It may also rely upon the fact that the letter by which KNN's solicitors sent the "Referral" to its solicitors on 31 January 2013 stated that it was enclosing "by way of service" a copy of the Referral, with no qualification to suggest that the additional documents were a prerequisite to service of the referral notice within the meaning of the scheme. It submits that Mr Bastone's timetabling letter of 1 February 2013 did not affect matters: there had been no request for time to be extended and, in any event, GD City submits that a proposed extension must be agreed by the parties and that there was no agreement in this case.

19. KNN responds that the sending of the referral notice without the appendices was ineffective to start time running. It points to the requirement under paragraph 7(2) that the referral notice shall be accompanied by copies of the construction contract

and such other documents as the referring party intends to rely upon and submits that, in this case, the appendices were integral and necessary to a proper understanding of the dispute so that the referral notice itself was a nullity. On this basis, it submits that the date of the referral notice for the purposes of paragraphs 7(1) and 19(1) should be taken to be 1 February 2013 so that Mr Bastone correctly calculated the 28 day period within which he had to issue his adjudication as concluding on 1 March 2013.

20. As a fall back position, KNN takes two further points if it be held that time pursuant to paragraph 19(1) otherwise ran from 31 January 2013. First, KNN submits that it is not open to GD City to take the point because it failed to object to the timetable when it was issued at any time before Mr Bastone issued his decision on 1 March 2013. Second, it relies upon paragraph 19(2) of the Scheme and submits that, since it was the referring party and consented to Mr Bastone's timetable, the relevant time within which Mr Bastone had to reach his decision was not twenty eight but was forty two days.

*Discussion*

21. GD City is correct in its submission that the document sent to Mr Bastone and to its solicitors on 31 January 2013 was in a form that was appropriate for a referral notice within the meaning of paragraph 7(1) of the scheme. Mr Bastone's initial reaction to receiving the Referral document on 31 January was to acknowledge receipt "of the referral notice", though he deferred giving directions until he had the supporting documents. On any view, his subsequent characterisation of the Referral document as merely a "frontispiece" was inapt. The question at issue now is whether, despite being in a form that was recognisably appropriate for a referral notice under the Scheme and Mr Bastone's initial response to it, the Referral document was in fact a referral notice which started time running.

22. I accept that, as Ramsey J held in *PT Building Services Ltd v ROK Build Limited* [2008] EWHC 3434 (TCC) at [52-54], paragraph 7(1) may be distinguished from paragraph 7(2): paragraph 7(1) is "a fundamental provision in the process of adjudication. On that basis, the decision that a late referral under paragraph 7(1) of the scheme took the process outside the scheme so as to make a decision unenforceable can be distinguished from a breach of paragraph 7(2) which refers to an associated procedural requirement." The starting point, therefore is that a referral notice that is not accompanied by copies of relevant extracts from the construction contract and other documents upon which the referring party intends to rely is procedurally defective but is not automatically outside the scheme. As Ramsey J's decision in *PT Building Services* demonstrates, provision of the referral notice without the accompanying documents may be sufficient (as it was in that case) to vest the adjudicator with jurisdiction pursuant to paragraph 7 of the scheme. It is implicit in his decision that provision of the documents in that state not only vested the adjudicator with jurisdiction but would have been effective to start time running.

23. However, in an important passage, Ramsey J at [55] made clear that a breach of paragraph 7(2) could be so fundamental that it went beyond being a mere procedural irregularity. He said:

> "55. I consider that it is undesirable that every breach of the terms of the scheme, no matter how trivial, should be seized

> upon to impeach the process of adjudication. To do so would increase the tendency of parties to take a fine tooth-comb to every aspect of the adjudication in the hope of finding some breach of the Scheme on which to impeach an otherwise valid adjudication decision. I do not consider that that was either intended or the natural effect of a failure to comply with the Scheme. There may, of course, be cases where the documents included with the referral notice are so deficient that it effects the validity of the adjudication process. However, I do not consider that a failure to include the relevant construction contract until a day later can do so or does so on the facts of this case. Nor do I consider that a failure to include the construction contract can be said to amount to such a serious breach of the rules of natural justice that the decision should not be enforced. There is nothing obviously unfair in the documents relied on in relation to the construction contract being received by the adjudicator later than the referral notice: see *Carillion v. Devonport* [2006] BLR 15 at paragraph 85."

24. I respectfully agree with and endorse Ramsey J's observations. It is to be noted that the question he was addressing was marginally different from that which arises in the present case. His decision was that a failure to provide the accompanying documents for 24 hours or a failure to provide the construction contract did not vitiate the entire adjudication process. However, Ramsey J clearly contemplated that a failure to provide accompanying documents could render the referral notice so deficient that the entire adjudication process was invalid. I agree, but would echo Ramsey J's cautionary words that it is undesirable that every breach of the terms of the scheme, no matter how trivial, should be seized upon to impeach the process of adjudication. Caution is particularly appropriate where the clear words of paragraph 19(1) make the referral notice the document by reference to which the process is to be commenced and the running of time is to be measured. In the light of those words the Court is required to keep in mind the distinction between (a) the referral notice (within the meaning of paragraphs 7(1) and 19), which is required to identify the dispute between the parties in writing and to refer it, and (b) supporting documents (within the meaning of paragraph 7(2)) which are to be those documents to which reference is necessary to see whether or not the referring party's case is soundly based.

25. In this case, KNN submits that the accompanying documents were critical to the ability of Mr Bastone to commence an informed consideration of the dispute. Specifically, KNN submits that Mr Eyre's previous decision was necessary because it established the duration of the extension granted to GD City and the date of Practical Completion, both of which were essential to any consideration of the questions whether KNN was entitled to claim liquidated damages and, if so, for how much.

26. Adopting a suitably cautious approach, I am not persuaded by KNN's primary submission. While it is correct that Mr Eyre's adjudication decision was the supporting document that evidenced the revised Completion Date and the principle that GD City was responsible for the delay between the revised Completion Date and Practical Completion, the Referral identified the material facts upon which KNN's

claim was based (including the fact of the revised Completion Date, that the parties had been agreed on the date when Practical Completion had been achieved, and that GD City was responsible for 26 weeks of delay) at paragraphs 15-18 and elsewhere. It would therefore be wrong to suggest that the nature of the dispute could not be identified without reference to the supporting documents; or that the Referral document did not "refer the dispute in writing" as required by paragraph 7(1) of the Scheme.

27. I therefore find that the referral notice was received by Mr Bastone and by GD City's solicitors on 31 January 2013.

28. Turning to KNN's fallback position, GD City is correct to point out that no one spoke in terms of an extension of time either when Mr Bastone issued his timeline on 1 February 2013 or at any time thereafter until after he issued his decision on 1 March 2013. That cannot be determinative. GD City's case on this issue is dependent upon a finding that time, properly calculated, expired on 28 February 2013 so that a timetable including issuing of the decision on 1 March 2013 necessarily required and involved an extension of the twenty eight day period allowed by paragraph 19(1) if the decision was to be valid.

29. KNN relies upon the decision of Coulson J in *Letchworth Roofing Co v Sterling Building Co* [2009] EWHC 1119 (TCC) and the same judge's earlier decision in *AC Yule & Son Limited v Speedwell Roofing & Cladding Limited* [2007] EWHC 1360 (TCC). In *Yule*, after reviewing relevant authorities the learned Judge summarised the position as follows at [15]:

> "When the adjudicator asks for more time in circumstances like this, I consider that there is a clear obligation on the part of both parties to the adjudication to respond plainly and promptly to the request. If, in breach of that obligation, one party does not respond at all, there must be a very strong case for saying that they accepted, by their silence, the need for the required extension. The adjudicator can do no more than work out that he needs a short extension, and seek agreement from the parties to such an extension. Common sense, as well as common courtesy, requires a prompt response. If one party does not respond at all to the adjudicator's request, it seems to me that that party runs a very clear risk that his silence will be taken to amount to acquiescence to the requested extension. I consider that that is the only proper inference to be drawn from the information available to me here. From that evidence I consider that, by their silence, Speedwell accepted that the adjudicator's time for completion was extended to 5th April."

30. For GD City it is submitted that the "acquiescing" party in both *Yule* and *Letchworth* did more than GD City has done in the present case, and therefore acquiescence is not shown. The starting point when considering this submission is that each case will depend upon its own facts and that comparison with the facts of other cases where acquiescence has been established is seldom if ever likely to be either informative or determinative. In the present case, GD City could have decided to rely upon its jurisdictional challenge alone, in which case it would have taken no part in the

adjudication proceedings. That is not what it chose to do. Instead, it engaged fully with the adjudication process in accordance with the timetable laid down by Mr Bastone while taking the point that its participation was without prejudice to its prior objection to his jurisdiction to act. In one material respect it went further that simply participating in the adjudication in accordance with Mr Bastone's timetable because it stated its need for an additional day in which to provide a response to the claim, which led Mr Bastone to change his timetable to accommodate it. In other words, it was not prepared to rest solely upon its jurisdictional challenge but wanted to hedge its bets by ensuring that, if it lost that challenge, it would still have defended the claim fully.

31. GD City now wishes the Court to ignore the fact of its participation in the adjudication because it had reserved its right to take the jurisdictional point that the referral was ineffective and, later, the point that any decision was unenforceable for bias. The first of these reserved issues is the subject of grounds 2 and 3 below; so far as I am aware, GD City has not pursued the allegation of bias or breach of natural justice made in its letter of 7 February 2013. I reject that submission that participating in the adjudication while asserting that its doing so was without prejudice to those issues means that GD's City's participation is to be ignored. Once GD City decided to protect its position by engaging in the adjudication procedure, the fact that it stated that its engagement was without prejudice to its prior objection does not render its engagement with the process procedurally invisible if the jurisdictional objection ultimately fails. The only effect of the reservation of the right to take the jurisdictional objection is that GD City's participation did not prevent it from taking that objection at a later date.

32. The issue is therefore whether GD City's full participation in the adjudication process in accordance with Mr Bastone's timetable should be taken as acquiescence of the timeline he had laid down, including the issuing of his decision on 1 March 2013. I am clearly of the view that it should. There can be little doubt that if GD City had given any indication at all that it found the timeline objectionable, KNN would have implemented the terms of paragraph 19(2) of the scheme expressly so as to give Mr Bastone the time that he had said he would take. The fact that Mr Bastone did not express his timeline in terms of a request for an extension of time does not matter: the implications of his timetable must have been just as clear to GD City and their highly competent solicitors on 1 February 2013 to precisely the same extent as they were on 1 March. In the light of the clear warning in *Yule* that parties are under an obligation to make their objections plain and that silence may be taken as acquiescence this is, in my view, a clear case where it was not open to GD City to do nothing until 1 March 2013 and then to attempt to spring a procedural trap without any prior warning. In fact, GD City went further than acting in accordance with the timetable without objection: it caused Mr Bastone to change it by giving them an extra day in which to respond.

33. I therefore hold that GD City acquiesced in the timeline laid down by Mr Bastone and that it is not open to it now to contend that 1 March 2013 was a day too late for the making and issuing of Mr Bastone's decision.

34. Furthermore, and for similar reasons, I accept KNN's submission that its conduct as referring party in complying with and acting pursuant to Mr Bastone's timetable

signified its consent to it, such that Mr Bastone's decision was within time by virtue of paragraph 19(2) of the scheme.

35. GD City's first ground of objection therefore fails.

Ground 2: A previous Adjudicator (Mr Eyre) had determined the amount of liquidated damages to be paid by GD City to KNN

Ground 3: The Claimant referred a decision to adjudication which had been determined by a previous adjudicator

*The issue*

36. It is common ground that an adjudicator may not open up matters decided by a previous adjudicator. If he does so, the later adjudicator's decision is a nullity. GD City contends that Mr Eyre had decided in a previous adjudication that (a) the correct amount of liquidated damages was £20,000 (ground 2) but that (b) KNN was not entitled to liquidated damages (ground 3). KNN submits that the only decision made by Mr Eyre was that KNN was not entitled to withhold any sum from the final account payment by reference to liquidated damages.

*The factual background*

37. The referral notice for the adjudication by Mr Eyre raised a claim for £368,580.18, being the balance due under GD City's final account. It did not refer to the issue of liquidated damages.

38. By paragraph 170.51 of its response KNN asked the Adjudicator to decide that "[GD City]" should pay [KNN] liquidated damages at the rate of £1,000 per calendar week[3] for the period of 22 weeks equalling £22,000, or such other rate and for such period the Adjudicator considers appropriate."

39. By paragraph 43 of its reply, GD City pleaded that

> "It is [GD City's] primary case that it is entitled to an extension of time for the full duration of the extended contract period. Without prejudice to this contention [GD City] would state that KNN are not entitled to recover LAD's from GDC as, as stated above, no valid withholding notice has been issued and no delay analysis has been carried out by KNN. KNN does not have a right to deduct any damages when it has not proved that [GD City] breached its contract and when it has not given the sufficient notices required by statute."

40. Mr Eyre provided a detailed reasoned decision. The relevant passages of his adjudication, which show what Mr Eyre decided were at [102] and [178-193] where he said:

> "102. Taking into account concurrency, GD City is entitled to an extension of time for Employer delays of 9 weeks 5 days.

[3] Which should have been a reference to calendar *month*.

Jackson Coles acknowledges that GD City is also entitled to a 3 week extension of time under clause 2.26.3 for adverse weather. If Jackson Coles are correct that there was an overall delay in the project of 33 weeks and 2 days, then GD City is responsible for 20 weeks 2 days of that delay.

…

**Liquidated Damages**

178. On the basis of my conclusions about GD City's entitlement to extensions of time, KNN have a putative claim for liquidated damages in the sum of £20,000.00.

179. There is a dispute between the parties as to whether the deduction or withholding of liquidated damages requires the giving of a withholding notice. Mr Bailey asserts that a withholding notice is required to withhold or deduct. Mr Pawlowski claims that no withholding notice is required, liquidated damages are automatically to be deducted or withheld, by virtue of clause 4.2 and/or 4.12.

180. Curiously, paragraph 227 of the Jackson Coles Report makes reference to the serving of a withholding notice on 19 April 2011. The GD City Final Statement was submitted on 8 October 2012. It was trite law that a withholding notice, to be effective, cannot be provided in advance of the making of the application. The serving of the withholding notice from 19 April 2011 cannot be effective in relation to Final Statement entitlements.

181. KNN Coburn does not seek to run an alternative case that, if a withholding notice is required, there is any particular document that is relied upon constituting an effective withholding notice.

182. In respect of the essential dispute between the parties, by reference to clause 4.12.9 of the Contract, for the Employer to withhold or deduct the Employer needs to give a written notice to the Contractor specifying the amount proposed to be withheld and/or deducted and the grounds for such withholding and the amount of withholding attributable to each ground.

183. I do not agree with Mr Pawlowski that the withholding or deducting of liquidated damages is automatically to be considered. The lack of any valid notice pursuant to clause 4.12.9 means that I should not take into account the putative liquidated damages claim of £20,000 in calculating whether payment is to be made to GD City. The withholding notice machinery of clause 4.12.9 would be superfluous or redundant

> if claims for deduction of liquidated damages were automatically considered."

*Discussion*

41. Mr Eyre's language was precise and clear. His decision was that KNN was not entitled to withhold any monies from the final account payment because of the absence of a valid withholding notice. This was a decision on the application of clauses 4.2 and 4.12 of the contract: he did not address or decide the issue whether KNN was entitled to claim liquidated damages pursuant to clause 2.29 of the contract. Since his decision under clauses 4.2 and 4.12 was that monies could not be withheld from the final account payment because of the absence of a valid withholding notice, it was not necessary for him to decide what would have been the correct amount of liquidated damages if his decision on withholding had gone the other way; and he did not do so. That is made plain by his prefacing words in paragraph 102, "*If Jackson Coles are correct that there was an overall delay in the project of 33 weeks and 2 days*, then GD City is responsible for 20 weeks 2 days of that delay." He did not decide that Jackson Coles were correct and therefore did not decide the correct period for calculation of liquidated damages was 20 weeks 2 days. Nor did he decide that any other period or amount of Liquidated Damages was correct. The conclusion that he did not decide the correct amount of liquidated damages is supported by his use of the word "putative" in paragraph 178, though I do not find his use of the word entirely clear and prefer to rely upon the language and meaning of his decision as a whole as the primary ground for my decision.

42. Mr Bastone was correct to take the view that Mr Eyre had not decided the issue of recovery of liquidated damages pursuant to clause 2.29 or the correct amount of liquidated damages. It was therefore open to him to decide as he did.

43. These two grounds of challenge fail.

<u>Ground 4: Breach of Natural Justice – Mr Bastone did not consider a material line of defence.</u>

*The issue*

44. In its rejoinder, GD City relied upon clause 2.17.4 of the contract, which provided that:

> "Notwithstanding any other term of this Agreement, the Contractor's liability in respect of any Employer's Claim shall be limited to the amount actually recovered from any Consultant or Sub Contractor who has carried out work in connection with the Employer's Claim. For the avoidance of doubt, the Contractor's liability in respect of each and every Employer's Claim shall not under any circumstances exceed the amount received (if any) by the Contractor from the relevant Consultant or Sub- Contractor in connection with the relevant Employer's Claim"

Employer's Claim was defined by the Contract as "any claim made by the Employer including without limitation a claim under this Agreement, for breach of this

Agreement, tort (including negligence), a breach of statutory duty but not including claims for death or personal injury."

45. Mr Bastone provided a fully reasoned and detailed decision. He summarised GD's case at paragraphs 13-19 of his decision. He did not there refer to the clause 2.17.4 defence; nor did he deal with it in his decision. There is no indication that Mr Bastone deliberately declined to deal with the point on jurisdictional or other grounds. In that sense the omission appears to have been inadvertent.

46. GD City submits that the clause 2.17.4 defence provided the possibility of a complete answer to KNN's claim for liquidated damages and that Mr Bastone's failure to address it constitutes a breach of natural justice that renders his decision unenforceable.

47. KNN submits that the mere fact that an adjudicator does not expressly address all the submissions made by the parties does not mean that he has not considered them or that his decision is unreasoned or constitutes a breach of the requirements of natural justice. In oral submissions it took the additional points that it is for GD City to show that there is substance in the clause 2.17.4 defence. That includes (a) satisfying the Court that the clause is in principle applicable to KNN's claim for liquidated damages and (b) satisfying the Court that there was material upon which the adjudicator could reasonably have held that the defence was applicable on the facts of this case.

*The applicable principles*

48. A number of authorities have referred to the question of natural justice in the context of adjudications. I respectfully adopt and endorse the judgment of Coulson J in *Pilon Limited v Breyer Group Ltd* [2010] EWHC 837 where he reviewed relevant authorities from [17] and provided a summary of the relevant principles at 22. For present purposes it is sufficient to set out his summary, which was:

> "22 As a matter of principle, therefore, it seems to me that the law on this topic can be summarised as follows.
> 22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: ….
> 22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: … .
> 22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: … .
> 22.4 It goes without saying that any such failure must also be material: … . In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: … .

> 22.5 A factor which *may* be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. … ."

49. It will be noted that an inadvertent failure to consider one of a number of issues will "ordinarily" not render the decision unenforceable. This qualification admits the possibility that an inadvertent failure may in an extraordinary case bring the principle into play. No clear guidance is available about when an inadvertent failure will render the decision unenforceable. Since the essence of the adjudication process is that the real dispute between the parties should be resolved, it seems to me that the touchstone should be whether the inadvertent failure means that the adjudicator has not effectively addressed the major issues raised on either side. Clearly, as [22.4] of *Pilon* makes clear, the failure must be material in the sense of having had a potentially significant effect on the overall result of the adjudication. The burden of showing materiality must rest on GD City, which asserts it. When confronted by a reasoned decision, the Court should tend to look for coherent reasoning underpinning the adjudicator's decision rather than hastening to a conclusion that an omission renders a decision unjust. That said, however, the decision whether an adjudicator has fairly disposed of the dispute that was referred to him will depend upon the facts of each case.

*Discussion*

50. GD City submits that the effect of clause 2.17.4 is that it can never be liable to KNN in any circumstances unless it not merely has the right to recover over, but has actually recovered from a Consultant or Sub contractor. It submits, correctly, that clause 2.17.4 appears in that section of the contract provisions which are specifically agreed between the parties rather than in the provisions of the underlying standard form of contract. It goes on to submit that, in those circumstances, clause 2.17.4 takes precedence over any other terms of the contract that might impose a liability upon GD City in favour of KNN because (a) it has been specifically agreed and (b) clause 2.17.4 itself says so.

51. The consequences of GD City's submissions for the application of the contract as a whole are startling. They would have the effect that GD City could determine whether or not it was liable to KNN by deciding whether or not to pursue a Consultant or Sub Contractor who might in turn be liable to GD City. A further consequence would be to transfer the risk of the insolvency of GD City's consultants and sub contractors to KNN. Most importantly, and specific to the present case, it would provide a complete defence to GD City in cases where no Consultant or Sub Contractor had any relevant involvement or any involvement that can be identified as having caused GD City's potential liability to KNN. This would be directly applicable to a claim for liquidated damages where what generates KNN's entitlement is the fact of delay without regard to who caused it. Typically delay may be the fault of the main contractor without involvement of Consultants or Sub Contractors; or, even where Consultants and Sub Contractors have had some involvement, it may not be either correct or possible to allocate responsibility to them.

52. If that were the correct interpretation of clause 2.17.4 the Court should apply it loyally. However, it is not a correct interpretation. If it were necessary to do so, I

would characterise GD City's interpretation as being commercially absurd in the context of a contract that includes detailed provisions for the levying of liquidated damages by reference to the fact (and not the causes) of delay. The key, in my judgment, lies in the words "the amount actually recovered from any Consultant or Sub Contractor *who has carried out work in connection with the Employer's Claim.*" Taken in the context of the contract as a whole, these words indicate that clause 2.17.4 is concerned with those Employer's Claims where a Consultant or Sub Contractor can be said to have carried out work "in connection with" the Employers' Claim and not otherwise. It is not sufficient that Consultants or Sub Contractors were working on the contract generally; their work must have a connection with the claim that is brought by the Employer. It follows that, where a Consultant or Sub Contractor's work has caused or contributed to the generation of an Employer's Claim, clause 2.17.4 is applicable, but not otherwise; and clause 2.17.4 will generally be inapplicable to a claim for liquidated damages and is inapplicable on the facts of this case where GD City has not attempted to show that any Consultant or Sub Contractor carried out work in connection with the claim for liquidated damages that was being advanced by KNN in the adjudication before Mr Bastone.

53. The Court was informed during the hearing that GD City had not previously relied upon Clause 2.17.4 although, on the basis of GD City's present submissions, it would have been a complete defence to the issues about liquidated damages raised and decided in Mr Eyre's previous adjudication. I do not rely upon that fact as an aid to primary construction, but note that the earlier non-reliance is consistent with my view that the interpretation that I have outlined above is what would have been understood by reasonable men in the position of the parties to the contract when the contract was made.

54. It follows that this ground of challenge fails.

**Conclusion**

55. I reject the grounds of challenge raised by GD City. KNN is entitled to enforce Mr Bastone's decision.