Neutral Citation Number: [2013] EWHC 3262 (TCC)

Case No: HT-13-335

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 28th October 2013

Before:

MR JUSTICE AKENHEAD

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Between:

BRIMS CONSTRUCTION LIMITED **Cla**

- and -

A2M DEVELOPMENT LIMITED **Defe**

- -

- -

James Bowling (instructed by **DAC Beachcroft LLP**) for the **Claimant**

Peter Oliver (instructed by **Clarke Mairs LLP**) for the **Defendant**

Hearing date: 17 October 2013

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JUDGMENT

Mr Justice Akenhead:

Introduction

1.
By these proceedings, Brims Construction Ltd ("Brims") seeks to enforce an adjudicator's decision dated 28 August 2013. Issues are raised concerning the adjudicator's jurisdiction and whether there was a breach of the rules of natural justice on his part. These largely arise out of arguments relating to whether the Notice of Adjudication was sufficiently broadly drafted, and if not, whether the way in which the parties chose and were invited by the adjudicator to argue matters in the adjudication reference amounts to a waiver of any jurisdictional challenge and, if not, whether the adjudicator wrongly shut out one of the parties from adducing evidence.

The Background

2.
By a written contract (the "Contract") entered into in October 2012, A2M Developments Ltd (A2M") employed Brims to construct a new care home at Whickham View, Denton, Newcastle-Upon-Tyne. The contract was in the JCT 2011 form of the Intermediate Building Contract with contractor's design.

There was an adjudication clause, Clause 9.2, which incorporated the Scheme for Construction Contracts.

3.
Relevant provisions of the Contract are:

(a) The Contract Particulars specified that the Date of Possession (which heralded commencement of the works) was to be 25 June 2012 and that the "first due date" for interim payments (in relation to Clause 4.7.1) was to be "July 2012 and thereafter the same date in each month or the nearest Business Day in that month". A footnote said that the "The first date should not be more than one month after the Date of Possession". The contractual Date for Completion of the Works was specified as 1 April 2013.

(b) Clause 4.7 stated:

“.1 Subject to any agreement between the Parties as to stage payments, the due dates for interim payments by the Employer are:

.1 for the period up to the date of practical completion of the Works, the monthly dates specified in the Contract Particulars…

.2 The Architect/Contract Administrator shall not later than 5 days after each due date issue an Interim Certificate, stating the sum that he considers to be or have been due at the due date to the Contractor in respect of the interim payment, calculated in accordance with clause 4.8, and the basis on which that sum has been calculated…"

(c) Clause 4.10 is in these terms:

“.1 In relation to any interim payment the Contractor may not less than 7 days before the due date make an application to the Quantity Surveyor (an ‘Interim Application’), stating the sum that the Contractor considers will become due to him at the relevant due date in accordance with clause 4.8 and the basis on which that sum has been calculated.

.2 If an Interim Certificate is not issued in accordance with clause 4.7.2, then:

.1 where the Contractor has made an Interim Application in accordance with clause 4.10.1, that application is for the purposes of these Conditions an Interim Payment Notice; or

.2 where the Contractor has not made an Interim Application, he may at any time after the 5 day period referred to in clause 4.7.2 give an Interim Payment Notice to the Quantity Surveyor, stating the sum that the Contractor considers to be or have been due to him at the relevant due date in accordance with clause 4.8 and the basis on which that sum has been calculated.”

(d) Material parts of Clause 4.11 are as follows:

“.1 Subject to clause 4.11.4, the final date for payment of an interim payment shall be 14 days from its due date.

.2 Subject to any Pay Less Notice given by the Employer under clause 4.11.5, the sum to be paid by the Employer on or before the final date for payment shall be the sums dated as due in the Interim Certificate.

.3 If the Interim Certificate is not issued in accordance with clause 4.7.2, but an Interim Payment Notice has been given under clause 4.10, the sum to be paid by the Employer shall, subject to any Pay Less Notice under clause 4.11.5, be the sum stated as due in the Interim Payment Notice.

.4 Where an Interim Payment Notice is given under clause 4.10.2.2, the final date for payment of the sum specified in it shall for all purposes be regarded as postponed by the same number of days as the number of days after the expiry of the five-day period referred to in clause 4.7.2 that the Interim Payment Notice is given.

.5 If the Employer intends to pay less than the sum stated as due from him in the Interim Certificate or Interim Payment Notice, as the case may be, he shall not later than 5 days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.12.1 (a 'Pay Less Notice'). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice."

4.
The Works proceeded into 2013 apparently without any great issue between the parties other than alleged late payments. Towards the end of the project, however, issues did arise in relation to the payment due up to and including June 2013. The adjudicator was later to hold that the "due date" under the Contract was 25 June 2013 (in effect calculating that as one month from the Date of Possession). Brims did not issue any Interim Application before then but did dispatch on 28 June 2013 to the Quantity Surveyor a detailed "Interim Application for Payment and Payment Notice" for June 2013. That showed a net sum due including VAT of £391,630.37. The history does not relate precisely what happened over the next few days but there was evidence that Brims called for a meeting with the Quantity Surveyor which was held on 8 July 2013, at which the application was considered in detail albeit that no agreement was reached as to a figure which the Quantity Surveyor would recommend to the Architect. Practical Completion was certified on 12 July 2013.

5.
However, on 15 July 2013, the Architect issued an Interim Certificate in the net sum of £120,340.30, apparently exclusive of VAT. By letter dated 18 July 2013, A2M's solicitors by letter purported to issue a Pay Less Notice explaining that the Employer considered that the sum due to Brims was £62,940.30, and seeking to justify the deduction by reference to alleged defects and alleged culpable delay. Brims' solicitors responded on 22 July 2013 to the effect that Brims had made a contractually valid Interim Application on 28 June 2013 which led to an entitlement to payment for the full amount because no Pay Less Notice was served in time. A2M's solicitors responded on 23 July 2013 that the "due date" was 25 June 2013 and that in effect the 28 June 2013 "application" was not an Interim Application at all. However the letter went on to refer to the meeting between Brims and the Quantity Surveyor on 8 July 2013:

"…on which date your client made its application to the Quantity Surveyor. Were the date of your client's application relevant to the determination of the Due Date, the date of that application was 8 July 2013 and not 28 June 2013.

In the alternative, by requesting that the Quantity Surveyor not to issue any evaluation of your client's application until he had met with your client, your client estopped itself from relying on any earlier date than that of the meeting as being the date of that application.

Your client made an Interim Application which could have taken effect with respect to the Due Date not more than 14 days after the date of Practical Completion…"

6.
Shortly thereafter, Brims instituted adjudication proceedings.

The Adjudication

7.
Brims' Notice of Adjudication was issued and served on 30 July 2013. Materially, it said as follows:

"**The nature and a brief description of the dispute**

6. A dispute has arisen between the parties to the Contract. The dispute concerns the failure by [A2M] to pay the amount to which [Brims] was entitled for work done up to 28 June 2013 by the final date for payment.

7. [Brims] claims two amounts in the alternative. The first is the amount due to [Brims] pursuant to the Interim Payment Notice issued on 28 June 2013 or, in the alternative, the amount due to [Brims] pursuant to the Interim Certificate issued on 15 July 2013.

8. [Paragraphs 8 to 10 refer to the applicability of the Scheme for Construction Contracts where payment becomes due in seven days after the relevant period or the making of the claim by the payee, the relevant period being that within which the work for which payment was being sought was carried out]

11. In respect of its works undertaken during the course of June 2013, [Brims] submitted an application and payment notice to the Quantity Surveyor…and the Architect…on 28 June 2013.

12. Accordingly, the latest date in July 2013 for the due date for payment for the work carried out in June 2013 was 7 July 2013.

13. [Paragraphs 13 and 14 refer to Clauses 4.7.2 and 4.10.1 of the Contract which were said to require the Architect not later than 5 days after the due date to issue an Interim Certificate and to permit an Interim Application to be made no less than seven days before the due date. Paragraph 15 referred to Clause 4.10.2.1 set out above. Paragraph 16 referred to Clause 4.11.5 also set out above]

17. Accordingly, in respect of the works undertaken by [Brims] during the course of June, the due date of payment was, at the latest, 8 July 2013…, the final date for payment was, therefore, 22 July and the last date by which a pay less notice could be issued was 17 July 2013. Further, the date by which the Architect ought to have issued an interim certificate was 13 July 2013.

18. The Interim Certificate issued in respect of work undertaken in June (and valued on 28 June as stated in the Certificate) was dated 15 July and, is therefore, ineffective as against [Brims'] Interim Payment Notice issued on 28 June.

19. In the alternative, if, which is not accepted, the Interim Application issued on 28 June is not an Interim Payment Notice then [Brims] was entitled to be paid on or by 20 to July, as a minimum, the amount certified in the Interim Certificate dated 15 July plus Vat (albeit that [Brims] reserves the right to dispute the amount certified).

20. Accordingly, on or by the 22 July 2013, [Brims] was entitled to receive payment…of £391,630.37 including VAT or, in the alternative the sum of 144,456 including VAT.

21. In breach of contract [A2M] has failed to pay by 22 July either the sum of £391,630.37 or the sum of £144,408.36. Instead, on 25 July 2013, it paid the sum of £75,528.36…

The redress sought

23. Brims…seeks the appointment of an Adjudicator to make the following decision:

23.1 That A2M…acted in breach of contract as set out in paragraph 21 above.

23.2 That Brims…is entitled to payment by A2M…of the sum of £316,102.01 or, in the alternative, the sum of £68,880, or such other greater or lesser sum as the Adjudicator may decide is due…"

8.
Mr Peter Vinden, having been appointed adjudicator, Brims served its Referral Notice on 2 August 2013. Material parts of this document are as follows:

"**Overview of the Dispute**

2. A dispute has arisen between the parties under the Contract. The dispute concerns the failure by [A2M] to pay the amount to which Brims was entitled for work done up to 28 June 2013 by the final date of payment.

3. Brims claims two amounts in the alternative. The first is the amount due to Brims pursuant to the Interim Payment Notice issued on 28 June 2013 or, in the alternative, the amount due to Brims pursuant to the Interim Certificate issued on 15 July 2013….

[4-9. These paragraphs set out details about the Contract and the clauses to be relied upon which included Clause 4.10.2 with both the relevant sub-clauses set out verbatim]

[10-12. These paragraphs refer to terms implied by the Scheme for Construction Contracts and relevant sections of the relevant statute as amended]

Dispute

13. The Works proceeded with Brims making monthly applications for payment, the Architect issuing interim payment certificate each month and [A2M] paying late as per the table below…[the table referred to the dates of applications by Brims which apart from two were between the 28th and the third days of the month]

[15-21. These paragraphs set out the first argument that there was no due date specified because the Contract Particulars only referred to "July 2012" and that therefore by operation of the Scheme the due date was seven days after the end of June 2013, that the certificate and any Pay Less Notice should have been issued by no later than 13 July and 17 July 2013 respectively, that no Pay Less Notice was issued by this latter date and that therefore the full amount claimed for in the June application was due]

22. [A2M] has, by letter dated 23 July 2013 […exhibited…] from its solicitors to the solicitors for Brims, argued that the due date is the 25th of each month or the nearest Business Day thereto. They also claimed that Brims' Interim Application was first made on 8 July 2013 due to that being the date of the meeting between Brims and the Quantity Surveyor to discuss the Interim Application. If that is correct then the following analysis would apply:-

Due Date	25 June	Final date for payment 9 July
Architect's Certificate	Due by 1 July	Not issued until 15 July
Contractor's Application (Interim Payment Notice-Clause 4.10.2.2)	First issued on 8 July (according to [A2M])	Therefore, by clause 4.11.4, final date for payment – 16 July

Last date for Pay Less Notice	11 July	Not given until 18 July

23. The effect of that argument is that the sum of £391,630.37 including VAT ought to have been paid by 16 July 2013.

Alternative claim

[24-26. These paragraphs set out the alternative claim based on the issued Certificate]

Breaches of Contract

27. In breach of contract [A2M] has failed to pay either the sum of £326,358.64 plus Vat…whether by the 16th July or the 22nd of July 2013 (paragraphs 23 and 21 above) or, in the alternative, the sum of £120,340.30 plus Vat…Instead, on the 25th July 2013, it paid the sum of £62,940.30 plus Vat…

The Redress Sought

29. Brims requires the Adjudicator to make the following decisions:

29.1 That the due date for payment of the amount due to Brims for work done in June 2013 was 7 July 2013 as set out at paragraph 19 above.

29.2 That, as a result, the latest dates the Architect ought to have issued an Interim Certificate and [A2M] a Pay Less Notice were 13 July and 17 July respectively as set out at paragraphs 20 and 21 above

29.3 That, as a consequence of the Architect failing to issue an Interim Certificate by 13 July, Brims' Interim Application issued to the Quantity Surveyor on 28 June 2013 was an Interim Payment Notice as set out in paragraph 21 above.

29.4 That, by not paying the sum of £391,630 37 by 22 July [A2M] acted in breach of contract as set out in paragraphs 19 and 27 above **or**

29.5 That if the due date for payment of the amount due to Brims for work done in June 2013 was 25 June 2013 as set out at paragraph 22 above then the latest dates the Architect ought to have issued an Interim Certificate and [A2M] a Pay Less Notice were 1 July and 11 July respectively as set out at paragraph 22 above and

29.6 That Brims' Interim Application issued to the Quantity Surveyor on 8 July 2013 was an Interim Payment Notice as set out at paragraph 22 above and

29.7 That by not paying the sum of £391,630 37 by 16 July [A2M] acted in breach of contract as set out in paragraph 22 and 27 above or, in the alternative,**[**29.8 – 29.10 These sub-paragraphs relates to the alternative claim based on the issued Interim Certificate]

29.11 That Brims is entitled to payment by [A2M] of one of the sums set out in paragraph 27 above, or such other some as the Adjudicator may decide is due…"

Attached to the Referral were various documents and financial breakdown as as well as a statement from Mr Clift director of Brims.

9.
On 8 August 2013, A2M filed its Response with which a two page witness statement from Mr Anderson of the Quantity Surveyor was provided, much of which was concerned with the meeting on 8

July 2013 at which, as he explained, the "Interim Application" of 28 June 2013 was reviewed. The Response itself set out, without any jurisdictional reservation, A2M's case that the issued Certificate was in accordance with the Contract, that the Final Date for Payment was 8 August 2013 and that the Pay Less Notice issued on 18 July 2013 was a proper one issued within time. Paragraph 12 sets this out in some detail but is headed:

"The dispute referred to Adjudication by Brims concerns an Interim Application submitted by Brims to the Quantity Surveyor on 28th June 2013…"

Paragraphs 14 to 24 address what A2M called "Brims' primary claim (£326,358.64 plus VAT)". Paragraph 24 said this:

"Brims' contentions as set out in paragraph 13 to 23 are wholly unmeritorious. The Adjudicator is invited to decide:

[24.1 – 24.7. These sub-paragraphs set out A2M's positive case, as to why the contentions in paragraph 13 to 23 were wrong, arguing for instance that "the June Interim Application is not capable of amounting to an Interim Payment Notice pursuant to clause 4.10 of the Contract"]

10.
Brims having served its Reply on 15 August 2013 (which amongst other things averted to the fact that A2M had not addressed Paragraph 22 of the Referral), the adjudicator wrote to the parties on 20 August 2013 in the following terms:

"19. I refer to the Parties' submissions made to date in this adjudication and my ongoing deliberations. From what I have seen so far neither party has made any submission in relation to the effect of clause 4.11.4 of the Parties' Contract on the Parties' dispute. I consider the provisions of clause 4.11.4 of the Contract are relevant to the matters I am to decide and I invite both parties to address me on the effect of the particular clause as they feel appropriate.

20. I direct that any submissions in relation to the effect of clause 4.11.4 on the Parties' dispute, as appropriate, are with me by 5.00 pm on Friday, 23 August 2013. "

He went on to ask for an extension of time for the issue of his decision.

11.
Brims' solicitors were the first to respond to the adjudicator on 21 August 2013, stating, so far as is material:

"It is Brims' primary case that it made an Interim Application in accordance with clause 4.10.1 on 28 June 2013 (paragraph 19 of the Referral) in respect of a due date of 8 July 2013 with the final date for payment on 22 July 2013. So clause 4.11.4 is not relevant to Brims' primary case.

[A2M] has argued that Brims' Interim Application under clause 4.10.1 was first made on 8 July 2013 and, in response, Brims has claimed that, if that is correct (which it denies), then such an application would amount to an Interim Payment Notice issued pursuant to clause 4.10.2.2, in which case Clause 4.11.4 is relevant - and, as set out in the table at paragraph 22 of the Referral, that clause was taken into account in calculating the final date for payment - being 16 July…

In conclusion, clause 4.11.4 is not relevant either to Brims' primary case nor to its alternative case - only to the case put forward at paragraph 22 of the Referral, in respect of which it was taken into account in the Referral

12.
By e-mail dated 22 August 2013 (timed at 22.33), A2M's solicitors sent in their response (to provide the requested submissions with respect to 4.11.4 of the Contract"). Paragraphs 1 to 4 of A2M's solicitors' email comment specifically on Clause 4.11.4 but Paragraph 5 stated that Clause 4.11.4 "can have no application to the current Adjudication, due both to jurisdictional and factual barriers to its application. Paragraphs 6 to 15, headed "Jurisdiction", put forward a jurisdictional challenge on the basis that the Referral Notice had purported to expand upon the Notice of Adjudication (beyond the two alternative claims said to have been specified in the Notice of Adjudication) to add an alternative argument set out in Paragraphs 22 and 23. A2M's apparent jurisdictional objection was that there was no claim within the Notice of Adjudication based on Clause 4.10.2.2, and therefore the dispute was limited to the two alternative claims. A2M's solicitors asserted that "any award made pursuant to 4.10.2.2would be made without jurisdiction as it would be made with respect to a claim which was not properly the subject of the Adjudication." Paragraphs 16 to 33 which are headed "Facts" address certain facts in particular, mostly by reference to A2M's argument that the due date was 25 June 2013:

"20. The Application dated 28 June 2013 does not set out a claim for the amount said to be due to Brims as of 25 June 2013, but rather for the sum said to have been due as at 28 June 2013. As such, it cannot be an Interim Payment Notice pursuant to 4.10.2.2…

22. No evidence, or indeed any assertion, has been put forward anywhere in the pre-Adjudication correspondence, in the Notice to Adjudicate or in the Referral to suggest that the Interim application valued the work done as of 25 June 2013. On the contrary, all of these documents make it clear that the Interim Application dated 28 June 2013 was for work performed as of the date of the Interim Application…

30. Brims has never put forward an application for sums due to it as of the Due Date of 25th June 2013. As such, Brims has never put forward any document that would be capable of being an Interim Payment Notice pursuant to 4.10.2.2…

32. Having now belatedly realised that its interpretation of the Contract is incorrect, and that both the primary and alternative claims set out in the Notice to Adjudicate are fatally flawed, Brims is attempting to characterise a claim for payment for work done as of 28th of June 2013 as being a claim for work performed as of 25th June 2013. It does this despite there being not a word of evidence to support the contention that the Interim Application of 28th June 2013 used a valuation date of 25th June 2013 that further that a review of all of the documentation shows the contrary…"

13.
Brims' solicitors replied on 23 August 2013, taking the view that, based on the Notice of Adjudication the dispute "between the parties is clear" and that the "amounts claimed by Brims are also clear - either £391,630.37 or, in the alternative, £144,408.46." They said:

"Brims, purely in response to the claim made by [A2M] that the due date was 25 June 2013 and that Brims' application for payment was not submitted until late July 2013 has pointed out that, if that were correct, then (and only then) Clause 4.10.2.2 would apply and clause 4.11.4 would also be relevant (as appears to be accepted by [A2M]) plus then Brims would still be entitled to be paid the sum of £391,630.37. It is only in respect of this that [A2M] has made its jurisdictional challenge. The challenge must fail as this claim still falls within the dispute being a failure by [A2M] to pay the amount to which [Brims] was entitled for work done up to 28 June 2013."

They suggested that the jurisdictional challenge was "hopeless".

14.
The adjudicator replied by letter on 27 August 2013 acknowledging that he had no power to decide his own jurisdiction but indicating that the Notice of Adjudication was wide enough to encompass the contentions based on Clause 4.11.4.

15.
The adjudicator issued his decision on 28 August 2013, having been allowed an additional week to do so. It is set out in a well ordered and comprehensible way. The Notice of Adjudication was set out verbatim with the first seven paragraphs addressing non-contentious matters. Paragraph 8 headed "Jurisdiction" referred to the jurisdictional challenge on 22 August 2013 and set out verbatim his response of 27 August 2013. Paragraph 9 headed "Matters for my Decision" set out 11 relevant questions which he needed to answer. Relevant parts of his decision on the matters in dispute were as follows:

“10.1 What is the due date for payment of the amount due to Brims for work done by Brims in the month of June 2013?

Decision

10.1.1 I decide that the due date for work done by Brims in the month of June 2013 was 25 June 2013. [There then followed 9 sub-paragraphs of reasoning]

10.2 By what date should the Architect…have issued an Interim Certificate in respect of the payment due to Brims for work done in the month of June 2013?

Decision

10.2.1 I decide that the Architect…should have issued its Interim Certificate in respect of the payment due to Brims for work done in the month of June 2013 on or before 30 June 2013. [Five sub-paragraphs of reasoning followed]

10.3 Is Brims’ Application for Payment dated 28 June 2013 a valid Interim Payment Notice for the work done by Brims in June 2013?

Decision

10.3.1 I decide that Brims’ Application to Payment dated 28 June 2013 is not a valid Interim Payment Notice for the work done by Brims in June 2013. [Reasoning then followed which was to the effect that Brims should have submitted its application on or before 18 June 2013 pursuant to Clause 4.10.1]

10.4 Is Brims’ Application for Payment dated 8 July 2013 a valid Interim Payment Notice for the work done by Brims in June 2013?

Decision

10.4.1 I decide that Brims’ Application for Payment dated 8 July 2013 is a valid Interim Payment Notice for the work done by Brims in June 2013. [His reasoning then referred to the meeting on 8 July 2013 to discuss the Application for Payment and the fact that both parties accepted that Brims “made an Application for Payment on 8 July 2013" at this meeting. It went on to say that Brims "was entitled to issue an Interim Payment Notice in response to the [Architect’s] failure to issue an Interim Certificate" going on to say that it "did this on 8 July 2013, in its meeting with the Quantity Surveyor”.

10.5 What is the final date for payment of the amount due to Brims for work done by it in June 2013?

Decision

10.5.1 I decide that the final date for payment of the amount due to Brims for work done by it in June 2013 is 17 July 2013. [His reasoning in the following sub-paragraphs involves an analysis of Clauses 4.11.1 and 4.11.4 which produced the 17 July date]

10.6 By what date should A2M have issued a valid Pay Less Notice?

Decision

10.6.1 I decide that the final date A2M should have issued a valid Pay Less Notice was 12 July 2013. [His reasoning, based on Clause 4.11.5, is that the Pay Less Notice needed to have been issued at least five days before the final date for payment.]

10.7 What sum, if any, is Brims entitled to receive from A2M for work done in June 2013?

Decision

10.7.1 I decide that Brims is entitled to receive the sum of £263,418.34 from A2M for work done in June 2013. [His reasons, based on his preceding decisions, was to the effect that because no Pay Less Notice was served within time the full net sum sought as at 8 July 2013 was due, less what had been paid.]

10.8 Is A2M in breach of contract in failing to pay Brims the amount due to it for work done in June 2013?

Decision

10.8.1 I decide that A2M is in breach of contract in failing to pay Brims the amount due to it for the work done in June 2013 as set out in Brims' Interim Payment Notice of 8 July 2013. [His reasons follow the earlier decisions.]"

16.
The decision goes on to address interest and fees and the like and the Summary required A2M to pay £263,418.34 plus VAT to Brims together with various other consequential items.

The Proceedings

17.
On 17 September 2013, Brims issued proceedings seeking to enforce the adjudicator's decision. It was supported by a witness statement of Mr Gordon of Brims' solicitors. A2M submitted two witness statements in response, one from Mr Banning, its solicitor, which highlighted the jurisdictional challenge and much of the history set out above. It says at Paragraph 19 that it was "implicit that the Adjudicator declined to draw the inference from the evidence which had been filed that the Interim Payment Application of 28th June 2013 valued the work as of 28th June 2013." He goes on to say that A2M was never offered an opportunity to put in further evidence to show that there was work done between 25 and 28 June 2013 and that therefore the 28 June 2013 document did not set out the amount stated to be due up to the "due date", his point being that it was not a proper Interim Payment Application for the period up to the due date. He therefore raises the issue about breach of the rules of natural justice. This was accompanied by a statement from Mr Anderson of the Quantity Surveyor, whose statement in the adjudication is referred to above, which was simply to the effect that his

understanding of the discussions on 8 July 2013 was that they were to the effect that the application related to all work done in the month of June up to 28 June 2013, with no significance or importance being attached to the date of 25 June.

18.
Brims submitted a witness statement of Mr Clift which responds to Mr Anderson saying that in fact the “works were effectively 100% complete as of the 25 June with only snagging being ongoing" with the "only works that were still being undertaken on site, and causing delays to our snagging, [being] A2M’s direct fitting out works". Very belatedly, on the day before the hearing, A2M submitted a further statement from a Ms Pimblott of the Architect saying that she attended site on 26 June 2013 and took some photographs (which she exhibited) stating that there were five items of work still being undertaken on 26 June. I can draw no inferences one way or the other on this but there does appear to be some outstanding work, although whether or not it falls within the responsibility of Brims to complete is arguable either way.

19.
A2M through its Counsel argued that there were two grounds of challenge, the first being a jurisdictional one. He argued that the Notice of Adjudication defined and constrained what the dispute between the parties was, saying that the dispute was limited to the claims for the specific amounts of money (in the alternative) as asserted in the Notice of Adjudication. In any event, there was no waiver because, although A2M in its Response did not challenge on a jurisdictional ground the assertions in Paragraphs 22 and 23 of the Referral, it did fairly and squarely make the jurisdictional objections in its e-mail to the adjudicator on 22 August 2013. His argument on the breach of the rules of natural justice was that the adjudicator on 20 August 2013 only invited or directed "submissions" on the Clause 4.11.4 point and that by necessary implication or interpretation he did not ask for evidence; he goes on to argue then that his client would have put in evidence which would have fully undermined the argument in Paragraph 22 and 23 of the Referral Notice and that the claim even on that basis would probably or at least could well have been dismissed.

20.
Brims’s Counsel argued that the Notice of Adjudication, based on its wording and viewed in its context particularly of A2M’s solicitors letter of 23 July 2013, was essentially and simply a disputed claim for the two alternative amounts and that the alternative arguments are not restrictive so as to reduce the scope of the referred dispute. He says that in any event the point was put fair and square in the Referral Notice and it was simply challenged in the Response on the merits but not on jurisdictional grounds; therefore, A2M has waived its right to challenge on jurisdictional grounds because his client continued to incur cost in the adjudication assuming as was the case that there was no jurisdictional challenge and has therefore acted to its detriment. He argues that by the time that belatedly A2M’s solicitors raise the point it was too late. He says that there was no, let alone material, breach of the rules of natural justice: the adjudicator clearly raised the point (and was therefore not going off on a frolic of his own) and invited submissions and A2M not only addressed the facts in its solicitors’ e-mail but it also had the opportunity if it so wished to put in any further evidence on the point.

The Law

21.
In the context of adjudication, jurisdictional issues venture into a number of different areas, ranging from the ambit of the referred dispute to other matters such as the invalid appointment of an

adjudicator. In this case, it is the ambit of the referred dispute which gives rise to the jurisdictional challenge. There is a plethora of factual circumstances which will give rise to slightly different considerations in each case. By far the greatest number of such challenges relate to claims for payment. In **OSC Building Services Ltd v Interior Dimensions Contracts Ltd**[2009] EWHC 248 (TCC), Mr Justice Ramsey was faced with such a challenge. He referred to the notice of adjudication which referred to the dispute concerning “non-payment… in respect of OSC’s final account" and to the fact that the Referral sought payment of an increased amount. He said that Paragraph 14:

“(1) On my reading of the notice of adjudication and the referral the dispute being referred to adjudication was the question of what sum were due to OSC when the notice of adjudication was issued. Those documents have to be read in the context and against the background of the prior communications between the parties, which included the process of submissions, comments and assessments which had taken place by that time.”

22.
In **Witney Town Council v Beam Construction Ltd**[2011] EWHC 2332 (TCC), the Court reviewed a number of the authorities relating to jurisdiction, concluding at Paragraph 38 of the judgment:

“i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.

(ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.

(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.

(iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties can not broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.

(v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts…”

23.
In the **Witney** case, reference was made to an earlier decision of the TCC, **Cantillon Ltd v Urvasco Ltd**[2008] EWHC 282 (TCC) where the Court said at Paragraph 55:

“In my view, one should look at the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds upon which that it has been rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it is referred to adjudication or arbitration. Similarly, the claiming party is not limited to the arguments, contentions and evidence put forward by it before the dispute crystallised. The adjudicator or arbitrator must then resolve the referred dispute, which is essentially the challenged claim or assertion but can consider any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute."

24.
One needs to bear in mind that Parliament in two Acts set out and then later developed the statutory law in relation to construction contracts (the Housing Grants, Construction and Regeneration Acts 1996 and the Local Democracy, Economic Development and Construction Act 2009), and in particular the right to adjudicate disputes (including differences). This was intended to be a relatively summary process, for instance it being resolved within 28 days of the reference. Adjudicators may not be and often are not legally qualified (for instance the adjudicator in this case) and parties themselves may not be legally represented in adjudications. Esoteric arguments on jurisdictional grounds should be discouraged. In determining what is being referred to adjudication, one should not have to engage in contorted mental gymnastics.

25.
Moving on to waiver in relation to jurisdiction, a party which does not raise any jurisdictional challenge (which could have been raised) during the adjudication will have acceded to the jurisdiction of the adjudicator. Obviously, this will not apply to jurisdictional challenges which only emerge once the decision comes out (such as an adjudicator deciding a dispute which has not been referred to adjudication). The question of waiver was considered in **Durham County Council v Jeremy Kendall**[2011] EWHC 780 (TCC) in the review of a number of previous cases which also considered how reservations as to jurisdiction should be made. Some relevant quotations from earlier cases were:

(a) **Aedifice Partnership Ltd v Ashwin Shah**[2010] EWHC 2106 (TCC)

"15. So far as jurisdictional objections that have been or could be taken during the adjudication, one will need to ascertain whether the parties have expressly agreed to give the adjudicator jurisdiction to resolve those objections or, even if they have not as such done so, whether the objecting party has effectively reserved or waived its position on jurisdiction…"

(b) **Pilon Ltd v Breyer Group Ltd** [2010] EWHC 837 (TCC)

"21. I can draw these various strands together:

(a) An express agreement to give an adjudicator jurisdiction to decide in a binding way whether he has jurisdiction will fall into the normal category of any agreement; it simply has to be shown that there was an express agreement.

(b) For there to be an implied agreement giving the adjudicator such jurisdiction, one needs to look at everything material that was done and said to determine whether one can say with conviction that the parties must be taken to have agreed that the adjudicator had such jurisdiction. It will have to be clear that some objection is being taken in relation to the adjudicator's jurisdiction because otherwise one could not imply that the adjudicator was being asked to decide a non-existent jurisdictional issue which neither party had mentioned.

(c) One principal way of determining that there was no such implied agreement is if at any material stage shortly before or, mainly, during the adjudication a clear reservation was made by the party objecting to the jurisdiction of the adjudicator.

(d) A clear reservation can, and usually will, be made by words expressed by or on behalf of the objecting party. Words such as "I fully reserve my position about your jurisdiction" or "I am only participating in the adjudication under protest" will usually suffice to make an effective reservation; these forms of words whilst desirable are not absolutely essential. One can however look at every relevant thing said and done during the course of the adjudication to see whether by words and

conduct what was clearly intended was a reservation as to the jurisdiction of the adjudicator. It will be a matter of interpretation of what was said and done to determine whether an effective reservation was made. A legitimate question to ask is: was it or should it have been clear to all concerned that a reservation on jurisdiction was being made?

(e) A waiver can be said to arise where a party, who knows or should have known of grounds for a jurisdictional objection, participates in the adjudication without any reservation of any sort; its conduct will be such as to demonstrate that its non-objection on jurisdictional grounds and its active participation was intended to be and was relied upon by the other party (and indeed the adjudicator) in proceeding with the adjudication. It would be difficult to say that there was a waiver if the grounds for objection on a jurisdictional basis were not known of or capable of being discovered by that party."

33. There is little to add to these observations. If a party does not effectively reserve its position on a given jurisdiction issue, of which it had actual or constructive knowledge, it can not raise it as an effective objection to a claim for the enforcement of the relevant adjudication decision. It becomes a somewhat different point if there arises an issue as to whether the parties have or are to be taken to have agreed that the adjudicator is to have jurisdiction to decide his or her own jurisdiction. One then needs to determine whether there was by words or conduct or both an agreement, express or implied, to that effect. Even if there was agreement, however, the Adjudicator must adjudicate upon it; he or she must go further than simply enquiring into his or her jurisdiction and reaching a provisional view. If he or she does not adjudicate upon jurisdiction which the parties have by agreement conferred on him or her, then there will be no binding decision on that issue and the Court may then have to resolve the issue."

(c) **GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd**[2010] BLR 377

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

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

26.
Some of these cases were more clearly concerned with cases in which no or an ineffective reservation was made as to jurisdiction. In **Metal Roofing v Kamm Properties Ltd** [2010] EWHC 2670 (TCC), the Court said the following in relation to a relatively prompt if not immediate jurisdictional reservation in an adjudication:

“As to the arguments, however, relating to whether or not the adjudicator was in effect given jurisdiction or whether jurisdiction was waived, I will at least say that the original defence did not

reserve the position on jurisdiction. Whilst it made the point about there being what was in effect an oral agreement, it did not seek to make a jurisdictional point about it. But it was only two days later that the further written Defence was submitted, which, undoubtedly, did make an effective reservation of jurisdiction. In the light of, rather than in spite of, the authorities, it may well be the case (and I do not need to make any final finding on this) that the defendant in the adjudication did make an adequate reservation of jurisdiction within a very short period of time of putting in the first Defence and, before it was suggested anyone acted on the defence to its detriment, the further defence was submitted, which did make an adequate reservation of jurisdiction. I would very much doubt whether a two day period in those circumstances, in the context of the initial defence, can be said to amount to an effective waiver of the right to raise a jurisdiction objection. So, on that argument, if it had been the only point, I would probably have decided against All Metal, but fortunately for All Metal that point is a point that is not the main one to be relied upon. In those circumstances, there would be judgment for All Metal."

27.
In my view, ordinary principles of waiver are applicable. It goes, almost without saying, that the failure prior to the adjudicator's decision to make a jurisdictional objection which it was open to a party to make during the adjudication, can be taken as a waiver of jurisdiction because in effect the party later wishing to raise the jurisdictional objection has actively participated in the adjudication, as if the adjudicator had jurisdiction, the other party has been entitled to rely upon that unqualified participation and has itself relied upon that in continuing to take part, to make submissions, and to incur costs and management time in the adjudication (to its detriment if there are always was a good jurisdictional challenge). In logic however, even if the jurisdictional challenge is made relatively late on in the adjudication proceedings but before the decision, there can still have been an effective prior waiver by the party which challenges jurisdiction at a late stage where it has had the opportunity to but failed to take take the relevant jurisdictional point at an earlier stage, if and to the extent that the other party has continued (positively) to participate (spend time, cost and resource) in the adjudication. What however is needed is some activity (such as the service of a Response without qualification) by the party which later seeks to challenge jurisdiction which amounts objectively to an assertion or representation that it is participating without reservation.

28.
In relation to natural justice, I take the following as an appropriate summary:

"3. In **Cantillon Ltd v Urvasco Ltd**[2008] BLR 250, this Court considered a number of the previous cases stating:

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

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

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

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

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

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of **Balfour Beatty Construction Company Ltd -v- The Camden Borough of Lambeth** was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

4. The **Cantillon** case was one in which the Court found that there was no material breach of the rules of natural justice. The TCC decision in **Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board**[2012] EWHC 84 (TCC) involved a finding that there was a material breach:

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

5. The reference in the **Cantillon** case to a breach of the rules being material where the adjudicator has not, prior to his or her decision, identified to the parties a point or issue "which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant" should not be treated as requiring statutory or contractual rules of interpretation to construe what was meant in the decision. If the adjudicator relies upon such a point or issue (either of fact or of law) and his whole decision stems from his finding on that point or issue, it will be decisive. A point or issue might well be of considerable potential importance to the outcome if it is not decisive of the whole decision but if it goes to important parts of the decision. Even if an adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision, that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the Court can have no confidence in the fairness of the decision making process." [**ABB Ltd v Bam Nuttall Ltd** [2013] EWHC 1983 (TCC)]

Discussion

29.
I have formed the clear view that the adjudicator had jurisdiction to decide what he did. My reasons are as follows:

(a) The dispute between the parties in effect blew up over a relatively short period of time, namely between about the middle to the end of July 2013. The real issue between the parties was whether and to what extent Brims was entitled to what it claimed in the 28 June 2013 application document. Nothing much had happened between its submission on 28 June and 8 July when the Quantity Surveyor and Brims met to discuss and review its contents. The parties then seem to have been

prepared to wait until the Architect issued the Interim Certificate on 15 July 2013, said to be based on a valuation date of 28 June 2013. That was followed shortly by A2M's solicitors Pay Less Notice on 18 July 2013 which resulted in Brims' claimed entitlement being reduced by 80%. That was when Brims deployed solicitors asserting their client's entitlement.

(b) The solicitors' correspondence particularly on 22 and 23 July 2013 demonstrates that part of what was in issue was A2M's alternative argument that the application for contractual purposes could not be considered to have been made until 8 July 2013 when the meeting took place.

(c) Without any further material exchanges, the Notice of Adjudication was served some seven days later.

(d) The Notice of Adjudication on its face at Paragraph 6 describes the dispute essentially as relating to "the failure by [A2M] to pay the amount to which [Brims] was entitled for work done up to 28 June 2013 by the final date for payment". That is, of course, ultimately exactly what the adjudicator decided in favour of Brims.

(e) Even Paragraph 7 is pitched at a relatively high level because it identifies two alternative claims, one of the amounts due pursuant to the Interim Payment Notice issued on 28 June 2013 and the other based on the later Certificate. What Paragraphs 7 to 19 of the Notice of Adjudication are putting is in effect legal arguments to be deployed to support the entitlement and ultimately, as Paragraphs 21 and 23 make clear, it is the money said to be due in relation to what was applied for on 28 June 2013 which is being claimed for in effect as damages or otherwise as debt.

(f) The fact that the Notice of Adjudication did not specifically mention the alternative argument which had been raised on behalf of A2M as the dispute built up between the parties in relation to the Application having to be considered as having been made on 8 July 2013 is not material because it is simply an alternative way of putting the case if, as turned out to be the case in fact, A2M wanted to assert that the application was not made until 8 July 2013. If of course the Notice of Adjudication had positively referred to this further argument, there could have been no suggestion that it was not part and parcel of the dispute which had already crystallised between the parties.

(g) That these are not fanciful observations is born out by the terms of the Response that "The dispute referred to Adjudication by Brims concerns an Interim Application submitted by Brims to the Quantity Surveyor on 28th June 2013…" That is a good description of what the dispute was.

30.
In any event, even if in some way the argument based on the application for payment having been made on 8 July 2013 was not part of the dispute being referred to adjudication by the Notice of Adjudication, it is clear that A2M waived any right to raise a jurisdictional challenge in relation to the adjudicator dealing with the point on the following basis:

(a) The Referral Notice runs the argument openly and clearly in Paragraph 22 and 23 with the relief claimed in relation to it in Paragraphs 29.5 to 29.7. It has not really been argued that this was not obvious on the face of the Referral Notice. It should be noted that the adjudicator was factually wrong in suggesting as he did on 20 August 2013 that neither party had made any submission in relation to the effect of clause 4.11.4 because it is expressly referred to in Paragraph 22 of the Refferal.

(b) A2M was represented by competent solicitors who presented a comprehensible and articulate Response which appears on its face to have been thoroughly researched by reference to the law and the facts. It is clear that A2M and those advising it had considered the contents of Paragraphs 22, 23

and the redress claimed in Paragraph 29 of the Referral Notice because they expressly rejected Paragraphs 22 and 23 (amongst others) as "wholly unmeritorious" and asserted in their Response a positive case as to why they are wrong. There is no hint of any jurisdictional objection either in the Response, before its service or indeed until 22 August 2013 (well after close of business).

(c) It was therefore over 14 days later (and only a week before the decision was originally due) that it raised its jurisdictional objection (there being, rightly, no issue in the Court proceedings but that in terms of its content, if not its timing, it was framed in adequate terms for a reservation). Since the service of the Response, Brims had deployed its solicitors and itself to produce its (eight page and not insubstantial) Reply and, at the very least, had also to respond to the adjudicator's letter of 20 August 2013. Brims had therefore necessarily relied upon the unqualified participation by A2M in the adjudication by its service of its Response.

(d) There are thus the key elements of waiver: words or conduct by the waiving party which are intended to be relied upon and are actually relied upon by the other party (with time, money and resource expended by it).

31.
In my judgment, there has been no, and certainly no material, breach of the rules of natural justice on the part of the adjudicator. My reasoning is as follows:

(a) If he always had the jurisdiction to address the issue upon which he ultimately decided the case in favour of Brims, particularly as it was spelt out in the Referral Notice, he can hardly be criticised for then deciding the case on that basis. A2M could have addressed the point in even more detail in its Response than it did and deployed whatever evidence it wished to support its defence on that point.

(b) Leaving this aside, the adjudicator behaved absolutely properly in raising with the parties a point upon which he believed he had not been fully addressed. This he did in his letter of 20 August 2013. It can not be said that he was in some way going off "on a frolic of his own" but even if it might be said that this was the case, he was putting to the parties for their response a particular point.

(c) A2M's Counsel's argued, without much justifiable conviction, that when the adjudicator "invited" the parties to "address" him on the effect of Clause 4.11.4 and directed that any "submissions" should be filed, he was in reality excluding or barring the parties from producing any further evidence. His words simply do not bear that meaning; in the context of adjudication, part of the submissions could have been an evidential submission. When a non-legally qualified adjudicator calls for "submissions", one can not infer that he was by his words intending to exclude the submission of further evidence. He asked to be addressed and called for submissions. In any event, one of those submissions from A2M could have been to the effect that A2M wanted to submit further witness or documentary evidence. The reality is that over half of the e-mail submission from A2M's solicitors on 22 August 2013 was actually on the "Facts". It therefore seems clear that A2M and its legal team did not feel constrained by the direction given by the adjudicator. Further, if they had felt some real need to deploy some additional evidence, it is not credible (even if it is being suggested) that they would not have at least asked the adjudicator for permission to deploy it.

Decision

32.
It follows from the above that there is no good reason advanced as to why this adjudication decision shall not be enforced. There should be judgment in favour of Brims.

33.
The Defendant seeks permission to appeal but its Counsel is unable to provide any reasons. There is no prospect of success on appeal and there is no good reason otherwise to grant permission. The Defendant also asks for a stay of execution but does not advance any reasons such as the usual one that the Claimant would or might be unable to repay if the appeal was successful. The stay application is refused as no good grounds for it have been advanced.

34.
The Claimant should have the costs of the proceedings and has presented a total bill of £13,235 for summary assessment. The Claimant says that this is a case for indemnity costs; I disagree as the challenge can not be classified as unreasonable or out of the ordinary to the This is challenged on the basis that too many hours are claimed in relation to the Grade A earner. I agree to some extent and the bill is to be assessed downwards accordingly to £11,000.