Neutral Citation Number: [2013] EWHC 798 (TCC)

Case No: HT-12-413

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/04/2013

Before :

THE HON MR JUSTICE RAMSEY

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Between :

WILLMOTT DIXON HOUSING LIMITED

(formerly INSPACE PARTNERSHIPS LIMITED)

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- and -

NEWLON HOUSING TRUST

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Jonathan Lee (instructed by Wendy McWilliams **Willmott Dixon Holdings Limited**) for the **Claimant**

Alex Hickey (instructed by **Trowers & Hamlins**) for the **Defendant**

Hearing dates: 17 January 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE RAMSEY

Mr Justice Ramsey:

Introduction

1.
This is an application under CPR 24 for summary judgment by the Claimant ("Willmott Dixon") against the defendant ("Newlon") arising out of two adjudication decisions.

Background

2.
Newlon employed Willmott Dixon as the contractor for part of a development known as Hale Village, Tottenham Hale, London. This mixed-use development included residential units, offices, retail units,

student accommodation and leisure facilities. Willmott Dixon was the contractor for the part of this development known as Block SE.

3.
Willmott Dixon was employed by Newlon under a contract dated 30 March 2007 (“the Contract”) which was in the ACA Standard Form of Contract for Project Partnering (PPC 2000), as amended, incorporating Partnering Terms and a Commencement Agreement made in January 2010.

4.
The Contract contained provisions as to adjudication and other matters as follows:

(1)
Clause 3.1 contained a provision for the cooperative exchange of information in the following terms: “The Partnering Team members shall work together and individually, in accordance with the Partnering Documents, to achieve transparent and cooperative exchange of information in all matters relating to the Project and to organise and integrate their activities as a collaborative team.”

(2)
Clause 27 dealt with various dispute resolution procedures and Clause 27.5 noted that those procedures were “without prejudice to the rights of any Partnering Team member involved in a difference or dispute to refer it to adjudication, and any such reference shall be in accordance with the procedure referred to in Part 2 of Appendix 5.”

(3)
Appendix 5 part 2 provided as follows:

“1. The term the "Adjudicator" shall mean the individual named in the Project Partnering Agreement or (if no individual is so named) such individual as shall be appointed from time to time in accordance with the edition of the Model Adjudication Procedure published by the Construction Industry Council current at the date of the relevant notice of adjudication (the "Model Adjudication Procedure").

2. Any Partnering Team member has the right to refer a difference or dispute for adjudication by giving notice at any time of its intention to do so. The notice shall be given and the adjudication shall be conducted under the Model Adjudication Procedure.

3. For the purposes of the Model Adjudication Procedure, the term "dispute" shall have the same meaning as "difference or dispute" in the Partnering Terms.

5.
In these proceedings it is common ground that the reference in Clause 1 of Appendix 5 Part 2 to the edition of the Model Adjudication Procedure published by the Construction Industry Council (“CIC Rules”) “current at the date of the relevant notice of adjudication” means that the applicable rules are those in the Fifth Edition. Whilst those are stated to be relevant to the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009, they do not differ in material respects relevant to these proceedings from the Fourth Edition which had been published in March 2007.

6.
The relevant provisions of the CIC rules are as follows:

(1)

Clause 1 provides: “The object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the Contract and this procedure shall be interpreted accordingly.”

(2)
Clause 8 deals with the Notice of adjudication as follows: “Either Party may give notice at any time of its intention to refer a dispute arising under the Contract to adjudication by giving a written Notice to the other Party. The Notice shall include a brief statement of the issues or issues which it is desired to refer and the redress sought.”

(3)
Clause 10 deals with requests to the Construction Industry Council (“CIC”) for the nomination of an adjudicator and Clause 13 provides as follows: “If a Party objects to the appointment of a particular person as adjudicator, that objection shall not invalidate the Adjudicator’s appointment or any decision he may reach.”

(4)
Clause 14 provides: “The referring Party shall send to the Adjudicator within 7 days of the giving of the Notice (or as soon thereafter as the Adjudicator is appointed), and at the same time copy to the other Party, a statement of its case including a copy of the Notice, the Contract, details of the circumstances giving rise to the dispute, the reasons why it is entitled to the redress sought, and the evidence upon which it relies.”

(5)
Clause 15 provides: “The date of referral shall be the date on which the Adjudicator receives the statement of case and he shall, as soon as reasonably practicable, notify the date to the Parties in writing.”

(6)
Clause 16 provides: “The Adjudicator shall reach his decision within 28 days of the date of referral, or such longer period as is agreed by the Parties after the dispute has been referred. The Adjudicator may extend the period of 28 days by up to 14 days with the consent of the referring Party.”

(7)
Clause 34 provides: “Unless the Parties agree, the Adjudicator shall not be appointed arbitrator in any subsequent arbitration between the Parties under the Contract. No party may call the Adjudicator as a witness in any legal proceedings or arbitration concerning the subject matter of the adjudication.”

(8)
Clause 35 provides: “The Adjudicator is appointed to determine the dispute or disputes between the Parties and his decision may not be relied upon by third parties, to whom he shall owe no duty of care.”

7.
Prior to the adjudications giving rise to these proceedings there had been a previous adjudication decision on 22 August 2012 which determined that Willmott Dixon were entitled to be paid under the Contract for certain basement works. Willmott Dixon applied for payment for those works but no payment was made by Newlon.

8.
On 9 October 2012 Willmott Dixon served a notice of intention to refer to adjudication a dispute as to the sums to which it was entitled for those basement works (“the Basement Works Dispute”).

9.
Also on 9 October 2012 Willmott Dixon served on Newlon a further notice of intention to refer to adjudication a dispute as to its entitlement to be paid sums withheld by Newlon on account of liquidated damages ("the LAD dispute").

10.
Willmott Dixon applied to the CIC for the appointment of adjudicators, making separate applications and paying separate fees in relation to each of the disputes. The CIC appointed the same adjudicator, Mr John Riches, in relation to each of the two disputes.

11.
On 11 October 2012 Willmott Dixon sent two letters to the Adjudicator, one in respect of each dispute, in the following terms:

"This letter is to advise you that with the hard copy of this letter I will be sending the Referral together with a file containing a bundle of copy documents. This letter and enclosures are being sent for guaranteed delivery to you tomorrow and a copy of this letter and enclosures are likewise being sent in the same manner to Trowers & Hamlins."

12.
In these proceedings Newlon raises question of whether or not the Adjudicator received a document entitled "Referral" with each of the letters sent by Willmott Dixon on 11 October 2012. Newlon says that it did not itself receive those documents.

13.
On 14 October 2012 the Adjudicator wrote two letters to the parties in identical terms, one in respect of each adjudication. Under "Procedure" he said as follows:

"The parties are aware that there are two Adjudications. All communications shall be clearly marked to show which Adjudication is being referred to.

The parties might consider if they wish, for convenience to consolidate the two Adjudications. Until such time as I am instructed by the parties to consolidate the two Adjudications I am working on the basis of running two timetables in parallel and producing two separate Decisions.

I confirm receipt of the Referral on 12 October 2012. That makes day one of this Adjudication 13 October 2012."

14.
On 19 October 2012 Newlon submitted a Response in relation to each of the adjudications. In each case they referred to a Referral served by Willmott Dixon which was dated 27 July 2012 and which formed part of the enclosures sent with the letter of 11 October 2012. Newlon did not refer to a Referral dated 11 October 2012 which Willmott Dixon said was also enclosed with that letter.

15.
Willmott Dixon said that, in each case, they sent to the Adjudicator and to Newlon a covering letter, a Referral document dated 11 October 2012 and a file which contained documentation including a previous Referral dated 27 July 2012 which had led to an adjudication decision on 22 August 2012. Newlon raises an issue as to whether or not the Adjudicator received the Referral document dated 11 October 2012 attached to each covering letter and says that it did not receive a copy at the time when the covering letter and the file were sent to the Adjudicator.

16.
In each Response Newlon raise an objection on the basis that Willmott Dixon had not sent a Referral document to the Adjudicator which complied with Rule 14 of the CIC Rules.

17.
On 24 October 2012 Willmott Dixon served a Reply in each of the Adjudications. In each of those Replies Willmott Dixon raised the question of why Newlon had not addressed the issues raised by the Referral dated 11 October 2012 and enclosed a further copy. In response, by email on 25 October 2012, Newlon's solicitors confirmed that a Referral dated 11 October 2012 appended to the Reply had not been included with the referral documents served on Newlon. They sought the opportunity to deal with the Referral document dated 11 October 2012 by serving a Rejoinder. On receipt of that email Willmott Dixon's representatives wrote to the Adjudicator asking him to confirm that he received the Referral document dated 11 October 2012 and the bundle of documentation in each Adjudication with Willmott Dixon's letter of 11 October 2012.

18.
In response to an email from the Adjudicator on 25 October 2012 Newlon's solicitors confirmed, in respect of each Adjudication, which documents they had received on 12 October 2012, stating that the Referral was a small black ring-binder which comprised documents which they listed.

19.
On 29 October 2012 Newlon's solicitors served a Rejoinder in each Adjudication enclosing witness statements from Mr Digby Hebbard explaining the documentation which he had received at the time of each Referral.

20.
On 5 November 2012 the Adjudicator wrote a letter in each Adjudication to say that he had "now checked through the whole matter" and that:

"1. It is true that the correct version of the Referral (that which matches the Notice of Adjudication) was not served until the Reply to the Response.

2. It does appear to me that only the supporting documents were served without the proper Referral."

21.
Subsequently on 8 November 2012 the Adjudicator wrote again to the parties in the following terms:

"I have no wish to add to the confusion on service of the Referral. I have found my copy of the Referral comprising three pages served on 11 October 2012.

It was not in the black file but behind the separate covering letter which became unattached from the main black file.

I accept it makes no difference to the way in which we now proceed but I thought, even at this late stage the parties should know I have my copy of the Referral."

22.
On 9 November 2012 the Adjudicator made a Decision in each of the two disputes referred to him. In each of the Decisions he recited the background concluding at paragraph 28.00 with the following :

"On 8 November 2012 I wrote to the parties confirming that my copy of the Referral served on the correct date had been found."

23.
In relation to the Decision on the basement quantum dispute the adjudicator held that Newlon should pay Willmott Dixon the total sum of £115,697.42 and should be liable for his fees and expenses of £3,648.96. In relation to the LAD dispute the Adjudicator held in his Decision that Newlon should pay Willmott Dixon the total sum of £130,019.69 and be liable for his fees and expenses totalling £3,302.88.

24.
Those sums were not paid and on 6 December 2012 Willmott Dixon issued a Claim Form, together with Particulars of Claim and made the usual applications when seeking enforcement of adjudication decisions in this court. Directions were given on 7 December 2012 leading to the hearing of this Part 24 Application. At that hearing I granted summary judgment and I now set out my reasons for that decision.

25.
Mr Jonathan Lee who appeared on behalf of Willmott Dixon, submitted that there were two valid Decisions and sought summary judgment for the sums awarded in those Decisions, together with the Adjudicator's costs which, as confirmed by the statement of truth in the Particulars of Claim, have been paid by Willmott Dixon. That application is supported by two witness statements from Ms. Wendy McWilliams, an in-house solicitor with Willmott Dixon, dated 6 December 2012 and 8 January 2013.

26.
Mr Alexander Hickey, who appeared on behalf of Newlon, submitted that the decision should not be enforced for two reasons. First, he submitted that the Referral was not properly served in accordance with Rule 14 of the CIC Rules and that therefore the Adjudicator did not have jurisdiction to deal with the disputes. Secondly, he submitted that the Adjudicator did not have jurisdiction because two disputes had been referred to adjudication by the same adjudicator, contrary to the provisions of Section 108(1) of the Housing Grants, Construction and Regeneration Act 1996 and Rule 8 of the CIC Rules. He relied on the witness statements of Mr Digby Hebbard, a solicitor and partner at Trowers & Hamlins LLP, solicitors for Newlon, one which was dated 29 October 2012 and served in the Adjudications and one dated 20 December 2012, served in these proceedings.

27.
On this application for summary judgment I therefore have to decide whether Mr Hickey's submissions raise sufficient grounds to give Newlon real prospects of successfully defending Willmott Dixon's claims based on the Adjudicator's Decisions. I shall therefore consider each of the matters raised by Mr Hickey in turn.

The Referral

Submissions

28.
Mr Hickey submitted that, on the evidence, there is sufficient doubt as to whether or not the Adjudicator received the referral document in each adjudication, being the document with the title "Referral" dated 11 October 2012. Similarly, based upon evidence of Mr Hebbard, he submitted that there was an issue to be resolved at trial as to whether Newlon's solicitors were served with a copy of the Referral document, which under Rule 14 of the CIC Rules should have been served on Newlon at the same time as it was served on the Adjudicator. He submitted that, as a result, there were real prospects of Newlon successfully defending these adjudication enforcement proceedings.

29.
First, in relation to the issue of whether the Adjudicator received the referral document, Mr Hickey referred to the Adjudicator's emails of 5 and 8 November 2012 and submitted that these raised an issue as to what the Adjudicator did receive under cover of the letter of 11 October 2012 which should properly be resolved by disclosure from the Adjudicator and then the Adjudicator should be called to give evidence to explain the situation. He submitted that, if the Adjudicator was not served with the Referral document, then the failure to serve the Adjudicator with that document within 7 days of the giving of the Notice of adjudication deprived the Adjudicator of jurisdiction to determine the dispute because there would be a failure to comply with Rule 14 of the CIC Rules.

30.
Further, Mr Hickey submitted that the failure to serve the Referral document on Newlon had the same consequence because there was similarly a breach of Rule 14 of the CIC Rules.

31.
He submitted that the Referral document is a key document giving jurisdiction and the failure to serve it both on the Adjudicator and on Newlon deprived the adjudicator of jurisdiction.

32.
Mr Lee submitted that there were no grounds on which Newlon could challenge the statement of the Adjudicator in his email of 8 November 2012 that he had found his copy of the Referral document in each adjudication served on the correct date. He submitted that there was no basis to challenge what the Adjudicator said in the email of 8 November 2012 and, in any event, he had included that statement within his Decision and that was a finding of fact which could not be challenged on an application to enforce and Adjudicator's decision. He also said that the approach suggested by Mr Hickey of disclosure and evidence from the Adjudicator was unrealistic. He referred to rule 34 of the CIC rule which provides that "no party may call the Adjudicator as a witness in any legal proceedings or arbitration concerning the subject matter of the adjudication." He submitted that this provision is sufficient to preclude the Adjudicator having to give evidence in these proceedings because the matter was part of the "subject matter of the adjudication" either generally or, in particular, because it did form part of the Decision by the Adjudicator.

33.
Mr Lee said that the parties, by rule 34, had therefore agreed that there should be no ability to challenge the evidence of the Adjudicator and so Newlon could not defend these proceedings on that basis. He submitted that this was a case where Newlon had no grounds for asserting that the Adjudicator had not been properly served with the Referral document and enclosures and therefore there was no basis on which they could successfully defend these enforcement proceedings.

34.
Alternatively, Mr Lee submitted that the Referral document itself was not a necessary part of the Referral and that the covering letter together with the file of documents was sufficient to set out Willmott Dixon's case even if the Referral document had not been included. He referred to the fact that Newlon had been able to plead a full Response to the Referral documents and that when copy of the Referral document dated 11 October 2012 had been served with the Reply, the matters dealt with by Newlon in the Rejoinder demonstrated that this Referral document took matters no further than the bundle of documents, including the Notice of Adjudication, served with the letter of 11 October 2012.

35.

In relation to Newlon's contention that their solicitors had not been served with a copy of the Referral at the same time as it was sent to the Adjudicator in breach of rule 14 of the CIC rules, Mr Lee submitted that the evidence of Mr Hebbard had inconsistencies whilst the evidence of Ms McWilliams, who had dealt with the documentation sent to Newlon's solicitors, was clear and persuasive and therefore the court should find there was no real prospect of Newlon successfully defending these proceedings on the basis that the Referral document was not copied to Newlon at the same time as it was sent to the Adjudicator. Alternatively, Mr Lee relied on his submission that the Referral document was not a necessary part of the Referral.

36.
Mr Lee further submitted that, even if the Referral document was not included with the copy sent to Newlon, it should not be permitted to rely on the fact that it did not receive the referral document, given the provision of clause 1 of the CIC rule and clause 3.1 of the PPC 2000 standard form of contract. He submitted that the rules should be construed broadly and that Newlon should not be permitted to rely on the absence of the Referral document in circumstances where it would have been evident that such a document was intended to be enclosed and where Newlon's submissions by reference to the Referral document of 27 July 2012 were contrived given that this document had been served in the previous adjudication in which Newlon's solicitors were instructed. It was, he submitted, evident that the Referral document dated 27 July 2012, enclosed in the file of documents, was not the Referral document for the current Adjudication. If Newlon did not receive the Referral document then, under the provisions referred to above, he submitted it had a duty to ask for the information from Willmott Dixon. If it had done so, Mr Lee said that a copy would have been supplied and he submitted that Newlon could not therefore rely on the absence of the Referral document.

37.
Mr Hickey in response submitted that Newlon was entitled to challenge the Adjudicator's statement that he had received a copy of the Referral document and that rule 34 of the CIC Rules did not preclude it from doing so nor would the fact that Newlon could not call the Adjudicator be a matter which would prevent it from challenging, in these proceedings, whether he did in fact receive the Referral document. On that basis, relying on Hart Investments Ltd v Fidler [2007] BLR 30, he submitted that Newlon had reasonable prospects of successfully defending these proceedings on the basis that the Adjudicator did not have jurisdiction.

38.
Alternatively Mr Hickey submitted that there was a dispute of fact between Mr Hebbard and Ms McWilliams which could not be resolved in summary proceedings and therefore summary judgment should not be given. He submitted that the failure to copy the referral document to Newlon was, in itself, a sufficient breach of rule 14 of the CIC Rules to deprive the Adjudicator of jurisdiction.

39.
In relation to Mr Lee's submission that the Referral document dated 11 October 2012 was not a necessary part of the Referral, Mr Hickey pointed to rule 14 and the reference to the need to send the Adjudicator "a statement of its case". He submitted that this showed that, whilst the Referral might include the other documents, it was necessary for there to be a document which was a statement of case. He submitted that the documentation provided, absent the Referral document, was not sufficient to comply with rule 14 of the CIC Rules. Finally Mr Hickey submitted that there was nothing either in rule 1 of the CIC Rules or in clause 3.1 of PPC 2000 which imposed on Newlon any obligation to request documents in the context of the Adjudication.

Decision

40.
The starting point for consideration of this issue is s.108 of the 1996 Act which deals with the requirements of a construction contract in relation to adjudication. Section 108(2)(b) requires the construction contract to "provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice". Whilst it is rule 14 of the CIC Rules which falls to be considered rather than the provision of either s.108(2)(b) itself or the provisions of paragraph 7 of part 1 of the Scheme for Construction Contracts ("the Scheme"), which would have applied if rule 14 had not complied with s.108, the purpose of rule 14, consistent with those other provisions, is for the dispute to be referred to the Adjudicator within 7 days of the notice of adjudication.

41.
It is in this context that His Honour Judge Coulson QC, as he then was, stated in Hart Investments Ltd v Fidler [2007] BLR 30 at [51] when considering paragraph 7(1) of Part I of the Scheme: "The referral notice must be provided by a date which is not later than seven days after the notification of the notice of intention to refer. If it is not, it cannot be a referral notice in accordance with the Scheme."

42.
In PT Building Services Ltd v ROK Build Ltd[2008] EWHC 3434 (TCC) I considered submissions which sought to extend the decision in Hart v Fidler. Whilst in Hart v Fidler it was held that there was no valid referral notice where there was a breach of paragraph 7(1) of the Scheme by failing to refer the dispute to the Adjudicator within time, it was contended in that later case that there was no valid referral notice where there was a breach of paragraph 7(2) because the referral notice was not accompanied by copies of or relevant extracts from the construction contract and such other documents as the referring party intended to rely upon. I held that a breach of paragraph 7(2) could be distinguished from a breach of paragraph 7(1) and said this at [54] and [55]:

"54. In approaching this issue, it is to be recalled that, where the scheme applies, it does so as an implied term of the construction contract - see s.114(4) of the 1996 Act. The consequence of a party's failure to comply with the terms of a contract will generally be a breach of contract, which may have a number of consequences depending on the nature of the term and the breach. Under the 1996 Act, there are a number of terms which are fundamental to the process of adjudication and which are set out in s.108 of the 1996 Act. In my judgment, the central purpose of the scheme is to incorporate those fundamental provisions which, when absent, lead to the scheme being imposed as an implied term. The provision in paragraph 7(1) of Part 1 of the Scheme, which was considered in Hart v. Fidler, is derived from s.108(2)(b) of the Act. That, it seems to me, makes paragraph 7(1) of the scheme one of the fundamental provisions 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.

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."

43.
Similarly in Linnett v Halliwells LLP [2009] BLR 312 I had to consider clause 41A.4 of the 1998 JCT Standard Form of Building Contract which required the dispute to be referred to the adjudicator within 7 days of the notice of adjudication and required the party to include with the referral, amongst other things, any material which the party wished the adjudicator to consider. The referral and its accompanying documentation was to be copied simultaneously to the other party. I referred to the decision of His Honour Judge Coulson QC, as he then was, in Cubitt Building Interiors Ltd v Fleetglade Ltd [2007] 119 Com LR 36 where at [41] he held that the requirements were mandatory but a failure to comply with them did not make the referral notice a nullity. He held that Clause 41A had to be operated in a sensible and commercial way. He added that "although clause 41A sets out a mandatory timetable, it is a timetable that needs to be operated in a sensible and businesslike way."

44.
In Linnett v Halliwells I agreed with that passage and said this at [96] and [97]:

"96. ...Where the parties have agreed, either expressly or by the terms implied by the Scheme, that the dispute shall be referred to the adjudicator within seven days then the courts should uphold that agreement. Generally, apart from exceptional cases such as Cubitt, this will mean that the court will treat the service of the referral within that period as being mandatory so that the failure by the referring party to serve it in that period will be regarded as making the referral a nullity as not being what the parties intended. In such cases the adjudicator will have no jurisdiction derived from that referral.

97. On the other hand, operating clause 41A and its mandatory timetable in a sensible and businesslike way means that where there has been a failure to comply with the detailed procedural aspects of clause 41A, the courts should be slow to find that this renders the relevant part of the process a nullity so as to deprive the adjudicator of jurisdiction. Objectively that cannot have been the intention of the parties or of the provisions of the Scheme. This is consistent with the position that I held applied under the Scheme in OSC Building Services Ltd v Interior Dimensions Contracts Ltd[2009] EWHC 248 (TCC)."

45.
Turning now to the provisions of rule 14 of the CIC Rules, the essence of that provision is that, in compliance with section 108(2)(b) of the 1996 Act, the timetable has to have the object of securing the referral of the dispute to the adjudicator within 7 days of the notice of adjudication. As stated in Hart v Fidler and in the decisions referred to above the important requirement of rule 14 is that the referring party should send the adjudicator a statement of its case within 7 days of the giving of the notice. The date on which that is done is then the date of referral, defined in rule 15, and that leads to the start of the primary period of 28 days in which the adjudicator has to reach a decision. If the referring party does not send the adjudicator "a statement of its case" within 7 days then, as in Hart v Fidler and those other decisions, the adjudication cannot proceed because there has been a failure of

the fundamental obligation in section 108(2)(b) to refer the dispute to the adjudicator within 7 days of the notice of adjudication.

46.
In the present case, despite Mr Hickey's tenacious submissions, I do not consider that it can possibly be contended that the Adjudicator did not receive the Referral documents dated 11 October 2012 with letters of 11 October and the black files in each of the two Adjudications. Whilst the Adjudicator in his initial email indicated he had not received the Referral document, he made it clear in his later email of 8 November 2012 that it was behind the covering letter which had become detached from the main black file. He expressly said that he had found the Referral documents and I see no basis for challenging that statement.

47.
I also consider that there is merit in Mr Lee's submission that, by incorporating the statement that he had the Referral document within his Decision, the Adjudicator stated as a fact that the Referral document had been served on the correct date. That was a finding or statement of fact within the jurisdiction of the Adjudicator which is not open to challenge on this application. I also note the statement in the Adjudicator's letter of 14 October 2012 where he said "I confirm receipt of the referral on 12 October 2012." By rule 15 of the CIC Rules that was the date, notified to the parties in writing, as the date on which the Adjudicator received the statement of case.

48.
Even if it could be argued that the Adjudicator had not received the Referral documents on 12 October 2012, it is evident that the covering letter and the enclosed bundle sufficiently set out a statement of Willmott Dixon's case in relation to each Adjudication. This is clear from the detailed Response which was put in by Newlon in respect of each Adjudication. In the Basement Works Dispute adjudication, for instance, Newlon dealt with the valuation and payment for that work both as to liability and quantum at paragraphs 4.1 to 4.12 and 5.1 to 5.8 of the Response. Similarly, in respect of the LAD dispute, Newlon set out a detailed response to the dispute at paragraphs 4.1 to 4.14, 5.1 to 5.3 and 6.1 to 6.6 of the Response. The sufficiency of the statement of case is also evidenced by the lack of response by Newlon to the Referral document dated 11 October 2012 in Newlon's Rejoinder once it had seen the Referral document attached to the Reply.

49.
Rule 14 does not prescribe a particular form by which a party must set out the statement of its case. Nor do I consider that the list of matters to be included with the statement of a party's case means that if a particular document is not included, in technical breach of rule 14 of the CIC Rules, then the adjudicator would not have jurisdiction to deal with the dispute. Just as in the cases cited above I consider that there is a distinction to be drawn between the fundamental obligation to refer the dispute to the adjudicator within 7 days under rule 14 and the other obligations relating to the detail of the manner in which the matter is referred to the adjudicator contained, in this case, in rule 14 of the CIC Rules and in other cases, for example, in paragraph 7(2) of part I of the Scheme.

50.
In summary, it follows that I do not consider that Mr Hickey is correct in his submissions that Newlon has real prospects of successfully defending the enforcement of the Decisions in the two Adjudications on the basis either that the Adjudicator did not receive the Referral document under cover of the letter of the 11 October 2012 or, even if he did not, on the basis that the documentation enclosed with the letter of 11 October 2012 did not sufficiently set out a statement of Willmott Dixon's case for the

purpose of the dispute being referred to the Adjudicator within 7 days of the giving of the Notice of Adjudication.

51.
In relation to the evidence that Newlon's solicitors did not receive the Referral document at the same time as the letter and file of documents in each adjudication, whilst, as Mr Lee persuasively submitted, Ms McWilliams was involved in the detail of sending out the letter of 11 October 2012 and its enclosures and there are inconsistencies in the evidence of Mr Hebbard, if that had been the only issue I would have been inclined to refuse summary judgment and direct that that issue should be determined at an early date. However that issue is not determinative.

52.
First the provision in rule 14 that the referring Party is to "copy to the other Party a statement of its case" to the other party at the same time as it sends it to the Adjudicator is not a term which, if breached, would lead to the Adjudicator not having jurisdiction. The Adjudicator has jurisdiction if the referring party sends a statement of its case to the Adjudicator within 7 days of the giving of the Notice. That is the action which founds the jurisdiction of the Adjudicator. The sending of a copy to the other party does not found the Adjudicator's jurisdiction. If, for instance the other party was sent a statement of the referring party's case but the referring party failed to send it to the Adjudicator within 7 days of the Notice, that would not found the Adjudicator's jurisdiction. If there is a failure by the referring party to send a statement of its case to the other party so that the other party is unaware of the case it has to meet then that is a matter which does not go to jurisdiction but could, depending on the circumstances, go to the question of whether or not the procedure complied with natural justice. In this case after receiving the Referral document attached to the Reply, Newlon served a Rejoinder and then dealt with the Referral document to the limited extent necessary. It is not and could not be contended by Newlon that there was any breach of the rules of natural justice in this respect.

53.
Secondly, as stated above, the letter of 11 October 2012 and the bundle of documents enclosed in each Adjudication was a sufficient statement of Willmott Dixon's case, in any event. That documentation was sent to Newlon at the same time as it was sent to the Adjudicator.

54.
Thirdly I consider that this interpretation of rule 14 is consistent with the general principle set out in rule 1 of the CIC Rules. As stated in that rule, the object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the Contract and not one where technical breaches of the rules are to be taken to prevent such a decision. Equally, when Newlon received the file under cover of the letter of 11 October 2012, if the referral document was not enclosed, then it is difficult to see how Newlon could have considered that the Referral document from the previous adjudication was intended to be the Referral document for this adjudication.

55.
This was a Contract where the parties had agreed to use the standard form of project partnering contract. They had agreed to work in mutual cooperation, as reflected in clause 3.1 by "transparent and cooperative exchange of information in all matters relating to the project" which, in my judgment, also includes performing the problem solving and dispute avoidance or resolution provisions in clause 27, including adjudication in clause 27.5. In such circumstances, I would have expected Newlon to have contacted Willmott Dixon to confirm that the Referral document of 27 July 2012 was really

intended to be Willmott Dixon's Referral document for the current dispute. It is quite evident that, had that been done, Newlon would have received the Referral document at that time, consistent with rule 14. Any failure to serve the Referral document at that time would therefore not have occurred had Newlon not been in breach of their obligations and Newlon cannot rely on its own breach.

56.
It therefore follows that I do not consider that the service of Willmott Dixon's statement of case on Newlon at the same time as it was sent to the adjudicator is a matter which, if not complied with, could deprive the Adjudicator of jurisdiction. However, in any event, a sufficient statement of case was sent at the same time and if Newlon had complied with its obligations under the Contract the referral document would have been received at the time stated in rule 14. I therefore do not consider that Newlon have real prospects of successfully defending the enforcement of the two adjudication decisions on this first ground based on alleged inadequacies of the referral process.

Two disputes referred to one adjudicator

Submissions

57.
Mr Hickey submitted that Willmott Dixon was not entitled to refer and the Adjudicator was not entitled to decide, two disputes at the same time. He referred to s.108 of the 1996 Act which states that a party to a construction contract has the right to refer a dispute for adjudication and that the contract has to enable a party to give notice at any time of his intention to refer "a dispute to adjudication". He also relied on the requirement to 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. On this basis Mr Hickey submitted that the Act clearly stipulates that a party is entitled to adjudicate "a dispute" and then refer that single dispute, "the dispute", to an adjudicator. Both of those provisions, he pointed out, referring to "dispute" in the singular and not "disputes" in the plural.

58.
Mr Hickey referred to a passage in Coulson on Construction Adjudication (Second Edition) at paragraph 7.78 and submitted that the learned author stated the principle correctly in these terms: "The 1996 Act makes it clear that only a single dispute can be referred to an adjudicator at any one time." He submits that this has been the principle followed by the courts, although as set out by His Honour Judge Anthony Thornton QC in Fasttrack Contractors Ltd v Morrison Construction Ltd [2000] BLR 168 at [20], the strictness of this interpretation has been alleviated by a broad interpretation being given as to what constitutes a single dispute, so that it may include a number of claims.

59.
Mr Hickey referred me to the decision at first instance and in the Court of Appeal in David and Teresa Bothma (in partnership) v Mayhaven Healthcare Ltd[2006] EWHC 2601 (QB) and [2007] EWCA Civ 527 in which His Honour Judge Havelock-Allan QC refused enforcement of an adjudication decision in which two disputes had been referred to the same adjudicator and the Court of Appeal, in refusing permission to appeal, expressed agreement with the principle that under the provisions of paragraph 8(1) of Part I of the Scheme, in the absence of consent for the adjudicator to adjudicate, at the same time, more than one dispute under the same contract, an adjudicator had no jurisdiction to determine more than one dispute at the same time: see [2007] EWCA Civ 527 at [4].

60.

I was further referred to Witney Town Council v Beam Construction (Cheltenham) Ltd [2011] BLR 707 where Akenhead J dealt with an adjudication decision made under a contractual provision which incorporated the Scheme. In that case there was a dispute as to whether more than one dispute had been referred to the adjudicator. After citing a number of decisions including Fastrack and Bothma, Akenhead J summarised his conclusions on the law at [38] and, in particular, at [38(vi)] said this:

"Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes."

61.
Mr Hickey submitted that the principle was clear: only one dispute can be referred to one adjudicator and that an adjudicator who has two disputes referred to him or her, does not have jurisdiction to deal with those two disputes. He submitted that a party cannot circumvent this principle by submitting two disputes to the same adjudicator for decision at the same time by the device of using two notices of adjudication and two referrals. This principle, he submitted, derives from the need for adjudication to be a fast and summary process and can only work fairly and effectively within a 28 day period if the parties and the adjudicator are only burdened with one dispute at a time. He submitted that if the court were to sanction the use of separate simultaneous references to adjudication before the same adjudicator that would be contrary to this principle.

62.
He also submitted that this principle was not undermined by the point that, if the parties agree in their contract, they can consent to having multiple disputes decided at the same time. He pointed out that there is no such provision in the CIC Rules although he accepted that rule 36 of the CIC Rules refers to an adjudicator being "appointed to determine the dispute or disputes between the Parties". This, he submitted, was in the context of resolving more than one dispute where there had been a joinder of additional parties under rule 22 of the CIC Rules.

63.
As a result Mr Hickey submitted that by referring two disputes to the same Adjudicator at the same time, as occurred in this case, Willmott Dixon had breached the principle established by s.108 of the 1996 Act and incorporated in the CIC Rules by the reference to "a dispute", in the singular, in rules 8 and 9 of the CIC Rules.

64.
Mr Lee accepted that under the Scheme, in the absence of consent, it is not possible to refer multiple disputes, properly so described, by a single notice of adjudication and single referral to start a single adjudication before a single adjudicator, as established by Bothma and applied in Witney Town Council. However Mr Lee submitted that this case is quite different from that situation and that Newlon were seeking to apply that principle to say that a party was not entitled to refer more than one dispute, even by separate adjudications, to the same adjudicator "simultaneously".

65.
Mr Lee submitted that both in Bothma and in Witney Town Council the adjudication was subject to the provisions of the Scheme which, absent consent, prevents a party referring to adjudication more than one dispute in a single adjudication to, necessarily, the same adjudicator. Mr Lee submitted there was nothing either in the 1996 Act or in the CIC Rules to prohibit one adjudicator from dealing with two disputes referred in two adjudications at the same time.

66.
He also submitted that under clause 1 of appendix 5 part 2 to the Contract the “Adjudicator” was the person appointed from time to time in accordance with the CIC Rules which, under rule 10, provide for the CIC to nominate an adjudicator as they did in this case. He relied on rule 36 of the CIC Rules which refers to the adjudicator determining “the dispute or disputes between the parties”. Whilst this was stated in the context of a duty of care, he submitted that it was not limited to cases where third parties might have been joined under rule 22. In any event, Mr Lee submitted that nothing in s.108 of the 1996 Act, the Contract or the CIC Rules prevents an adjudicator from determining two separate disputes under two separate notices of adjudication and referrals at the same time.

67.
He also pointed out that, in this case, it was the CIC who nominated the same adjudicator but they might have nominated separate adjudicators and, had they done so, there could have been no objection. However, Mr Lee pointed out that the parties cannot object to the same adjudicator being appointed because under rule 13 any objection to the appointment of a particular person as adjudicator “shall not invalidate the Adjudicator’s appointment or any decision he may reach.” This, he submitted, puts beyond doubt any argument that the Adjudicator in this case was unable, as a matter of jurisdiction, to make two adjudication Decisions on two Adjudications where the Notices of adjudication had been given on the same date and the referral was to the same adjudicator on the same date.

Decision

68.
Whilst this issue has been argued with commendable ingenuity by Mr Hickey, I consider that Mr Lee’s submissions are plainly right and that there is nothing in the CIC Rules or otherwise to prevent a party from giving two notices of adjudication, each relating only to one single dispute and for each of those adjudications then to be referred to the same adjudicator.

69.
There is nothing in section 108 of the 1996 Act or in the Rules which prevents a party from giving more than one notice of adjudication, each relating to one dispute and then referring each adjudication to an adjudicator. Equally, there is nothing in those provisions to limit the time at which two or more adjudications can be commenced. They might be commenced at the same time or one before the other. The adjudication procedure might last for different periods so that the adjudications might overlap in time. There is nothing to prevent that and indeed, quite the contrary, because a party has the right to give notice of adjudication “at any time” under Section 108(2)(a) this makes it plain that there is no limit on the time when a party can commence one or more adjudications.

70.
The logical conclusion of Mr Hickey’s submission would be to preclude or limit the commencement of multiple adjudications which might overburden either the parties or the Adjudicator. That cannot be the position in the light of s.108(2)(a). Indeed, Mr Hickey’s submissions departed from what was said, by way of submission, in paragraph 47 of Mr Hebbard’s Witness Statement of 20 December 2012. There Mr Hebberd had said it was “of course open, for a referring party to appoint two separate adjudicators” in separate adjudications.

71.
I consider that a party must be able to start a number of adjudications, each for a single dispute, at the same time or over the same period in order to comply with s.108(2)(a). If a party can commence

multiple adjudications there is nothing to prevent the same adjudicator from being appointed in a number of those adjudications. For instance, the parties may, in their contract, agree the person who is to act as adjudicator. They may, as here, agree that a third party appoints the adjudicator without the right to challenge that appointment. I do not consider that the appointment of the same adjudicator is an objectionable as being contrary to the 1996 Act, the CIC Rules or any requirement of the Contract. In the absence of any such provision, I do not consider that it can give raise to any right to object to the jurisdiction of the adjudicator.

72.
If one or other party is overburdened by multiple adjudications then that is the result of the statutory requirement to be able to commence adjudication “at any time”. If an adjudicator is overburdened because of the number of adjudications between the same two parties under the same contract he has the ability to refuse nomination or obtain extensions of time for the parties or, in appropriate cases, to resign. Subject to that I do not consider that there is an underlying policy which could prevent an adjudicator from having jurisdiction because of multiple adjudications being referred to the same adjudicator by the same parties under the same contract.

73.
When read in context, statements that an adjudicator has no jurisdiction to determine more than one dispute at the same time are all references to cases where a party has commenced one adjudication and has sought to refer more than one dispute to adjudication in that adjudication. They are not concerned with cases where a party has commenced more than one adjudication each dealing with a single dispute and then the agreed mechanism of appointment of an adjudicator has led to those two adjudications being dealt with by the same adjudicator. Such a process is consistent with and not contrary to section 108 of the 1996 Act nor to the CIC rules nor to any other principle.

74.
As a result I consider that Willmott Dixon was entitled to refer the two disputes to adjudication by giving two notices of Adjudication and making two referrals to adjudication. The fact that the Adjudicator was then the same adjudicator appointed to deal with each of the two adjudications does not have any effect on the Adjudicator’s jurisdiction to determine the disputes referred to him in each of those Adjudications. Accordingly Newlon does not have real prospects of successfully defending the enforcement of the Adjudication Decisions on this ground.

75.
I have proceeded on the basis that Mr Hickey was correct and that s.108 precludes a party from referring more than a single dispute at the same time, as has been stated in a number of previous decisions. He however accepted that a party could refer multiple disputes to adjudication if the parties consent to that. Mr Lee was careful in his submissions to point out that under the Scheme, without the consent of the parties, it is not possible to refer more than one dispute to adjudication: see Bothma and Witney Town Council both of which involved adjudications under the Scheme. He did not accept that it went further. It is to be noted that the reasoning in Bothma at [4] was that as paragraph 8(1) of Part I of the Scheme provided that the adjudicator could, with the consent of the parties, adjudicate more than one dispute, that meant that absent such consent he could not. The decision was not based on a principle derived from the wording of s.108(1), which refers to a party having a right to refer “a dispute” to adjudication.

76.

On analysis such an argument as to the meaning of “a dispute” in s.108(1) has difficulties. If s.108(1) limits a party to being able to refer a single dispute to adjudication by the reference to the phrase “a dispute” rather than the use of the word “disputes”, then that causes problems for parties consenting to refer multiple disputes to a single adjudication. If a party agreed to a provision for multiple disputes to be referred to adjudication then that provision would not comply with s.108(1). The effect of a provision of the construction contract not complying with s.108(1) would be that s.108(5) would cause the adjudication provisions of the Scheme to apply. The effect would be that paragraph 8(1) of the Scheme would apply which allows multiple disputes to be referred if the parties consent and that would be what the parties had done and were free to do under the Scheme. On that basis the Scheme would not comply with s.108(1). This suggest that an argument based on the reference in s.108(1) to “a dispute” being “one dispute” may not be correct and that the reference to “a dispute” is more likely to be a generic reference to “a dispute”, without seeking to limit it to a singular dispute.

77.
In this case I have not needed to decide whether the references in rule 8 to “a dispute” or “the dispute” limited the parties in this case to referring one dispute. However, given the wording of rule 36 which refers to the Adjudicator being appointed “to determine the dispute or disputes between the Parties”, I would have held that the reference to “a dispute” or “the dispute” in rule 8 was a generic reference which was not intended to limit the number of disputes which could be referred to adjudication by a Notice. Contrary to Mr Hickey’s submission I do not consider that the reference to “disputes” in rule 36 cannot properly be construed as being limited to cases of joinder of third parties under rule 22. If it had been necessary, I would have based my decision on this.

Summary and Conclusion

78.
As a result I consider that Willmott Dixon is entitled to summary judgment in relation to the two decisions of the Adjudicator.

79.
In the circumstances I do not need to consider what would be the position in relation to Willmott Dixon’s ability to recover the fees from Newlon if there were no jurisdiction. However as stated in PC Harrington Contractors Limited v Systech International Limited[2012] EWCA Civ 1371, there is a distinction to be drawn between recoverability of adjudicator’s fees where there has been a breach of natural justice and where there has been a jurisdictional challenge but a request by the challenging party that the Adjudication should proceed to deal with the merit: see the judgement of Davis LJ at [44] with which the other members of the Court of Appeal agreed. This case would potentially have fallen into the latter category, if Newlon’s contentions had succeeded.