Neutral Citation Number: [2014] EWHC 1058 (TCC)
Cases No: HT-14-26 and HT-14-54

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 8 April 2014

Before :

THE HON MR JUSTICE RAMSEY

- -

Between :

Laker Vent Engineering Limited (“Laker”)	**Cla**
- and -	
Jacobs E&C Limited (“Jacobs”)	**Defe**
And Between	
Jacobs E&C Limited	**Cla**
-and-	
Laker Vent Engineering Limited	**Defe**

- -

Simon Lofthouse QC (Instructed by Systech Solicitors) on behalf of Laker.

Steven Walker QC (Instructed by Fenwick Elliott LLP) on behalf of Jacobs

Hearing date: 14 March 2014

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Judgment

Mr Justice Ramsey :

Introduction

1.
These two sets of proceedings arise out of a sub-contract entered into on 30 March 2012 (“the Sub-Contract”) under which Laker agreed to supply, fabricate and install pipe-work at Markinch Biomass Combined Heat and Power (CHP) Plant (“the Plant”) in Fife, Scotland. This formed part of the work which Jacobs had agreed to carry out under a main contract (“the Main Contract”) with RWE Npower Renewables (Markinch) Limited (“RWE”). The Main Contract was for the design, manufacture, supply, construction, installation, testing and commissioning of the Plant.

2.
In the first set of proceedings Laker seeks summary judgment in the sum of £808,123.69 plus VAT and £27,375.00 and £1000.00 as adjudicators’ fees and administration charges, together with interest arising out of three adjudication decisions made on 7 January 2014, as corrected on 12 January 2014.

3.
In the second set of proceedings Jacobs seeks two declarations as to the relationship between extensions of time and the mechanism for taking-over under the Sub-Contract. Laker seeks to stay those proceedings to arbitration.

4.
On 17 March 2014 I notified the parties of my conclusions on the applications and I now set out my reasons for those conclusions.

Adjudication enforcement proceedings

5.
I shall deal first with the adjudication enforcement proceedings which were commenced on 24 January 2014, supported by the first witness statement of Julian Ives.

6.
Directions were given that led to the service of the first witness statement of Jeremy Robert Glover dated 11 February 2014 and the first witness statement of Alan Davenport also dated 11 February 2014. These were responded to by the second witness statement of Julian Ives dated 16 February 2014. There was then a second witness statement of Jeremy Robert Glover dated 5 March 2014 and a third witness statement of Julian Ives dated 10 March 2014.

7.
In these proceedings Jacobs raises three grounds of challenge to the Adjudicator's decisions.

8.
First, Jacobs says that because the Sub-Contract did not contain any provision for adjudication the only way for adjudication to apply would be if the Sub-Contract was a construction contract under the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009, ("the Act). In that case under s.108(5) of the Act, the Scheme for Construction Contracts ("the Scheme") would apply in the absence of an adjudication provision in writing in the Sub-Contract.

9.
Jacobs says that the Sub-Contract is not a construction contract because it is not an agreement for carrying out of construction operations under s.104(1) as the relevant operations under the sub-contract were not construction operations. Jacobs submits that the work under the Sub-Contract was work of assembly and installation of plant on a site where the primary activity is power generation and is therefore expressly not construction operations by reason of s.105(2)(c) of the Act.

10.
In response Laker says that in fact by reference to the proper analysis of the "site" the primary activity is paper production as the Plant was constructed to provide electricity and steam for the paper mill of Tullis Russell Papermakers Limited ("Tullis Russell") to replace a coal and gas fired power plant which had been operating there for some 60 years.

11.
Secondly Jacobs says that the Adjudicator made inconsistent decisions. In a decision which he referred to as Award No 1 he granted an extension of time to what he referred to as "Practical Completion" which was evidently 11 October 2013 but in a further decision, Award No 3, he decided

that the works were complete and ready for taking-over on 30 August 2013 which is some 6 weeks before the date on which he decided the works were “Practically Complete” in Award No 1.

12.
Laker says there is no inconsistency in having taking-over earlier than the contractual time for completion, as extended.

13.
Thirdly, Jacobs says that the Adjudicator was, in any event, not properly appointed as he was appointed under the Scheme for Construction Contracts which applies to England and Wales and expressly provides that it “shall extend only to England and Wales” when, in fact, the Plant is located in Scotland.

14.
Laker says that under the Sub-Contract it was agreed in the Special Conditions that the Sub-Contract “shall in all respects be governed by and in accordance with the Laws of England and shall be subject to the jurisdiction of the English Court.” On that basis Laker submits that the laws of England apply and so the relevant Scheme is the Scheme which applies in England and Wales.

15.
However, Laker also takes an initial point and submits that the court does not need to deal with the merits of those three issues raised by Jacobs because there is a threshold defence to Jacobs’ challenges. After receipt of the Adjudicator’s three decisions Jacobs applied successfully under the slip rule for a correction to be made and therefore, Laker submits, Jacobs elected to affirm the decisions and in doing so is now precluded from pursuing any of the challenges. I shall therefore first deal with that objection.

Affirmation of the decisions

16.
Laker refers to the decision of Mr Justice Akenhead in Wales & West Utilities Limited v PPS Pipelines Systems GmbH [2014] EWHC 54 (TCC). In that case there was an issue whether the decision in a third adjudication was enforceable. At [42] Akenhead J, having found that the decision in the third adjudication was unenforceable added “it may well be the case that by paying without reservation the sum awarded by the decision in the adjudication Wales has elected not to challenge the decision (as it now seeks to do).”

17.
He referred to the decision of His Honour Judge Seymour QC in Shimizu Europe Limited v Automajor Limited [2002] EWHC 1571 (TCC) in which the losing party in an adjudication had asked for amendments to the decision to be made under the slip rule and had also made some payment. It then sought to avoid enforcement on grounds of jurisdiction.

18.
Mr Justice Akenhead also referred to PT Building Services Limited v ROK Build Limited [2008] EWHC 3434 (TCC) in which at [20] to [25] I set out the law on election. At [26] and [29] I set out my conclusions as follows:

“26. In my judgment the underlying decisions on election or approbation and reprobation, as applied in the context of adjudication, show that a party cannot both assert that an adjudicator’s decision is valid and at the same time seek to challenge the validity of the decision. The party must elect to take

one course or the other. By taking a benefit under an adjudicator's decision, the party will generally be taken to have elected a particular course and will be precluded from challenging the adjudicator's decision. In Macob the benefit was the claim to have the proceedings stayed to arbitration in relation to the decision. In Shimizu the benefit was the right to have the decision corrected under the slip rule.

…

29. PTB also relied on the fact that ROK had paid the Adjudicator's fees and had thereby elected to treat the Adjudicator's decision as valid. I do not consider that, in the absence of evidence to show that the payment was a mistake, the court can come to that conclusion as a matter of inference or otherwise, as Mr Lee sought to submit. Rather, the natural inference from the payment of the adjudicator's fees is that ROK intended to make payment in respect of a valid decision requiring such payment. Did that payment amount to an election? Mr Lee submits that it is difficult to characterise ROK's payment as amounting to ROK taking a benefit. There is strength in that point but, in my judgment, the taking of a benefit, whilst sufficient for there to be an election, is not necessary. What has to be determined is whether there has been an election. Objectively, a party who decides to pay a sum awarded against it in an adjudicator's decision does so in reliance on that decision being valid. I consider that, in the absence of any circumstances indicating to the contrary, by making that payment ROK elected to treat the adjudicator's decision on fees and expenses as being a valid decision, at least to that extent."

19.
Mr Simon Lofthouse QC, who appeared on behalf of Laker, submitted that it is not in issue that, in this case, Jacobs sought to have Award No 1 corrected under the slip rule. He referred to the email sent on 9 January 2014 by Jacobs' solicitors to the Adjudicator. In that email it was stated:

I confirm receipt of the three Decisions. Having reviewed the same, we believe there may be a small slip at paragraph 8.8 of Award Number 1 re the extension of time.

…

We have attached a note which shows what we believe to be the effect of this on your collection set out at paragraph 8.8.

We would be grateful if you could consider this and, if you agree, amend the decision accordingly.

As before, we fully reserve our client's position in relation to your jurisdiction and for the avoidance of doubt, this email is written without prejudice to that general reservation of our client's position in relation to your jurisdiction."

20.
Mr Lofthouse submitted that although Jacobs attempted both to take the benefit of the slip and to reserve its position on jurisdiction, such an approach is not permissible because simultaneous approbation and reprobation is not available to a party.

21.
Mr Steven Walker QC, who appeared on behalf of Jacobs, submitted that in this case there had been no election to treat Award No 1 as being binding by merely applying for the decision to be corrected under the slip rule because in doing so Jacobs were not taking any benefit in relation to the decision. Further he submitted that, in any event, the addition of general words of reservation as to jurisdiction

at the end of the solicitors' email of 9 January 2014 were sufficient to preserve Jacobs' right to object to the jurisdiction of the Adjudicator.

22.
He referred to PT Building Services at [29] where I said "I consider that, in the absence of any circumstances indicating to the contrary, by making that payment ROK elected to treat the adjudicator's decision on fees and expenses as being a valid decision, at least to that extent." He said that the reservation in this case was a circumstance indicating to the contrary. Mr Walker also referred to the decision in Wales & West Utilities where Mr Justice Akenhead referred to the fact that by paying "without reservation" the sum awarded by the decision, Wales had elected not to challenge the decision. Again, he said that in this case there was a reservation.

23.
Mr Walker also referred to Coulson on Adjudication (2nd Edition) at paragraph 14.23 where he said in relation to approbation and reprobation "thus, it is important for any disgruntled party, who seeks to get the adjudicator to correct his decision, to make sure that, if he does so, he does not waive his right to complain that the adjudicator did not have the necessary jurisdiction to make the decision in the first place." In addition Mr Walker referred to The Construction Adjudication and Payments Handbook at paragraph 7.94 where, again, in relation to approbation and reprobation it was stated "courts may refuse to allow parties to challenge the enforceability of adjudicators' decisions if, through their actions, and without adequately reserving their rights, they have acknowledged the validity of the decision by electing to…".

24.
Mr Walker submitted that by making the general reservation Jacobs' solicitors had properly reserved its entitlement to challenge jurisdiction and could not thereby be treated as having elected to affirm the Adjudicator's decision.

25.
In reply Mr Lofthouse submitted that the general reservation was not sufficient to prevent Jacobs from having elected to take the benefit of a correction to the decision and so not being able to challenge jurisdiction. He referred to the decision of Mr Justice Akenhead in Allied P&L v Paradigm Housing [2010] BLR 59 where he decided that the reservation which was made was not effective in relation to the objections later taken.

26.
The terms of the letter written in that case were set out in the judgment at [17] as follows:

"… We consider that an appropriate adjudicator in this matter would be a legal adjudicator, i.e. a barrister with construction experience, rather than a surveyor. The issues in dispute are not technical ones…

We would also bring to your attention the fact that we have not had a letter of claim from your client, and therefore issuing a Notice of Adjudication is premature.

We also reserve our position in respect of the jurisdiction of the adjudicator, bearing in mind that the Contract is now at an end, and will probably be the subject of either legal proceedings or arbitration, we are quite happy for either to take place, but put you on notice that we reserve our position on challenging the adjudicator's jurisdiction…"

27.

Mr Justice Akenhead then said as follows at [33]:

“It must follow that there may be numerous types of jurisdictional challenge and there can also be different types of reservation. One can reserve generally or specifically. I will leave open the issue as to whether a general reservation as to jurisdiction without any hint or suggestion as to what the grounds are can be effective; it may be so indefinite as to be a meaningless and ineffective reservation but it may be that in a particular context a general reservation may suffice. In this case however, Counsel both accepted. properly and correctly in my judgment that, if a specific reservation was made on one ground and it was established that the ground in question was an invalid jurisdictional objection, the party in question must be taken to have acceded to the jurisdiction only subject to the specific failed ground; in those circumstances, the parties will be taken to have submitted to the jurisdiction even if there are other good grounds which existed but were not mentioned.”

28.
He there turned to consider the letter before coming to his conclusion at [43] and [44] in the following terms:

“43. However, the matter does not end there because I have formed a clear view that there was in effect and in practice no valid or effective jurisdictional reservation made by Paradigm on the grounds that no dispute had crystallised in relation to the financial consequences of the unlawful termination as asserted by Allied. One needs to analyse what was said and what was not said by Paradigm and its advisers:

(a) Their solicitor’s letter of 10 July 2009 does not reserve a jurisdictional objection in relation to quantum matters or indeed on the grounds of non-crystallisation of any dispute. The fact that Paradigm had “not had a letter of claim from” Allied is not a jurisdictional point at all; it is more a complaint or criticism that there has been no formal claim beforehand. There is of course no requirement under the adjudication clause or in the HGCRA for there to be such a formal claim beforehand. It follows that their complaint that the issue of a Notice of Adjudication was premature was also unfounded. The language of the letter suggests that the solicitors were aware of the need to reserve their position in relation to jurisdictional matters because they go on to reserve “their position in respect of jurisdiction of the adjudicator” on a specific ground, albeit one that was totally unjustified and is no longer pursued. The fact that they did not raise the language of reservation in relation to the “letter of claim” point supports the view that there was no intention to make a jurisdictional reservation with regard to that point.

…

44. It follows from the above that there was no objection to the jurisdiction of the adjudicator in relation to that part of the dispute or claims referred to adjudication on the grounds that all or some of those claims have not effectively been disputed. Thus, subject only to the bad jurisdictional objections which they did register, Paradigm not only did not make any effective reservation to the jurisdiction of the adjudicator but also acceded to the jurisdiction of the adjudicator to resolve all the claims which were the subject matter of the Referral. In those circumstances, the adjudicator’s jurisdiction to resolve and issue a decision in respect of, all those claims is un-challengeable.”

29.
In the later case of GPS Marine Contractors Limited v Ringway Infrastructure Services Limited [2010] BLR 377 I had to consider whether a general reservation was sufficient. I dealt with the issue and cited a number of authorities included Bothma (t/a DAB Builders) v Mayhaven Healthcare Limited

[2007] EWCA Civ 527 and the decision in Allied P&L v Paradigm. At [36] to [40] I dealt with the position in relation to arbitration, citing the decision of Hobhouse J, as he then was, in Compania Maritima Zorroza SA v Sesostris SA [1984] 1 Lloyd's Rep 652 at 660 and the subsequent decision of Potter J, as he then was, relying on that judgment in Allied Vision Limited v VPS Film Entertainment GmbH [1991] 1 Lloyd's Rep 392 and came to the following conclusion at [41]:

"I respectfully adopt that approach which seems to me to be equally applicable in the case of adjudication. The question in this case is therefore whether the words of general reservation were sufficiently clear to prevent Ringway's subsequent participation in the adjudication from amounting to a waiver or an ad hoc submission. In my judgment the words used both in the letters of 3 and 10 July 2009 and in the Response were sufficient to prevent a waiver of any jurisdictional argument, including one based on the alleged agreement of compromise/withdrawal and, as a result, there was no ad hoc submission."

30.
Mr Lofthouse submitted that the analogy with arbitration was not an appropriate one and he referred me to the judgment of Chadwick LJ in Carillion Construction Limited v Devonport Royal Dockyard Limited [2006] BLR 15 where he said at [86]:

"The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case."

31.
The question of reservation of right in relation to jurisdictional or other challenges arises both in the courts and in arbitration in relation to jurisdiction. The courts have brought in express provisions in CPR11 and in relation to arbitration there are now provisions in sections 72 and 73 of the Arbitration Act 1996. In adjudication there are no statutory provisions and, in my judgment, it is appropriate to see how the common law dealt with the provision in relation to arbitration before it was the subject of statutory provisions. On that basis and given the observations of Waller LJ in Bothma at [14] I am in no doubt that a general reservation of rights is sufficient to prevent a party's participation in an adjudication from being taken as an election to affirm the adjudicator's jurisdiction or a waiver of any rights to object to the adjudicator's jurisdiction.

32.
However the general reservation which it is appropriate to make during the course of the adjudication proceedings so as to enable a party to rely on that reservation either by way of proceedings for a declaration or on enforcement becomes more difficult following the publication of a decision. Evidently by the time of any enforcement proceedings a party will be obliged to, and generally will wish to, raise its jurisdictional challenges and cannot both seek to challenge and uphold a decision. The question is whether a party can after the decision reserve its rights to challenge the decision and at the same time take steps which are only consistent with it being a valid decision. The decisions to which I have referred deal with the question of general reservations and then continued participation in the proceedings. In Shimizu there was no attempt to seek a correction under the slip rule or to pay under an express reservation although a challenge to jurisdiction was mentioned.

33.
With some hesitation I have come to the conclusion that a party can still rely on the general reservation of jurisdiction and apply under the slip rule or make payment. The effect of a reservation is that a party says that whilst it is acting in a particular manner which appears consistent with the

adjudicator having jurisdiction, it is not waiving its rights to contend that the adjudicator did not have jurisdiction. A party will then participate in the adjudication under such a reservation and will seek to persuade the adjudicator not to award the other party any sum but reserve its right to argue that the adjudicator could not award any sum on the grounds that the adjudicator did not have jurisdiction.

34.
A correction under the slip rule seems to me to come within the same principle. A party seeks to reduce the sum awarded or have some other correction in its favour to cover itself should the jurisdictional challenge fail but reserves the right to contend that the adjudicator did not have jurisdiction. The same applies to the case of payment if a party pays under a reservation. A party may pay a sum under a decision to cover itself should the jurisdictional challenge fail but may still reserve the right to contend that the adjudicator did not have jurisdiction. It is at a point where it is no longer possible to reserve rights that necessarily a party must elect between approbation and reprobation in terms of relying on or challenging the decision.

35.
In this case there are two jurisdictional challenges on the basis that the Sub-Contract was not a construction contract and on the basis that the Scheme in England and Wales did not apply. In both cases I consider that the general reservation in Jacobs' solicitors' email of 9 January 2014 was sufficient to permit Jacobs to apply under the slip rule without thereby waiving the right to challenge the Adjudicator's jurisdiction or electing to treat the decision as binding.

36.
The other ground of challenge is based upon inconsistency between Award No 1 and Award No 3. It would only be to the extent that such a challenge were to be based on lack of jurisdiction that the general reservation of jurisdictional challenge would allow Jacobs to pursue that challenge. I shall therefore consider this aspect when I consider that ground of challenge.

37.
I now consider the three grounds on which Jacobs challenges the enforcement of the decisions.

Whether a construction contract

38.
Under the Sub-Contract there is no express provision for adjudication. In those circumstances it is only if the Sub-Contract is a construction contract, as defined by the Act, that there would, in the absence of an adjudication provision complying with s.108 of the Act, be an implied term giving rise to a right of adjudication by the incorporation of the Scheme under s.108(5) and s.114(4) of the Act.

39.
In this case the work which was carried out under the Sub-Contract would prima facie come within the meaning of construction operations within s. 105(1). However Mr Walker submits that the particular operations are not construction operations because they come within the exceptions within the section 105(2) and, in particular, 105(2)(c)(i) because they involve assembly and installation of plant on a site where the primary activity is power generation. Alternatively, he submits that the construction operations come within the exception in s.105(2)(c)(ii) being assembly and installation of plant on a site where the primary activity is the production of gas, in the form of steam.

40.

During the course of submissions it became evident that the real issue between the parties was the definition of the “site”. Mr Walker submitted that the site was the area of land which Tullis Russell had leased to RWE to construct the Plant. He accepted that if the definition of the “site” were to be the whole of the land retained by Tullis Russell for the purpose of the paper mill and the area of land leased by Tullis Russell to RWE then the primary activity on that “site” would not be power generation but would be paper production. Equally Mr Lofthouse accepted that if the reference to the “site” were to be a reference only to the land leased by Tullis Russell to RWE then the primary activity on that site would be power generation. Mr Lofthouse, however, submitted that the definition of “site” was the larger area of the Tullis Russell paper mill, including the land leased by Tullis Russell to RWE.

41.
Mr Walker submitted that the “site” should be confined to the land leased by Tullis Russell to RWE because that was the site on which Laker carried out its works under the subcontract with Jacobs. He said that RWE and Tullis Russell were separate corporate entities engaged in different commercial activities of power generation and paper production. He said that the Plant would be operated by RWE in furtherance of RWE’s renewable energy business and, in terms of output, its primary purpose was to export power for payment principally to the national grid. He referred to the witness statement of Mr Davenport who says that RWE has permission to generate up to 65 MW while Tullis Russell only requires up to 17 MW. He calculates that between 65-70% of net power would be produced for the grid. He also calculates that most of the steam, around 64%, produced in normal operation would be used for power generation with the balance being sent to Tullis Russell. He says that the documents show that the Plant will produce some 6% of Scotland’s renewable energy target and will be the largest plant of its kind in the UK.

42.
Mr Walker said that the plant is being built at RWE’s cost and that RWE has invested some £200 million in the plant. He referred to Mr Davenport’s evidence that RWE will receive subsidy for power exported to the national grid because the Plant will use renewable fuel giving rise to renewable obligation certificates. Again he relied on Mr Davenport’s evidence that the Plant has been designed to operate in power only mode so that if Tullis Russell were to cease to require steam to operate the paper mill the plant could and would continue to supply power to the national grid. He referred to the fact that the land on which the Plant is being constructed is leased from Tullis Russell to RWE until 2029 or later and the premises are legally separate and distinct from Tullis Russell’s paper mill. Mr Walker said that in that way there has been a division of Tullis Russell’s original premises to allow the construction of the Plant by RWE which then form physically separate and distinct premises from Tullis Russell’s paper mill. He referred to the definition of “the Site” both in the Main Contract and in the Sub-Contract which shows that that is a reference to the area leased by Tullis Russell to RWE. He said that Laker’s installation forms part of the RWE plant and that there are separate access and exit roads to the plant. He says that whilst the Plant will deliver power and steam to Tullis Russell, the primary activity of the Plant remains the generation of power.

43.
He referred to previous decisions which had considered the application of the exceptions in section 105(2). First he referred to the decision of His Honour Judge Bowsher QC in ABB Zantingh Limited v Zedal Building Services Limited [2000] EWHC 40 (TCC) in which a printing business operated at two sites decided to build diesel powered generation plants which was subcontracted to ABB who in turn subcontracted the wiring, including containment systems and secondary steel support to Zedal. The

issue was whether or not that work was carried out on a site where the primary activity was power generation under section 105(2)(c) of the Act.

44.
In dealing with the question of the "site" Judge Bowsher QC said this at [28]:

"It seems to me that this is the central issue between the parties. If the site is defined as the small areas on which the generators stood in Oldham and Watford, surrounded by a security fence, then the primary activity of the sites must be power generation, because the only activity of those sites is power generation. That must be so even though the activity (as shown by the planning applications) was intended to be merely temporary. If the site is defined as the whole areas occupied by MCP at Oldham and Watford, then it cannot conceivably be said that the primary activity of those sites is power generation. Taking those sites as a whole, power generation can only be regarded as ancillary to the primary activity of printing colour magazines whether or not excess power might be sold to others."

45.
In holding that the construction operations were not carried out at a site where the primary activity was power generation, Judge Bowsher QC referred to the definition of "the Site" in the main contract. He then said this at [33] to [34]:

33. That definition, made in a contract to which neither Zedal nor ABB were party, might be thought to support the case presented by ABB. However, I do not accept that what some other parties defined as the site is the same as what was envisaged by Parliament for different purposes particularly when in the same contract they refer to the site in more general terms.

34. When Parliament refers in section 105(2) to "a site where the primary activity is…" the reference must be to a place broader than a generator surrounded by a security fence. To make any sense of the Act, one has to look to the nature of the whole site and ask what is the primary purpose of the whole site? Is the primary purpose power generation, or, in this case, printing?"

46.
Mr Walker sought to distinguish ABB on the basis that, in this case, the site of the Plant is on land leased to RWE and that RWE owned the Plant, not Tullis Russell. In ABB the generators were owned by MCP on land it owned. In this case the Plant is intended to generate power, the majority of which is to be exported to the national grid whereas in ABB it was for use by MCP. In this case the Plant is not temporary as in ABB and RWE is the power generator not Tullis Russell and Tullis Russell is not the employer for the construction of the Plant.

47.
On this basis Mr Walker submitted that it is the site of the Plant not the site of the paper mill which should be considered for the purpose of ascertaining the primary activity.

48.
He also referred to the decision of Lord Hardie in the Outer House, Scottish Court of Session in In the petition of Mitsui Babcock Energy Services Limited [2001] Scot CS 150 in which the issue was whether the assembly and installation of boilers was on a site where the primary activity was the production or processing of chemicals, pharmaceuticals, oil or gas. The boilers were to be located on two vacant pieces of land within a petrochemical complex at Grangemouth operated by a company

within the BP group of companies. They were to be constructed on behalf of and operated by CHP which leased the land from a BP company.

49.
Mitsui relied upon the fact that “the Site” was defined in the contract; that the sites were identifiable physical areas and that the boilers were to be operated by CHP, who were tenants of the land and who had a contractual relationship with BP. It was submitted that significance should be attached to the fact that an identifiable commodity was being produced by a separate enterprise and delivered to the petrochemical complex which was located outside the boundaries of the construction sites. It was therefore said that it was legally and contractually possible to distinguish between the construction site and the site of the petrochemical complex.

50.
It was submitted on behalf of the sub-contractor that the site should be construed as being the whole petrochemical complex and the proper approach was to identify the primary activity which the construction operations were intended to further. In that case it was submitted that the purpose of erecting and installing the boilers was to provide steam to the petrochemical complex.

51.
Lord Hardie was referred to ABB Zantingh v Zedal and also considered the decision of His Honour Judge Humphrey LLoyd QC in ABB Power Construction Limited v Norwest Holst Engineering Limited where at [13] and [14] he said this:

“Mr Blackburn submitted that section 105(2) should be read as a whole. I agree. It must also be read in the context of sections 104 and 105(1). In my judgment section 105(2) when compared with section 105(1) therefore shows that it was the intention of Parliament that exemption should be given by applying an additional and different test: was the object of the ‘construction operation’ to further the activities described in section 105(2)(c)... since in those industries or commercial activities it was not thought necessary that at any level there need be a right to adjudicate or to payment as provided by the Act.

The object of this subsection is therefore that all the construction operations necessary to achieve the aims or purposes of the owner or of the principal contractors, as described in it, would be exempt. If these approaches are correct then an interpretation should be given to section 105(2)(c) which would further and not thwart them”

52.
Lord Hardie also referred to “area regulations” which applied and which recognised that the project was a development on the BP site. He also noted that the steam from both boilers was used in its entirety to supply BP’s steam distribution system which was used both for the generation of electricity via BP’s existing power plant and for the supply of steam for chemical processes at the BP complex. Adopting the views expressed by Judge LLoyd QC, Lord Hardie said that it was clear that the installation of the boilers was to further the primary activity of the processing of chemicals and oil on the petrochemical complex.

53.
Mr Walker said that this decision was distinguishable because in that case all of the steam was delivered to another company in the BP group for the exclusive use of the BP complex at Grangemouth whereas here most of the power was going to the national grid. In addition in that case both CHP and the BP company which owned the land were companies in the BP group whereas here

RWE and Tullis Russell were not part of the same group. As a result Mr Walker submitted that in this case the “site” should be confined to the site leased to RWE by Tullis Russell where the primary activity was plainly power generation.

54.
As an alternative, given that the Adjudicator suggested that the primary activity on the site was steam generation for paper drying, Mr Walker submitted that steam is a gas and that the exception in s. 105(2)(c)(ii) would apply as the primary activity would be the production and/or transmission of gas. Mr Lofthouse did not seek to support the finding of the Adjudicator as to the primary activity and I proceed solely on the basis of the Jacobs’ primary submission that the relevant activity was power generation.

55.
Further, Mr Walker referred to a number of plans of the areas of the paper mill and the Plant showing separate access to the area leased to RWE by Tullis Russell and the location of fencing and boundaries. He also referred to the lease of the site by Tullis Russell to RWE which contained the following recitals:

“(1) Tullis Russell is the owner of a commercial and industrial site at Rothesfield, Markinch, Fife and carries on from that site the business of paper manufacturing;

(2) RWE proposes to erect on Tenant’s Site the Plant and thereafter to operate the Plant; and

(3) Tullis Russell and RWE have agreed to enter into a lease to permit the construction, commissioning, operation, maintenance, repair and ultimately decommissioning of the Plant.”

56.
The lease contained definitions as follows:

(1)
“ **Landlord’s Site** ” means the Rothes Mill Site under exception of Tenant’s Site;

(2)
“ **Plant** ” means the power plant to be constructed and commissioned by or on behalf of the Tenant on the Tenant’s Site pursuant to Clause 4.1…

(3)
“P **remise** s” means the Tenant’s Site and the Plant and any alteration, improvement or addition to them;

(4)
“ **Rothes Mill Site** ” means the subjects at Rothes Mill, Cadham Road, Glenrothes, registered in the Land Register of Scotland under Title Number FFE17575;

(5)
“ **Tenant’s Site** ” means ALL and WHOLE those areas of ground extending to 11.776 acres (4.765 hectares) or thereby in total, comprising (a) that area shown outlined in orange on the Plan and (b) the Gas Pipe Land, all forming part of the Rothes Mill Site;

57.

Mr Walker referred to the fact that the term of the lease was 20 years with an ability to extend by a period of some 5 years and also by 4 years if RWE exercised the relevant options. He also referred to the following obligation by RWE to construct the works at Clause 4.1:

“The Tenant or its contractors shall, at the Tenant’s sole cost, design carry out and complete the construction and commissioning of the Plant in a good and workmanlike manner with all due diligence and in compliance with all Applicable Law;”

58.
He referred to ownership of the Plant at Clause 7.2 of the lease:

“Subject to the Landlord’s option to purchase the Standby Boiler Plant in terms of the ESC and also notwithstanding the termination of this Lease pursuant to Clauses 3.3, 3.5 or 7.1 or by effluxion of time, ownership of the Plant in and on the Tenant’s Site and any alteration, improvement or addition to the Plant shall remain with the Tenant and shall, in questions between the Landlord and the Tenant, remain a Tenant’s trade fixture.”

59.
He also referred to the Tenant’s obligation of reinstatement in the following terms at Clause 8.1.1:

“Upon termination of this Lease, howsoever determined, the Tenant shall, unless otherwise agreed with the Landlord in writing:

(a) Demolish, dismantle and remove from the Tenant’s Site all buildings and other erections, equipment, machinery structures, installations (including foundations) or erections thereon (including the Plant to ground level); and

(b) clear the Tenant’s Site and leave the Tenant’s Site clean and tidy, in a condition commensurate with compliance by the Tenant with its obligations contained in Part 3 of the Schedule.”

60.
I was also referred to the decision in Conor Engineering Limited v Les Constructions Industrielle de la Mediterranee [2004] BLR 212 in which the parties agreed what the “site” meant and Mr Recorder David Blunt QC said this at [18] and [20]:

“18. It appears that the site had been previously used for waste disposal but that such use had ceased to enable the new waste incinerator and electricity generation plant to be built. This gives rise to the question whether it could be said that the site was one where the primary activity was either waste disposal or power generation when, because the plant was being built, neither of those activities could take place. This problem arises out of the use in section 105(2)(c) of the word “is”. His Honour Judge Humphrey LLoyd QC considered this point in ABB Power Construction Ltd v Norwest Holst Engineering (2000) 77 Con LR 20. In argument counsel for the claimant pointed out that it would make little sense if work done to improve an existing complex would be exempt whilst work for a new project would not, and the Learned Judge endorsed that argument, stating that such a result would be an absurdity. I respectfully agree with that conclusion. In my judgment “is” in this provision means “is, or will be”.

…

20. The wording in the section under consideration is “the primary activity” (my emphasis). What is “the primary activity” at a particular site is a question of fact. Whilst I accept that the primary purpose of a site will always be a relevant consideration in deciding what is its primary activity, it is

possible to imagine situations which could give rise to an argument that an activity embarked upon for only secondary reasons is in fact (eg because of its scale or output, etc) the primary activity."

61.
Mr Lofthouse submitted that, like ABB, this is a case where one should look at the whole site. The works address was the paper mill and the purchase order between the parties was also addressed to Jacobs "c/o Tullis Russell Papermakers". He submitted that, as in ABB, when considering the "site", the area which has to be considered is broader than the area of the generating plant surrounded by a security fence. As in ABB here the primary purpose of the "site" was paper related. He submitted that Tullis Russell is a paper manufacturer and that the Plant provides power for that paper manufacturing process together with steam for paper drying. He said that the Plant was needed because the existing power and steam plant could no longer be relied on to provide a secure supply of steam and electricity to the paper manufacturing plant.

62.
Mr Lofthouse referred to a quote on the RWE website which said:

"The CHP scheme will replace the existing power plant at Tullis Russell, which is nearing the end of its planned operational use, with a new cleaner form of energy generation which will reduce the company's carbon emissions and safeguard jobs at the mill.

The additional capability will allow more energy to be exported to the local grid helping to meet Scotland's ambitious renewable electricity targets."

63.
He also referred to the Tullis Russell website where this was said:

"A £200 million state-of-the-art biomass plant is on its way to being realised after RWE npower renewables officially took over the site of the new power station at Tullis Russell in Markinch today (17 November 2010).

Construction is now underway for combined heat and power (CHP) plant, which will be owned and operated by RWE npower renewables and provide 40 permanent jobs in the operation of the plant and fuel-processing facility. It will provide Tullis Russell with steam, which it needs for paper drying, as well as electricity and helps to safeguard 540 jobs at Markinch while reducing the papermill's fossil fuel CO_2 emissions by around 250,000 tonnes each year."

64.
Mr Lofthouse also referred to the construction phase health and safety plan for the Plant which stated under "Location of the Works" that "The construction site is located within an existing facility currently occupied & owned by Tullis Russell Papermakers" which was also the site address and the "Project Description" was "Design & Construction of a biomass fuelled combined heat and power plant to provide electricity and steam services to existing paper mill.".

65.
In addition he referred to a document which set out the general description of the works as well as the operational and maintenance requirements and was prepared by RWE. Under "Introduction" it was stated in relation to an overview of auxiliary steam system under overview of the works, as follows:

New auxiliary steam supply plant will be required to provide a top-up, start-up and back-up steam supply to the existing Tullis Russell CHP plant during the 'interim period' and through the operating life of the new biomass CHP.

The existing Tullis Russell CHP plant comprises: two gas fired package boilers, three operational HP coal fired boilers, a natural gas fired HP boiler and three steam turbine generators. The balance of the power requirement for Tullis Russell can be imported from the national grid via an 11kV connection.

The existing package boilers are located in an area that will be required for the construction of the new CHP plant. These boilers will therefore have to be removed or relocated (to be carried out by others) in order to make way for the new plant. This will leave a period of time, the 'interim period' where the boiler capacity will need to be replaced by the new package boilers to be delivered under this Contract."

66.
I consider that the whole site including both the land leased by Tullis Russell to RWE and the whole paper mill complex is to be considered as the relevant "site" in this case, for the following reasons. First, as the documents show this was a power plant which was being constructed at a site owned by Tullis Russell. Whilst part of the site was leased to RWE, the freehold of the whole site remained with Tullis Russell. At the end of the lease the part leased to RWE would revert back to being part of the overall site.

67.
Secondly, the purpose of providing a power plant at that location was to provide steam and power to Tullis Russell whose existing coal and gas burning plant had come to the end of its life after 60 years. The Plant was therefore providing steam and electricity to serve the whole site.

68.
Thirdly, as a matter of common sense and by observing the overall plans of the location, it is clear that the plant occupied an area of some 10% of the total paper mill site. This led to the Plant generally being described as being at the Tullis Russell paper mill and its postal address being by reference to its location at the Tullis Russell paper mill.

69.
Fourthly, whilst the Plant was increased in size so that it could export what was likely to be the majority of its electricity to the national grid to provide 6% of Scotland's renewable energy target and that was clearly an important consequence of constructing the Plant, the definition of the "site" depends not on that consequence but on the location of the Plant. The Plant was located where it was because it was to provide a power and steam facility for the Tullis Russell paper mill.

70.
Fifthly, as I said at the hearing and as Judge Bowsher QC said in ABB in relation to the definition of "the Site" in the main contract of that case, I consider that analysis of the terms of the lease between RWE and Tullis Russell and of information contained in documents which are unlikely to have been seen by Laker and/or Jacobs tends to complicate the issue of the definition of the "site". Rather the matter has to be considered as one of overall impression rather than detailed examination of particular documents or obligations which would not have been known to the parties when they entered into the Sub-Contract. However, even on an analysis of the lease it shows that both the Landlord's and the Tenant's Sites are part of the Rothes Mill Site which is the freehold site owned by Tullis Russell. RWE's obligation under the lease to construct and, on termination, demolish the Plant

shows that the Plant does not have a continued existence after the limited period for which Tullis Russell has leased the relevant land to RWE. This demonstrates that this is not an independent power station but one which depends on the relationship with Tullis Russell.

71.
For those reasons I do not consider that Jacobs have real prospects of successfully defending these proceedings on the basis that the work carried out by Laker was work carried out on a site on which the primary activity was power generation rather than paper making.

Inconsistency between Award No 3 and Award No 1

72.
Laker commenced three adjudications. On 2 October 2013 Laker issued two notices of intention to adjudicate and on 3 October 2013 Laker applied to the Institution of Chemical Engineers ("IChemE") for the appointment of an adjudicator. Those notices related to "growth in scope" and to an entitlement to extension of time ("EOT") and prolongation costs. A third notice was served by Laker on 4 November 2013 in relation to the issue of a taking over certificate. Laker again applied to IChemE and in each case IChemE appointed the same adjudicator.

73.
The parties extended the time for the Adjudicator to make his decisions to 7 January 2014 in relation to all three decisions. On 7 January 2014 the Adjudicator issued three decisions which he referred to as Award No 1, Award No 2 and Award No 3. Award No. 1 related to EOT and prolongation costs; Award No. 2 related to growth in scope and Award No. 3 related to the taking over certificate. In Award No. 2 the adjudicator referred to Award No. 1 and in Award No. 3 the adjudicator referred to Awards No. 1 and No. 2. However, in Award No. 1 at paragraph 8.8 he included a "collection for the purposes of a corrected certificate and net sum payable for Awards, 1, 2 & 3" which summarised the sum awarded by those decisions. It was Award No 1 which was then corrected under the slip rule, as referred to above. The decisions were delivered by email and Mr Glover explains in his first witness statement at paragraph 60 that the Adjudicator's three decisions were issued under cover of two emails both timed at 13.57 pm, although the email attaching Award No 3, the decision in relation to the taking over adjudication, was received first.

74.
In Award No. 1 under overview of the dispute there is an "adjudicator's observation" that "in short, [Laker] seeks 52-weeks Extension of Time in this Award No. 1". At paragraph 8.3 the adjudicator said as follows:

"8.3 ISSUE

"Whether [Laker] is entitled to an Extension of Time and if so how much?"

ADJUDICATOR'S DECISION: YES, as claimed.

8.3.1 DISCUSSION/ADJUDICATOR'S OBSERVATIONS

It is common ground that the original contract completion period was/is just over 6-months from 30 March 2012 to 12 October2012. But

Practical Completion is about 1-year later."

75.

At paragraph 8.3.2.2 the Adjudicator then states as follows:

“8.3.2.2 “Is [Laker] therefore entitled to an extension of time?”

ADJUDICATOR’S DECISION: YES, precisely as claimed.

DISCUSSION:

Plainly the work was being done on instructions (i.e. [Jacobs] to [Laker]). That’s the factual cause of taking all of the time it took being 18-months or so.”

76.
Those are all within a section which is entitled “issues and opinions”. In a section entitled “redress sought by [Laker]” the Adjudicator went through each of the requests made by Laker in paragraph 50 of the referral and then set out his decision. In particular, he set out this request and decision:

“(c) That [Laker] is entitled to an EOT of 52 weeks for completion of the subcontract works or such other period as the Adjudicator shall think appropriate.

ADJUDICATOR’S DECISION: Granted to Practical Completion.”

77.
In Award No. 3 where the Adjudicator dealt with the taking over certificate, He set out the following background taken from the referral:

“A taking-over certificate was applied for by [Laker] on 20 August 2013. On 06 September [Jacobs] responded but did not issue a taking-over certificate. [Jacobs] maintains that certain documentation has to be supplied by [Laker] before issue of taking-over certificate. In the event [Jacobs] has issued the taking-over certificate on 20 November 2013, backdated to 12 October 2013 with outstanding Works including want of Quality Certification Dossier(s).”

78.
He then dealt with the issue at paragraph 9.2 where he stated:

“9.2 ISSUE

“Whether [Jacobs] was correct in not issuing a “Taking-Over Certificate” within 28-days of [Laker] application of 30 August 2013”

ADJUDICATOR’S DECISION: NO. It ought to have issued the Taking-Over Certificate.”

79.
Mr Walker submitted that there is an inconsistency between Award No 1 and Award No 3. He referred to the terms of the Sub-Contract and, in particular, Clause 1.1.24 defining the time for completion, Clause 14.4 providing for extension of the time for completion, Clause 16.1 providing for Jacobs to take over the Sub-Contract works when they have been completed in accordance with the Sub-Contract except in minor respects that do not affect the safe use of the Sub-Contract works for their intended purpose and Clause 16.2 which states that Laker may apply for a taking over certificate not earlier than the day on which the Sub-Contract works are complete in Laker’s opinion and ready for taking over under sub-clause 16.1.

80.

He also referred to the special conditions and, in particular, SC 2.2 which identifies a date for completion of the whole of the Sub-Contract as 12 October 2012 and SC 5.0 which provides for the payment of liquidated damages for late completion of the whole of the Sub-Contract works.

81.
On this basis Mr Walker submitted that the Sub-Contract does not contemplate that the taking over date will be before the completion date as this would mean that Jacobs could recover liquidated damages after taking over. Rather he said that the Sub-Contract provided that Jacobs could recover liquidated damages from the completion date until the date of taking over, if later. He referred to Award No 1 at paragraph 8.3.2.2 which he says means that Laker was entitled to an extension of time up to 11 October 2013. He then referred to section 9 where the Adjudicator says that he has granted an extension to Practical Completion. Mr Walker said that "Practical Completion" is not a term used in the Sub-Contract but by reference to paragraph 8.3.1 of Award No 1 it is evident that the Adjudicator decided that Practical Completion was achieved on 11 October 2013.

82.
He referred to paragraph 5(1) of Award No. 3 which is stated to be the "executive summary of the award" where the following is stated:

The Taking-Over Certificate ought to have been issued stating the date of 30 August 2013 when the Works were complete and ready for taking-over."

83.
He submitted that on this basis in Award No. 3 the Adjudicator has decided that the Sub-Contract works were complete and ready for taking over on 30 August 2013 whereas in Award No. 1 he has decided that Practical Completion was achieved on 11 October 2013.

84.
Mr Walker submitted that there is therefore an inconsistency which is not a mere error of law because the statutory provisions provide that adjudicators' decisions are binding pending final determination. He referred to Coulson on Construction Adjudication (Second Edition) at paragraph 7.9.7 where it states "It is clear beyond doubt that a second adjudicator cannot open up any matters decided by the first adjudicator. If he purports to do so, the decision of the second adjudicator will be a nullity." He submitted that the decision as to when the Sub-Contract works achieved taking over was essential to the Adjudicator's decision in Award No. 3 and that likewise his decision as to when completion occurred was essential to his determination of the extension of time and prolongation costs to which he found Laker to be entitled in Award No. 1.

85.
As the decisions were all issued on the same day, he submits that it is not possible to adopt an analysis based on one decision coming before the other decision. Further he submitted that the inconsistency means that neither decision is enforceable. Alternatively, on the basis of Mr Glover's evidence he said that the first decision was in fact Award No. 3 which might be treated as the first in time but Award No. 3 does not contain any decision directing Jacobs to pay Laker the sum claimed in these proceedings. That is contained in Award No 1. Alternatively, he submitted that there has been a breach of natural justice because it is unfair for the Adjudicator to have disregarded a finding made in one dispute when deciding another dispute and the failure is material because it goes to the essential findings in each decision.

86.

Mr Lofthouse submitted that there is no inconsistency between extending the time available for completion as the Adjudicator did in Award No. 1, and a party actually finishing earlier and therefore being entitled to a taking over certificate from an earlier date, as the Adjudicator found in Award No. 3. He submitted that the concept of Practical Completion is not a concept used in the Sub-Contract and is an irrelevant reference adopted by the Adjudicator. He said that the reference was possibly explained by Laker's analogy between Practical Completion under the JCT Standard Form of Building Contract and the taking over certificate, as explained in Mr Ives' second witness statement. Alternatively, he submitted that it can either be ignored or alternatively can be severed as not being a decision on a matter referred to him under dispute No 1. He referred to Cantillon Limited v Urvasco Limited [2008] BLR 250 at [65].

87.
In this case I consider that, as a matter of common sense, the three decisions should be treated as having been issued at the same time. They were issued at 13.57 pm on 7 January 2014 and although they were contained in two emails the obligation of the Adjudicator under paragraph 19 of Part 1 of the Scheme was to reach his decision by a particular date and under paragraph 19(3) "as soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract". I consider that the Adjudicator reached his decision in all three awards on 7 January 2014 and delivered the decisions at the same time. In particular in this case in Award No. 1 he took into account his findings in Awards No 2 and No 3 in coming to the net sum payable for those awards. I do not consider that it is possible to come to any conclusion other than that the Adjudicator reached and delivered his three decisions at the same time. What he did was the equivalent of delivering the awards in two envelopes and I do not consider that any sensible interpretation should take account of which envelope was on top of another or which one was opened first.

88.
The question of whether or not there is an inconsistency between the decisions depends, essentially, on the law which applies to the interpretation of written documents: see Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 at 913 and Chartbrook Limited v Persimmon Homes Limited [2009] 1 AC 1101.

89.
Approaching the matter in that way and reading paragraphs 8.3, 8.3.1, 8.3.2.2 and 9(c) of Award No 1 together, I consider that the Adjudicator's decision was that Laker was entitled to an extension of time of 52 weeks to 11 October 2013. That was the decision he made in respect of EOT and the financial consequences of that extension were then dealt with in that decision.

90.
The reference to Practical Completion being about one year later than 12 October 2012 and the reference in paragraph 9(c) to "granted to Practical Completion" do not, in my judgment, amount to a decision by the Adjudicator as to taking over. The concept of Practical Completion is not something which is dealt with under the terms of the Sub-Contract which merely refers to "completion" and the issue of a taking over certificate. Practical Completion is a concept under the JCT Standard Form of Building Contract.

91.
In any event I consider that on an application for enforcement, the court does not review the findings of fact and law which have been made by the Adjudicator. Provided that the decision in Award No 1

was sufficiently certain as to what extension of time was granted, as I consider it was in this case, then the court will grant summary judgment and will not look at the correctness of the underlying reason for coming to the decision.

92.
Equally it is evident from Award No. 3 reading paragraphs 5.1, 9.1 and 9.2 together that the Adjudicator held that the taking over certificate ought to have been issued stating the date of 30 August 2013. Again that was a decision which was sufficiently certain to be enforced.

93.
I do not consider that there is anything inconsistent with the Adjudicator determining that an extension of time should be given to 11 October 2013 and a decision that taking over took place on 30 August 2013. That is the effect of the decisions which are temporarily binding on the parties and those decisions are enforceable. It follows that I do not consider that there is any uncertainty or any conflict between the two decisions, one dealing with extensions of time and the other dealing with the date of the taking over certificate.

94.
Putting the matter at its highest, if the adjudicator has wrongly concluded that completion took place on 11 October 2013 and has therefore granted an extension of time which is longer than he should have done, then that is a matter which does not affect the temporarily binding nature of his decision in Award No. 1. Equally, if in coming to his conclusion as to the date of taking over he has made an error of law in granting a taking over certificate effective from 30 August 2013 when it should have been on a date later than that date, then that is an error of fact or law which does not affect the temporarily binding nature of that decision.

95.
I do not consider that the Adjudicator can be said to have been in breach of natural justice in the way in which he decided the issues in either Award No 1 in the light of Award No 3. He decided the issues on the evidence and submissions put before him and there was nothing unfair about the process and the only unfairness alleged by Jacobs would arise, as stated above, from either an error of fact or law which does not give rise to a natural justice challenge.

96.
It follows that I do not consider that Jacobs have real prospects of successfully defending the application for summary judgment on the basis that there is an inconsistency between Award No. 1 and Award No. 3 or one which prevents the enforcement of those Awards.

97.
If, contrary to the view I have expressed, Award No 1 contained reasoning for an extension of time which was contrary to the decision on taking-over in Award No 3 then I do not consider that this would mean that Award No 1 would be a nullity or that Award No 3 would be affected. That reasoning may as a matter of fact or law be in error but that does not make Award No 1 a nullity. In those circumstances there is no need to sever any part of Award No 1. The decision in Award No 1 would stand on its own as would the decision in Award No 3.

98.
In any case I do not consider that the contention by Jacobs that there is an inconsistency between Award No 1 and Award No 3 is something which goes to the jurisdiction of the Adjudicator, which, as set out above, was the subject of the general reservation in the email from Jacob’s solicitors of 9

January 2014. It follows that there was no general reservation in relation to the inconsistency point and I consider that Jacobs would therefore, in any event, be precluded from challenging the decisions on this basis having sought to rely on the decisions for the purpose of the application to correct them under the slip rule.

The Scheme

99.
In this case the Sub-Contract did not contain any express provisions for adjudication and, as I have held above, it was a construction contract because it was an agreement for the carrying out of construction operations which were not within the exclusion in s.105(2)(c). It was therefore a construction contract which did not comply with the requirements of s.108(1) to 108(4) of the Act and so, under s.108 (5) of the Act, the adjudication provisions of the Scheme for Construction Contracts applies. The Act provides at s.114(1) and (3) that the Minister for England and Wales and the relevant Minister for Scotland shall by regulations make a scheme referred to as the Scheme for Construction Contracts. Section 114(4) states that where any provisions of the Scheme for Construction Contracts apply in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

100.
Under the Sub-Contract Clause 44.0 provided:

“The Sub-Contract shall in all respects be governed by and interpreted in accordance with the Laws of the Country stated in the Special Conditions of Sub-Contract.”

101.
Further SC 1.0 stated:

“The Sub-Contract shall in all respects be governed by and interpreted in accordance with the Laws of England and shall be subject to the jurisdiction of the English courts.”

102.
In the referral notice for the EOT adjudication Laker referred to the Scheme for Construction Contracts (England and Wales) 1998, as amended and at paragraph 11 said that it applied to the Sub-Contract.

103.
In all three notices of intention to refer disputes to adjudication in the three Adjudications Laker referred the dispute to adjudication pursuant to the Act and pursuant to the Scheme for Construction Contracts (England and Wales) 1998. Equally when it applied to the IChemE to appoint an adjudicator it sought appointment on the basis that the Scheme for Construction Contracts (England and Wales) 1998, as amended, applied to the Sub-Contract. It is also evident that the Adjudicator made his decisions by reference to the Scheme.

104.
Mr Walker referred to paragraph 1(2) of the England and Wales Scheme which states “these Regulations shall extend only to England and Wales.” He referred to the Scheme for Construction Contracts (Scotland) Regulations 1998 which at Regulation 1(2) provides “these regulations extend to Scotland only.” He also referred to Bennion on Statutory Interpretation (5th Edition) where at section 103 it is stated “The ‘extent’ of an Act is the geographical area throughout which it is law.” In the

commentary it is said that “The ‘extent’ of an Act consists of the territory or territories throughout which, so long as it is operative, the Act forms part of the current body of law or corpus juris.”

105.
Mr Walker submitted that paragraph 1(2) of the England and Wales Scheme means that it is only law in England and Wales and is not applicable in this case given that the Sub-Contract was for construction operations in Scotland.

106.
Mr Walker submitted that had the notices identified the Scotland Scheme, the same adjudicator might have been appointed but he referred to the decision of Mr Justice Edwards-Stuart in Twintec Limited v Volker Fitzpatrick Limited 2014 EWHC 10 at [58] where he said:

“Mr. Reed submits that it makes no difference because the nominating authority who purported to nominate the adjudicator, the President of the RICS, would have been the nominating authority under the Scheme (the parties not having made any other agreement about the appointment of an adjudicator). In these circumstances Mr. Reed submits that Twintec is seeking to promote form over substance and that its position is entirely artificial. Whilst, at a practical level, I have some sympathy with this submission, I cannot accept it because the validity of the procedure by which the adjudicator was nominated goes to the heart of his jurisdiction.”

107.
Further Mr Walker referred to differences between the England and Wales Scheme and the Scotland Scheme and in particular to paragraphs 7.3, 9(4), 19(a) and (b) and 22A. As a result he submitted that, where the Adjudicator has been appointed under the wrong Scheme, the wrong procedure has been adopted and the procedure by which the Adjudicator was nominated is a matter which goes to the heart of the Adjudicator’s jurisdiction in this Adjudication.

108.
Mr Lofthouse submitted that the parties agreed by the special conditions that the Sub-Contract should be governed by and in accordance with the laws of England and that therefore the England and Wales Scheme applied to this Contract. Alternatively, he submitted that the England and Wales Scheme, so far as is material, is identical and therefore there has been no effect on the Adjudication.

109.
As stated in section 103 of Bennion, the extent of an Act defines the geographical area in which it is law. The Act applies both in England and Wales and also in Scotland but a different Scheme applies in those jurisdictions. Indeed when the Schemes were amended, there are different amendments to the Schemes in England, in Wales and in Scotland, although the differences between the amendments in England and Wales were insignificant. That means that the Act and the England and Wales Scheme applies in Wales and in England and that the Act and the Scotland Scheme applies in Scotland

110.
In each of those jurisdictions the law applied to a relevant construction contract made in those jurisdictions will, unless a different proper law is chosen, be the law of that jurisdiction. However, in this case, although the project was based in Scotland, the parties in the Sub-Contract expressly agreed that English Law was to govern the Sub-Contract. As a matter of English law both the Act and the England and Wales Scheme, as amended, apply where English law is the applicable law. This is most clearly shown by the fact that, under s.114(4) of the Act, the provisions of the Scheme take effect as implied terms of the Sub-Contract. Matters related to implied terms depend on the proper law

which governs the relevant contract. It is therefore the implied terms of the England and Wales Scheme, as amended, which apply where, as here, English law governs the Sub-Contract.

111.
On that basis Jacobs has no real prospects of successfully defending these proceedings on the basis that the Adjudicator did not have jurisdiction because he was appointed under the England and Wales Scheme, as amended, rather than the Scotland Scheme.

112.
If, however, the wrong Adjudicator had been appointed under the wrong Scheme and the wrong Scheme had been applied to the Adjudication then for the reasons set out by Mr Justice Edwards-Stuart in Twintec, the Adjudicator would not have been properly appointed or the Adjudication conducted under the correct Scheme and this is a matter which would go to jurisdiction. However in this case where it seems that both parties proceeded on the basis that the England and Wales Scheme applied I would have had to consider whether this jurisdictional defence had been waived by Jacobs who expressly referred to the England and Wales Scheme in some documents.

The Part 8 Claim

113.
Jacobs have brought a Part 8 Claim in which they seek declarations that under the Sub-Contract "The Time for Completion of the whole of the Sub-Contract Works refers to the date when the Sub-Contract Works are complete and ready for taking over within the meaning of Sub-Clauses 16.1 and 16.2 of the said contract."

114.
Jacobs also seeks a declaration that "an adjudicator was wrong in law in deciding that [Laker] was entitled to an extension of the Time for Completion of the whole of the Sub-Contract Works to 11th October 2013 and that the Sub-Contract Works were complete and ready for taking over within the meaning of Sub-Clauses 16.1 and 16.2 on 30th August 2013."

115.
Those proceedings were commenced on 18 February 2014 supported by the first witness statement of Jeremy Robert Glover dated 18 February 2014. By order dated 19 February 2014 the hearing of the Part 8 Claim was directed to be heard at the same time as the summary judgment application. However when Laker acknowledged service it objected to the jurisdiction of the Court and, by application dated 5 March 2014, sought to have the Part 8 proceedings stayed pursuant to s.9 of the Arbitration Act 1996. That application was supported by the first witness statement of Tom Ventre and the first witness statement of David Neil Hunter both dated 5 March 2014. Second and third witness statements of Jeremy Robert Glover, both dated 10 March 2014, were served in opposition.

116.
Under special condition Clause SC13.0, headed Arbitration, Clause SC13.1 deals with disputes under the Sub-Contract in the following terms:

"If any dispute arises between the Contractor and the Sub-Contractor in connection with this Sub-Contract, it shall, subject to the provisions of this Clause, be referred to the arbitration and final decision of a person agreed between the parties, or failing such agreement, the dispute or difference shall be referred for settlement in the same manner as a dispute or difference arising under the Main

Contract. In accordance with the Main Contract the dispute or difference shall be referred to and settled in accordance with the provisions of the Main Contract."

117.
In an exchange of correspondence, Laker's solicitors had written on 26 February 2014 to say that there was an arbitration clause and on 3 March 2014 Jacobs' solicitors had sent Laker a notice requesting Laker to agree to the appointment of a named arbitrator. They said that, if Laker did not so agree, Jacobs would submit that there was no question of a stay to arbitration under Clause SC13.1. A notice to concur in the appointment of an arbitrator was attached.

118.
In Mr Glover's second witness statement he referred to an email of the same date from Lakers' solicitors proposing the names of three candidates to act as arbitrator. He said that Jacobs did not agree to appoint any of Laker's proposed arbitrators and that "it is, therefore, unlikely that an arbitrator will be agreed to decide the dispute by the date of the hearing of [Laker's] application or at all."

119.
Mr Walker submitted that although Clause SC13.1 provided for disputes to be referred to the arbitration and final decision of the person agreed between the parties it stated that, failing such agreement, the dispute or difference should be referred to settlement in the same manner as a dispute or difference arising under the Main Contract. He said that it was common ground that under the Main Contract there is no arbitration provision.

120.
Mr Walker submitted, therefore, that if the parties did not agree an arbitrator the matter had to proceed by way of court proceedings because that is the manner in which a dispute or difference arising under the Main Contract would have to be resolved. He submitted that s.18 of the Arbitration Act 1996 does not apply because it only applied if or to the extent that there is no agreement as to what is to happen in the event of failure of a procedure for the appointment of the arbitral tribunal. In this case he submitted that Clause SC 13.1 does contain an agreement of what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal in that it is then to be resolved in court proceedings.

121.
Mr Lofthouse submitted that this is a case where there is a valid arbitration clause and under s.9 of the Arbitration Act 1996 the court is required to grant a stay unless satisfied that the arbitration agreement is null and void, imperative or incapable of being performed. He submitted that there was an arbitration agreement and it is not null and void, inoperative or incapable of being performed and therefore he is entitled to a stay. He also submitted that, in the event that the parties do not agree on an arbitrator the court should appoint one under s.18 of the Arbitration Act 1996.

122.
Clause SC13.1 does include an arbitration agreement because there is an agreement by which the parties have agreed to refer disputes to arbitration.

123.
The parties have not yet reached agreement and Clause SC13.1 requires agreement but does not contain a procedure for agreement. It merely says that the arbitrator has to be agreed between the

parties. In those circumstances I consider that the position is dealt with under s.16 of the Arbitration Act 1996 which provides as follows:

“(1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.”

124.
This is a case in which a sole arbitrator is provided for under Clause SC13.1 and therefore under s. 16(3) the parties have jointly to appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so. The request was made, in my judgment, by the letter from Jacob’s solicitors of 3 March 2014 and therefore at the date of the hearing the parties were still in a position where they may be able to appoint the arbitrator no later than 28 days after 3 March 2014. If they do so then Clause SC13.1 will take effect and there will be a valid arbitration commenced under the arbitration agreement.

125.
If the parties do not agree on the appointment of an arbitrator within that timeframe then I do not consider that s.18 of the Arbitration Act 1996 would apply to provide a mechanism for appointment in default of agreement. That section provides:

“(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.

…

(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section. ”

126.
Under Clause SC13.1 the parties have said what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. They have said that, failing such agreement, the dispute or difference shall be referred to settlement in the same manner as a dispute or difference under the Main Contract which is by way of court proceedings. That, in my judgement, means that s.18(1) applies and the default procedure under s.18(2) does not apply.

127.
It follows that if the parties do not agree an arbitrator within the timeframe provided by s.16 of the Arbitration Act after the notice of 3 March 2014 then the court cannot appoint an arbitrator and the matter would have to be dealt with, not by arbitration, but by way of court proceedings. In those circumstances, the court would not grant a stay under s.9 of the Arbitration Act. Section 9(4) provides as follows:

“On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”

128.

Where therefore there is no agreement on an arbitrator I consider that the arbitration agreement in Clause SC13.1 becomes inoperative or incapable of being performed and therefore a stay of proceedings would not be appropriate. Whilst the strict position might be that, given the existence of an arbitration agreement which at the date of the hearing was not then inoperative or incapable of being performed, Laker would be entitled to a stay, I consider that any stay would have to be lifted in the event that the parties did not agree an arbitrator in this case.

129.
I therefore consider that the appropriate way to proceed is to adjourn the application to stay the Part 8 proceedings under s.9 of the Arbitration Act. In any event, at this stage and given that there is an arbitration agreement, it would be inappropriate for the court to deal with the Part 8 claim. In accordance with the general principle that temporarily binding adjudication decisions are to be enforced I do not consider that the current uncertainty as to whether the Part 8 claim can be brought in arbitration or in court proceedings should affect the ability of Laker to enforce the adjudication decisions.

Summary and Conclusion

130.
In relation to the application by Laker for summary judgment on the three decisions of the Adjudicator, I find that, for the reasons set out above, Jacobs has no real prospects of successfully defending the claim and that accordingly Laker is entitled to summary judgment in relation to the sums claimed.

131.
In relation to the application by Laker to stay the proceedings in relation to the Part 8 claim, there is an arbitration agreement which is not at the present time null and void, inoperative or incapable of being performed. However in the event of a failure to agree an arbitrator under the Sub-Contract, any dispute in connection with the Sub-Contract will be referred for settlement in court proceedings. If the parties do not agree an arbitrator by no later than 28 days after service of Jacobs' Notice to Concur dated 3 March 2014 the arbitration agreement will then be inoperative or incapable of being performed and the Part 8 proceedings would not be stayed under s.9 of the Arbitration Act 1996. In those circumstances the application to stay is adjourned, with liberty to apply.