Case No: 3MA50102

Neutral Citation Number: [2014] EWHC 280 (TCC) .

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

Manchester Civil Justice Centre

7 February 2014

Before :

His Honour Judge Raynor QC sitting as a judge of the High Court

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Between :

HILLCREST HOMES LIMITED **Cla**

- and -

BERESFORD AND CURBISHLEY LIMITED **Defe**

- -

- -

Ms Serena Cheng (instructed by **DWF LLP**) for the **Claimant**

Mr Patrick Clarke (instructed by **Pinsent Masons LLP**) for the Defendant

Hearing dates: 11 and 16 December 2013

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JUDGMENT

JUDGE RAYNOR QC

1.
The Claimant (“Hillcrest”) is a property developer. The Defendant (“B&C”) is a building contractor.

2.
By a Design and Build Contract in the JCT Standard Form (2005 Edition, Revision 2, 2009) (“the Building Contract”) B&C agreed with Hillcrest to undertake the design and construction of a substantial residential property at Sleepy Hollow, Castle Hill, Prestbury in compliance with the contract documents including the Employer’s Requirements referred to below.

3.
The Structural Engineers, who were appointed by Hillcrest for the purposes of the Development prior to the making of the Building Contract, were Howard Taylor Associates (“HTA”).

4.
In this action brought under the Part 8 procedure, Hillcrest claim

a.

declarations that the decision of the Adjudicator appointed to determine an adjudication commenced by Notice of Adjudication dated 14 November 2012 is unenforceable for reasons stated hereafter; and

b.
the Court's final determination that a novation agreement signed by HTA on 26 November 2012 ("the Novation Agreement") is, or is to be treated as, binding upon Hillcrest and B&C; and

c.
an order that B&C pay damages for what is alleged to be a breach of contract committed by referring to adjudication disputes which are said to have been outwith the ambit of the adjudication provisions of the Building Contract.

The Factual History

5.
By letter dated 8 July 2010, HTA confirmed that their fee for the structural design work in connection with the Development up to Building Regulations application stage would be £4,000, which fee would include all necessary meetings and site visits during the course of the project. That letter was described as a "Fee proposal" in the Employer's Requirements, and it is common ground that that proposal was accepted by Hillcrest and that, as stated, HTA were duly appointed as Structural Engineers for the purposes of the development.

6.
The Employer's Requirements were prepared by the Vinden Partnership ("Vinden"), Construction Contract Consultants, in October 2010 and were supplied to B&C.

7.
So far as material Section 1.6 of the Employer's Requirements contained the following terms:

1.6
Design Responsibility

1.6.1 The Contractor shall note that the whole of the works fall within his design responsibility, including work originally commissioned by the Employer, and he will be required to obtain all statutory approvals and meet any additional requirements set out in the Employers' Requirements.

1.6.3 The Contractor shall appoint Consultants and specialist sub-contractors as he requires for the design of the works and shall ensure that a collateral warranty in respect of each is provided to the Employer and potential lender/purchaser.

1.6.5 Appointment of Howard Taylor Associates – Structural Engineers

1.6.5.1 The Employer requests and requires that the pre-tender Structural Engineer, Howard Taylor Associates, should be retained and appointed to the successful Building Contractor to continue and complete any necessary design work required.…

1.6.5.3 The Structural Engineer shall be novated to the Contractor in accordance with the draft Novation Agreement included in Appendix F. Novation shall occur on execution of the Building Contract

1.6.5.4 The Contractor shall liaise with Howard Taylor Associates and establish the extent of the works being provided. Any works required by the Contractor in addition [to] that provided as part of the Employer's Requirements shall be identified and notified to the Employer."

8.
The draft Novation Agreement annexed as Appendix F was (so far as material) in the following terms:

“THIS AGREEMENT

Is made the day of 2010

BETWEEN

(1) [ ] whose registered office is situated at [

] (“the Employer”); and

(2) [ ] whose registered office is situated at [

] (“the Contractor”); and

(3) [ ] whose registered office is situate at [

] (“the Consultant”)

WHEREAS

A. The Employer has appointed the Consultant to provide (set out type of services being provided e.g. architectural) services (“the Services”) by an agreement dated [ ] (“the Appointment”).

B. The Employer has appointed the Contractor under a contract (“the Design and Build Contract”) of even date herewith to design and construct certain works as therein described (“the Project”).

C. The Employer has agreed to assign to the Contractor by way of novation its entire benefit, rights and interest in and under the Appointment and the Consultant has agreed to enter into this Agreement for the purpose of giving its consent to such assignment

IT IS HEREBY AGREED as follows:

1.
Novation

1.1
The Employer as beneficial owner hereby assigns to the Contractor its entire rights, benefits, liabilities and obligations under and pursuant to the Appointment including but without limitation, its accrued rights, benefits, liabilities and obligations subject to Clause 1.4

1.2
The Consultant undertakes to perform the Appointment and to be bound by its terms in every way as if the Contractor were, and had been from the inception, a party to the Appointment in lieu of the Employer. The Contractor agrees that he will not hereafter terminate the Consultant’s engagement under the Appointment without prior written consent of the Employer, such consent not to be reasonably withheld or delayed.

1.3
The Contractor undertakes to perform the Appointment and to be bound by its terms in every way as if the Contractor were, and had been from the inception, a party to the Appointment in lieu of the Employer….”

9.
There is in fact, although not raised by Hillcrest in the Particulars of Claim, an issue between the parties as to whether it was a term of HTA's appointment with Hillcrest that HTA would when required execute the Novation Agreement. In order to avoid an adjournment of the trial, it was agreed by the parties at the commencement of the trial that I should proceed upon the basis that no such obligation was secured by Hillcrest, although the latter reserved the right to make an application to amend its Particulars of Claim prior to the perfecting of any order following the handing down of the judgment in draft. As will appear, on the basis of my conclusions the issue of whether there was such an obligation is not determinative of the decision as to whether there has been an effective novation.

10.
On 5 November 2010 B&C submitted its tender based on the Employer's Requirements.

11.
On 17 November 2010 there was a tender review meeting attended by representatives of the parties and Vinden, and the minutes recorded the fact that Hillcrest was "satisfied that all design works [were] to be completed as part of the design teams pre-contract appointment" and that accordingly allowances for fees to be paid to the Consultants (including HTA) by B&C could be removed from its Contract Sum Analysis.

12.
Although the Building Contract was not concluded until later, a contract start up meeting took place on 7 February 2011 attended by (among others) Paul Collings of Vinden, representatives of Hillcrest, Paul Adams, an Estimator and Quantity Surveyor acting for B&C, and Michael Taylor, the principal of HTA.

13.
The minutes of the meeting included the following:

Action

2.5.5
The design team (Architect, M&E consultant and the

Structural Engineer) are to be novated and collateral warranties

provided. PA

2.5.6
TVP to distribute electronic draft novations and collateral

warranty details to B&C and the design team for consideration and

execution PC/PA

14.
"P A" and "P C" are respectively Mr Adams and Mr Collings.

15.
Notwithstanding the start up meeting and the commencement of work on or about 14 February 2011, issues remained to be resolved between Hillcrest and B&C before the Building Contract could be concluded.

16.
Further site meetings attended by (among others) the persons named above took place on 24 March 2011 and 28 April 2011, it being recorded in the minutes that B&C were to prepare novations and collateral warranties for HTA (and the other members of the design team).

17.
It is common ground between the parties that the Building Contract was made in or before May 2011.

18.
The following terms of the Building Contract are material

a)
Article 7: Adjudication provided "If any dispute or difference arises under this Contract, either party may refer it to adjudication in accordance with clause 9.2" (which provided that if a dispute or difference arose under the Contract which either party wished to refer to adjudication, the provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 applied subject to qualifications which are not material for present purposes)

b)
Clause 1.1 defined "Contractor's Persons" and "Employer's Persons" as follows:

"Contractor's Persons: the Contractor's employees and agents, all other persons employed or engaged on or in connection with the Works or any part of them and any other person properly on the site in connection therewith, excluding the Employer, Employer's Persons and any Statutory Undertaker

Employer's Persons: all persons employed, engaged or authorised by the Employer, excluding the Contractor, Contractor's Persons, and any Statutory Undertaker but including any such third party as is referred to in clause 3.15.2."

c) It is pertinent to note that Article 8 of the Building Contract (providing for arbitration), which the parties agreed should not apply, is in significantly wider terms than the adjudication provision, providing (subject to exceptions) for reference to arbitration of "any dispute or difference…of any kind whatsoever arising out of or in connection with this Contract".

19.
At site meetings in May and June 2011, it was again stated that B&C would prepare novations and collateral warranties for the architect, structural engineer (HTA) and M & E Consultants.

20.
At a site meeting on 28 July 2011 Novation and Collateral Warranty agreements were handed over by Mr Adams to the Architect and Mr Taylor for signature. The Novation Agreement handed over was in the form annexed to the Employer's Requirements (with the names of the parties inserted), and Recital A recorded that the appointment was "by an agreement/fee proposal dated 8 July 2010".

21.
A typed version of the Novation Agreement was sent by Mr Adams to HTA on 9 December 2011. Recital A recorded that the appointment was by an agreement dated 8 July 2010 "in the form of a fee proposal from Howard Taylor Associates".

22.
At a site meeting on 19 January 2012 (which Mr Taylor did not attend) it was stated, as regards the Novation and Collateral Warranty, that Mr Taylor was awaiting a response from his insurers.

23.
Thereafter Mr Adams chased Mr Taylor for the return of the executed Novation and Collateral Warranty agreements and awaited a response, as was noted at a site meeting on 15 March 2012 at which Mr Taylor was absent.

24.
A further site meeting was held on 19 April 2012 attended by (among others) Messrs Adams and Taylor. In the minutes circulated thereafter it was stated that Mr Taylor "confirmed that the Novation agreement would be signed and issued to [B&C] this week". In his witness statement made for the purpose of these proceedings, Mr Adams stated (in paragraph 6.15): "I do not recall if Michael Taylor made this statement". However, Mr Taylor certainly did not return the signed Novation Agreement and, notwithstanding repeated attempts, Mr Adams was unable to get hold of Mr Taylor.

25.
On 6 July 2012 and again on 1 August 2012 Mr Adams sent chasing e-mails to Mr Taylor, stating in the latter e-mail that he was being put under considerable pressure by Hillcrest to get the Novation and Warranty documents returned.

26.
By e-mail sent on 2 August 2012 Mr Taylor stated that he had been

"deliberating over whether I should provide a collateral warranty for Sleepy Hollow. There was no mention of the requirement to provide a warranty when I first quoted for the job and it only cropped up mid-way through the job…"

He stated that he was reluctant to enter into the warranty agreement but made no mention of the Novation Agreement. However he did not return the same.

27.
Mr Adams thereafter continued to chase for the executed Agreements.

28.
On 17 September 2012 practical completion of the works under the Building Contract was certified.

29.
On 2 October 2012 Mr Adams and Noel Beresford of B&C met with Mr Taylor to discuss the provision of the Novation and Warranty Agreements. At that meeting Mr Taylor stated that he was only made aware of Hillcrest's insistence that he provide such agreements part way through the works, and did not wish to enter into them.

30.
By letter dated 5 October 2012 sent to B&C, Mr Taylor confirmed that he had not signed either Agreement, and again stated that there was no stipulation for a Collateral Warranty or a Novation Agreement when his fees were negotiated.

31.
A copy of Mr Taylor's letter of 5 October was sent by Mr Adams to Mr Collings of Vinden. In his letter Mr Adams asserted:

"The requirement to appoint the Structural Engineer cannot be concluded and as such Beresford and Curbishley have no contract with HTA. In turn this means that all structural matters remain under the

responsibility of the Employer (Hillcrest Homes Limited) and recovery of all costs incurred as a result of inadequacies within the structural design will be sought directly from The Employer”

32.
By letter dated 16 October 2012 sent to Vinden, Pye Associates, Claims Consultants acting on behalf of B&C, asserted that the latter had entered into the Building Contract on the understanding that the structural design would be novated, which had not happened. It was contended that Hillcrest had made a negligent misrepresentation to B&C with the intention of inducing the latter to enter into the Building Contract and notice was given of B&C’s intention to seek recovery of all losses resulting therefrom. On 16 October 2012, in reply, Mr Collings of Vinden asserted that the lack of a completed novation or warranty document did not relieve B&C of responsibility for all structural matters.

33.
By e-mail sent on 25 October 2012 to Mr Adams, Mr Taylor stated that he had had “several discussions with Paul Collings….and [HTA’s] PII insurers and I have been advised to sign the Novation Agreement in order to comply with my contractual obligations for the project.” He stated that he had therefore completed the Agreement and returned it to Mr Collings.

34.
On 9 November 2012 the Novation Agreement was forwarded by Vinden to B&C for execution but the latter has refused to execute the same.

35.
The Novation Agreement executed as a Deed by Mr Taylor is in the form annexed to the Employer’s Requirements, save that

a)
it has been dated 26 October 2012

b)
the names of the parties have been completed and

c)
neither of the alternative payment clauses in 1.4 has been deleted, but it is not suggested by either party that this is material since no further payment by either B&C or Hillcrest to HTA was contemplated at the time the Building Contract was made.

<u>The Adjudication</u>

36.
B&C’s response to the demand that it sign the Novation Agreement was to commence the adjudication proceedings referred to in paragraph 4(a) above.

37.
Notice of Adjudication was given by Pye Associates on behalf of B&C on 14 November 2012. In that Notice B&C contended that the services of HTA had not been novated and requested a declaration by an adjudicator in the following terms:

1.
the Responding Party made a negligent misstatement regarding the novation of the consultant structural engineer, Howard Taylor Associates, including the Referring Party to enter into contract; and

2.
such negligent misstatement was a misrepresentation entitling BCL to recover damages and/or loss and expense; and

3.
improper pressure has been brought to bear on HTA to agree to sign the purported novation agreement dated 26 October 2012; and

4.
such purported novation agreement is void; and

5.
the services of Howard Taylor Associates have not been novated; and

6.
the costs of the adjudicator shall be borne by the Responding Party."

38.
Following the appointment of Mr Gerard Bergin as Adjudicator, B&C on 21 November 2012 served its **Referral Notice**.

a) Under the heading "Introduction"

i) it was stated that the dispute concerned Novation;

ii) it was averred that Hillcrest had made a negligent misstatement both verbally and as a term of the contract that HTA had agreed to the novation of its desired services when, in fact, it had not done so until after practical completion in what was referred to as "the purported novation agreement"; and

iii)
it was further alleged that HTA was put under improper pressure to sign the purported novation agreement and that in those circumstances the agreement was "void in any event"

b)
Under the heading "The Case for [B&C]: Negligent Misstatement", it was contended

i)
that the Novation of HTA was a mandatory condition of the Building Contract;

ii)
that such novation in accordance with clause 1.6.5.3 of the Employer's Requirements was to occur on execution of the Building Contract;

iii)
that such execution occurred in December 2011, which accordingly was the date when Novation should have taken place;

iv)
since HTA had not in fact agreed to Novation at the date of the Building Contract, it followed that there was a negligent misstatement upon which B&C had relied when entering into that Contract; and

v)

as a result B&C was entitled to recover damages under section 2(1) of the Misrepresentation Act 1967 “and/or loss and expense” (paragraphs 63.2 and 64)

c)
Under the heading “The Case for [B&C]: Improper pressure” it was contended that improper pressure had been brought to bear on HTA to agree to sign the purported Novation Agreement and that such purported agreement was void.

d)
The “Case for [B&C]” concluded as follows:

“The Services of Howard Taylor Associates

72.
For the reasons given above under the sub-headings negligent misstatement and improper pressure it is contended that the services of Howard Taylor have not been novated.”

e)
The declaratory decision sought in the Referral Notice was as stated in the Notice of Adjudication.

39.
In its **Response**

a) Hillcrest took the single jurisdictional objection that there was no dispute between the parties, crystallised or otherwise (paragraph 7);

b) it was denied in paragraph 11 that HTA did not agree to Novation and averred that from the outset HTA agreed with Hillcrest to be novated, and that this was always common ground;

c) it was accordingly denied that there was any misstatement (negligent or otherwise) and it was also averred that no improper pressure had been applied to HTA, whose services had accordingly been novated;

d) in paragraph 53, it was asserted that given that B&C admitted in the Referral that the Building Contract was executed in or about 2011, “it follows that implied Novation occurred in or about December 2011”.

40.
In its **Reply**

a)
B&C asserted (in paragraph 19) that it was its understanding that the quotation from HTA dated 8 July 2010 was accepted by Hillcrest and that the contract between HTA and Hillcrest was “a simple contract” on the terms set out in the said letter;

b)
in paragraph 53, Hillcrest’s assertion that there had been an implied novation was denied, it being asserted that “Novation cannot be ‘implied’ when a proposed party to the purported novation states clearly and expressly that it has never agreed to novate its services”.

41.
In oral submissions Mr Patrick Clarke, Counsel for B&C, pointed out accurately that what was stated in paragraph 19 of the Reply represented B&Cs stated understanding at the date of the Reply (20

December 2012), its case being that at the date of the Building Contract it believed that HTA had agreed to novate its appointment as alleged in the Referral Notice.

42.
Following service of the Reply, the parties exchanged further statements of case, which are not material for present purposes.

43.
It will be seen that in their Statements of Case neither party referred to the fact that neither Hillcrest nor B&C had signed the Novation Agreement executed by HTA (which I shall refer to hereafter as "the Novation Agreement"). Nowhere did Hillcrest assert that B&C was bound to execute the same.

44.
The Adjudicator published his decision on 17 December 2012. He addressed each of the sought declarations in turn.

a)
Under the heading "Did Hillcrest make a statement as regards the novation of Taylor's [services] contract and in so doing, did it induce [B&C] to enter into the [Construction] Contract?",

he found that as the Building Contract provided specifically for the novation of HTA's services, and as the parties concurred that this was so, "it can be said with conviction that Hillcrest made a statement to this effect", which did, or would have induced B&C to enter into Building Contract (paragraphs 15.6 and 15.7)

b)
Under the heading "Did the statement amount to a negligent misstatement thus constituting a misrepresentation and, if so, does it entitle [B&C] to recover damages and/or loss and expense?",

he found that

i)
the "Appointment" constituting the services contract between Hillcrest and HTA "did not make provision for novation and therefore Hillcrest was negligent in stating that such contact could or would be novated [and that accordingly] the statement at Employer's Requirements Section 1.6.5.3 amounts to a negligent misstatement and constitutes a misrepresentation".

ii)
B&C, having framed its claim under the Misrepresentation Act 1967 as opposed to a claim for damages for breach of contract, was permitted to claim damages for misrepresentation under the relevant provisions of the Act but was not entitled to recover loss and expense, that being a contractual remedy pursuant to clause 4.19 of the Building Contract (paragraph 16.6)

c)
Under the heading "Was improper pressure brought on [HTA] to agree to sign the purported Novation Agreement dated 26 October 2012 and, if so, does this render the said Novation Agreement as void?"

i)
he concluded that there was insufficient evidence to prove that improper pressure had been so applied;

ii)

and stated that had he concluded that it was secured improperly and/or by undue influence then it would have been void but as he had not so concluded “it is potentially valid”, a matter he would address in the following section of his Decision.

d)
Under the heading “As a fact, have [HTA’s] services been novated?”

i)
he found that clause 1.1 of the draft Novation Agreement annexed to the Employer’s Requirement envisaged an “Appointment” that preceded the appointment of the Contractor; and

ii)
that the provision in paragraph 1.6.5.3 of the Employer’s Requirements that novation should occur “on execution of the Building Contract” implied the time at which the parties agreed the contract, which he found to be about February 2011, not when it was executed formally in about December 2011; and

iii)
that in any event it was apparent that the novation had not occurred by December 2011.

iv)
In paragraph 18.7 he concluded

“The Novation Agreement signed and dated 26 October 2012 by [HTA] does not, in my opinion, represent the actual scope of the structural services that comprised the “Appointment” prior to [B&C’s] employment or at the time the Contract Documents were executed. I consider [HTA’s] statements on both 2 August 2012 and 5 October 2012 that its fee did not include for novation as being a correct reflection of the true position. Therefore the Novation Agreement dated 26 October 2012 does not represent accurately the “Appointment” envisaged pre-Contract and hence is void. As [HTA’s] services were required to be novated by a valid deed, as a fact, such services have not been effectively novated.”

v)
In paragraphs 20 to 24 of his Decision, he made declarations as follows

“Declarations

20.
Hillcrest made a negligent misstatement with regard to the novation of Howard Taylor Associates services which did, or would have, induced Beresford to enter into the Contract

21.
The negligent misstatement was a misrepresentation entitling [B&C] to recover damages but not loss and/or expense

22.
Improper pressure was not brought to bear on [HTA] to agree to sign the purported novation agreement dated 26 October 2012

23.
The purported novation agreement dated 26 October 2012 is void

24.

[HTA's] services have not been novated"

Hillcrest's claim for declarations as to the unenforceability of the decision of the Adjudicator

45.
Hillcrest contends that the decision is unenforceable for three reasons: it is submitted that

a)
the claims for misrepresentation and/or negligent misstatement are outwith the scope of the adjudication provision contained in Article 7 of the Building Contract;

b)
in breach of that provision more than one dispute was referred to adjudication, and

c)
the Adjudicator's decision on the validity of the Novation Agreement was reached in breach of natural justice.

46.
I shall consider each of these submissions in turn

(A) The claims for misrepresentation and/or negligent misstatement

47.
Under Article 7 of the Building Contract, unlike Article 8 (the Arbitration provision where applicable), a dispute may only be referred to adjudication if it "arises under the Contract". Hillcrest submits that a claim for damages for negligent misstatement and/or misrepresentation is not, on the proper construction of the Contract, one which "arises under this Contract". In so submitting, Ms Cheng relies upon the decision of the Court of Appeal in Fillite (Runcorn) Limited v Aqua-lift (1989) 45BLR 27, where it was held, in relation to an arbitration clause, that the phrase "disputes arising under a contract" was not wide enough to include disputes which did not concern obligations created by or incorporated in that contract, with the result that the clause was not wide enough to cover claims for misrepresentation under the Misrepresentation Act 1967 or for negligent misstatement.

48.
In response Mr Clarke submits

a)
that the decision in Fillite can no longer be regarded as good law, given the decision of the House of Lords in Fiona Trust v Privalov [2007] 4All E.R. 951; and

b)
that the issue in question was ultimately which party was responsible for the fulfilment of the obligation to novate, and a key issue in relation to that dispute was whether or not Hillcrest misrepresented the agreement of HTA to novate, and

c)
alternatively, that the declarations in paragraphs 20 and 21 of the Decision are severable from those in paragraphs 23 and 24.

49.
In the Fiona Trust case, after referring to the decision in Fillite, Lord Hoffman in paragraphs 12 and 13 of his speech, stated as follows:

1.
I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at paragraph 17) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in section 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But section 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.

2.
In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

50.
In response Ms Cheng submits that Lord Hoffman’s reasoning in Fiona Trust is inapplicable to adjudication clauses, which are present or implied by reason of statutory intervention. In my judgment there is considerable force in this submission.

51.
In addition the draftsmen of the JCT Contract have, presumably intentionally, chosen different formulations of disputes that may be referred in the one case to adjudication under Article 7 and in the other to Arbitration under Article 8. As stated in paragraph 18(c) above, Article 8 is expressed in much wider terms (namely “any dispute or difference….of any kind whatsoever arising out of or in connection with this contract”), in contradistinction to the words of Article 7 (“any dispute or difference [arising] under this Contract”). It seems to me that the draftsmen must be taken to have intended that the disputes capable of being referred to arbitration were wider than those capable of being referred to adjudication, where the words of Article 7 simply followed the wording of section 108 of the Housing Grants, Construction and Regeneration Act 1996, which conferred the right to refer disputes to adjudication.

52.
It is plain from what is stated in paragraph 37 above that the claims referred to adjudication included a claim for damages arising under section 2(1) of the Misrepresentation Act 1967, a claim which was upheld by the Adjudicator in Declarations 20 and 21, the claim for loss and expense arising under the Building Contract being rejected. In my judgment that claim under the 1967 Act was not, on the proper construction of the Building Contract, a claim arising “under this contract”. On the contrary, it

was a claim arising under the Act. It follows that in my judgment the Adjudicator had no jurisdiction to determine the same.

53.
Mr Clarke submits that nonetheless the declarations in paragraphs 23 and 24 of the Decision are severable from declarations 20 and 21 and that these former declarations are valid. For reasons which will appear, whilst I accept that the declarations are severable, this seems to me to be academic in this case because:

i)
of my conclusion that the referral to adjudication of a dispute or disputes outwith the scope of Article 7 does not give rise to a claim for damages for breach of contract;

ii)
I have determined that the declarations in paragraphs 23 and 24 of the Decision are unenforceable because of breach of natural justice; and

iii)
in any event it is for me finally to determine those matters the subject of Declarations 23 and 24

(B) The submission that more than one dispute was referred to adjudication

54.
It is plain that under Article 7 only a single dispute may be referred to adjudication. Hillcrest submits that in this case two distinct disputes were referred, namely

i)
the dispute as to whether B&C was entitled to damages for negligent misstatement and/or misrepresentation; and

ii)
the dispute as to whether the purported novation agreement dated 26 October 2012 was void and whether there had been novation of the services of HTA.

55.
In response, B&C point out that the objection that more than one dispute was referred was not taken before the adjudicator, although it is recognised that that objection does not preclude the objection now being taken (it not being contended that there was an ad hoc submission of two disputes to adjudication). Mr Clarke submits that at all times the parties regarded the matters set out in the Notice of Adjudication as forming part of the same and a single dispute, namely as to whether there had been novation of the services of HTA and, if not, which party was responsible for that state of affairs.

56.
However, this seems to me to over simplify the position. In my judgment two disputes were plainly referred, namely whether there was a negligent misstatement regarding the agreement of HTA to novate entitling B&C to damages under the Misrepresentation Act 1967 (or under the contract), and secondly whether there had in fact been an effective novation of the services of HTA. Indeed it seems to me that this conclusion follows inevitably from my determination of the issue of whether the dispute regarding entitlement to damages for misrepresentation was a dispute arising “under” the Building Contract. Two disputes were referred, one, namely whether there had been novation of the

services of HTA, arising under the Building Contract, and the other, as I have held, being a dispute outwith the scope of Article 7.

57.
In resolving this issue, I have been referred to the helpful statement of principle set out in paragraph 38 of the judgment of Akenhead J in Witney Town Council v Beam Construction Limited [2011] BLR 707. I am of course cognisant that a dispute can comprise a single issue or any number of issues within it; however, for the reasons stated, I am of the firm view that there were two discrete disputes referred here.

58.
In those circumstances, the Adjudicator having proceeded to embark upon the resolution of more than one dispute in an adjudication governed by Article 7, Ms Cheng, relying upon the judgment of HH Judge Havelock-Allan QC in Bothma v Mayhaven Healthcare Limited [2006] EWHC 2601, submits that the award as a whole is unenforceable.

59.
In paragraph 26 of his judgment in that case the judge said:

26 It is common ground that the effect of clause 8(1) of the Scheme, which provides: “The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract”, is to confine adjudications under the Scheme to single disputes rather than to a multiplicity of disputes. It was held by His Honour Judge Humphrey Lloyd in Pring & St Hill Ltd v Hafner (in particular I refer to paragraphs 21 to 22 of his judgment) that if an adjudicator were to proceed to embark upon the resolution of more than one dispute in an adjudication governed by the terms of the Scheme, then he would do so without jurisdiction. It seems to me that that must be a logical if harsh result, because if an award were produced under the scheme resolving more than one dispute, it would be impossible, unlike in the case of excess of jurisdiction, to determine by any process of severance which part of the award should be enforced and which part of the award should be discarded. Given that the consent of the parties is a prerequisite to the determination of more than one dispute, it seems to me it must follow that if in truth more than one dispute has been resolved, the award as a whole is unenforceable

60.
However, in my view this case is distinguishable from the Bothma case because I have held that the dispute regarding the claim to damages under the 1967 Act, in respect of which the declarations in paragraphs 20 and 21 were made, was not a dispute arising under the Contract within Article 7, whereas the dispute regarding whether there had been an effective novation, in respect of which the declarations in paragraphs 23 and 24 were made, was. In those circumstances I do not see why those last declarations should not be severed even though they rely in part upon the same facts as the declarations in paragraphs 20 and 21. However, for the reasons stated in paragraph 53, this seems to me to be entirely academic in this case.

(C) Breach of natural justice

61.
Hillcrest’s complaint relates to paragraph 18.7 of the Decision, in which the Adjudicator found the Novation Agreement dated 26 October 2012 to be void and went to conclude (as appears in paragraph 44(d)(iv) above) that as HTA’s services “were required to be novated by a valid deed, as a fact such services have not been effectively novated”.

62.
It is Hillcrest's case that that determination was on a legal basis which had not been put forward by either party and which Hillcrest had been afforded no opportunity to address.

63.
Ms Cheng relies upon the summary of the law as set out in paragraph 57 of the judgment of Akenhead J in Cantillon v Urvasco [2008] BLR 250, 262:

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

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

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

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

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

64.
Reliance is also placed upon the judgment of Coulson J in Primus Build Limited v Pompey Centre [2009] BLR 437:

40. But where, as here, an adjudicator considers that the referring party's claims as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim of some sort could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision

65.
Paragraph 18.7 of the Decision is set out verbatim in paragraph 44(d)(iv) above.

66.
For B&C, Mr Clarke submits that the decision arose out of B&C's submissions at paragraphs 51 to 61 of the Referral Notice. It is submitted that the Adjudicator did nothing more than accept those submissions.

67.
In paragraphs 22 and 24 of the Defence, it is asserted that the Adjudicator simply accepted B&C's contention that there was no contractual obligation for HTA to agree to novation and/or the collateral warranty as neither had formed part of its original contract with Hillcrest.

68.
In paragraph 38 above I have summarised the contents of the Referral Notice. It will be seen that nowhere did B&C contend that "the Novation Agreement dated 26 October 2012 does not represent

accurately the “Appointment” envisaged pre-contract and hence is void” (paragraph 18.7 of the Decision). True it is that it was alleged that the Novation Agreement was void, but it is clear on my reading of the Referral Notice that that allegation was based on the assertion that the same had been induced by the exercise of improper pressure (see paragraphs 14 and 70).

69.
It is also true that it was asserted by B&C that novation was a mandatory condition of the Building Contract and was to occur on the execution of the same and that HTA had not agreed to novation then or at any time during the construction phase, and hence there was no novation at any time during that phase (because of absence of agreement). It was also asserted, and accepted by the Adjudicator, that there was no contractual obligation for HTA to agree to novation and that for the reasons given under the heading “Negligent misstatement” and “Improper pressure” there was no novation.

70.
However, as stated, the basis of the Adjudicator’s decision was that because the actual appointment of HTA did not include provision for novation at the time of execution of the Building Contract, the Novation Agreement executed by HTA did not represent accurately the appointment as envisaged pre-Contract (ie an appointment including an agreement to novate on the execution of the Building Contract) and was thus void. I find that that was not a contention that was raised by either party and it follows in my judgment that Hillcrest is right in contending that the Adjudicator determined the issue of whether the Novation Agreement dated 26 October 2012 was void on a basis which had not been put forward by either party and which Hillcrest had had no opportunity to address. On that basis there was a material failure to comply with the rules of natural justice and for that reason in my judgment the declarations under paragraphs 23 and 24 of the Decision are unenforceable.

71.
Mr Clarke contends that my decision should be otherwise because the Adjudicator (he submits) found as a matter of fact that there had been no agreement to novation by all three parties and no execution of the Novation Agreement by all. In those circumstances he submits that the finding is not determinative of the central issue in the dispute as to whether HTA’s services had been novated and that the decision in paragraph 24 of the decision was accordingly unaffected.

72.
The difficulty with that submission is that it seems to me, on my reading of paragraph 18.7 of the Decision, that the determination that “as a fact, such services have not been effectively novated” was based upon the preceding determination that the Novation Agreement dated 26 October 2012 was void for the reasons stated previously in that paragraph. If that is right then it does not seem to me that the declaration in paragraph 24 of the Decision is unaffected by the breach of natural justice.

73.
However, as previously stated, it seems to me that all this is academic given that it is for me to finally determine the issue of novation and I have dismissed Hillcrest’s claim for damages.

The Damages Claim

74.
As appears from previous sections of this judgment, I have held that B&C submitted to adjudication disputes that were outwith the scope of Article 7. Hillcrest submits that B&C was only entitled to have recourse to adjudication in accordance with that Article and that by purporting to refer the matters

referred to in paragraphs 45(a) and more than one dispute to adjudication, it acted in breach of contract.

75.
In support of that submission Hillcrest relied upon passages in the judgment of HH Judge Humphrey Lloyd QC in the case of Griffin and Tomlinson v Midas Homes Limited (2000) 78 Com OR 152. In paragraph 3 of his further decision in that case, Judge Lloyd stated:

3. The Scheme apparently implicitly confers on the adjudicator a power to apportion his fees and to decide who should pay the apportionment. The adjudicator has done so on the basis of all the work that he carried out. However in the light of my decision it is clear some of that work was unauthorised as it was beyond his jurisdiction and accordingly the Defendant cannot be liable for it. Only the party that sought adjudication is liable for the fees, expenses and costs incurred by asking for a decision which the adjudicator had no authority to make and to which it was not entitled under the contract and which in breach of contract is sought. Section 114(4) of the Act provides

“Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.”

Thus the Scheme took effect as implied terms of the sub-contract. The Claimants were only entitled to exercise their right to call for adjudication if it first complied with paragraph 1(3) of the Scheme. They did not do so in part and were thus in breach of contract.”

76.
Ms Cheng also relies upon the fact that in the case of Linnett v Halliwells [2009] BLR 312, Ramsey J (at paragraph 72) quotes this paragraph of the judgment of Judge Lloyd QC without comment or criticism.

77.
However, with all due respect to Judge Lloyd, I do not agree that the submission to adjudication of a dispute outwith the scope of Article 7 constitutes a breach of contract. In my judgment it would only be a breach of contract so to refer a dispute if there is to be implied in the Building Contract a provision that there should be no reference to adjudication other than as contemplated under Article 7. The implication of such a term would only arise if its implication was necessary to give business efficacy to the contract or otherwise was an obvious inference from the facts. I do not consider either to be the case:

a)
the implication is certainly not necessary to give business efficacy to the contract, which works perfectly well absent such implication;

b)
nor do I consider the implication of the term to be an obvious inference from the agreement, ie “so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract” (Chitty on Contracts, 31st ed Volume 1, paragraph 13-008). Indeed I consider that the question of whether such a term is to be implied would most likely give rise to serious disagreement since the question of whether a dispute is within the ambit or outwith Article 7 will often give rise to difficult questions, and the party who claims an absence of jurisdiction always has the option of

protecting himself by simply taking the jurisdictional point and then playing no part in the adjudication.

78.
As to the authorities relied on

a)
in paragraph 3 of his further judgment, Judge Lloyd made clear that he was not expressing any final conclusions, since in paragraph 2 he had stated that he proposed to set out the conclusions that he had reached so far but that if they were unacceptable there might have to be further argument;

b)
Ramsey J in Linnett was not considering the question of whether the submission of a dispute outwith the scope of Article 7 would give rise to a claim for damages.

79.
Ms Cheng further submits that in any event, as between the parties, it is only B&C who can be liable for the fees, expenses and costs of the Adjudicator, and again she relies upon the Griffin and Linnett cases. However, I do not consider that submission to be sound because in this case, having taken the jurisdictional point, Hillcrest participated in the adjudication proceedings without prejudice to its jurisdictional submissions. In those circumstances it seems to me, following the decision of Ramsey J in Linnett, that Hillcrest is liable for the Adjudicator's fees (see paragraph 70 of his judgment).

80.
It follows that I dismiss the claim for damages, although had I found in favour of Hillcrest on liability, I would have awarded it the amount claimed since B&C mounted no defence on quantum.

Final Determination: Declarations as to the effect of the Novation Agreement

81.
In paragraph 28 of the Particulars of Claim, Hillcrest seeks declarations in the following terms:

"28. Further or alternatively:

28.1
Even if the Novation Agreement does not accurately represent the terms of Hillcrest's Appointment with HTA envisaged prior to the Contract, that does not render the Novation Agreement void.

28.2
On a proper construction of the Construction Contract and Novation Agreement:

28.2.1
That Agreement is valid and the services of HTA have been novated to B&C with retrospective effect;

28.2.2
B&C is bound to Hillcrest as if B&C were and had been from the inception a party to the Appointment in lieu of Hillcrest and

28.2.3
HTA is not an "Employer's Person" for the purposes of the JCT DB and/or, on a proper construction of the JCT Construction Contract DB, is not to be construed as such and/or

28.2.4

B&C is estopped from denying that it is so bound.

28.3
Alternatively, B&C is in breach of Contract in:

28.3.1
failing to procure the novation of HTA's Appointment upon execution of the Contract and/or

28.3.2
failing to counter-sign the Novation Agreement

and ought not to be permitted to rely on its own said breach to deny the validity of that Agreement and/or the effects pleaded above".

82.
It will be seen that Hillcrest thus seeks declarations in the alternative, namely

a)
that HTA's execution of the Novation Agreement on 26 October 2012 was effective to novate its services to B&C with retrospective effect (in which case the declarations sought in paragraphs 28.2.2 and 28.2.3 of the Particulars of Claim would follow in my judgment); alternatively

b)
that B&C was in breach of contract in

i)
failing to procure the novation of HTA's appointment on the execution that the Building Contract; and/or

ii)
refusing to sign the Novation Agreement

and is not entitled to rely on its own breach to deny the effectiveness of the novation or to excuse its failure to sign the Agreement, the lack of Hillcrest's signature being immaterial since it is common ground that Hillcrest is willing to sign the Deed.

83.
I shall consider each of these alternatives in turn.

a) Was HTA's execution of the Novation Agreement effective to novate its services to B&C with a retrospective effect?

84.
Ms Cheng's submissions start with the following uncontroversial proposition:

"It is trite law that novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. The question is whether, as a matter of fact, the party contracting with one company accepted the new company as his counterparty in place of the old. (Chitty on Contracts, 31st Ed., (Sweet & Maxwell, 2012, Supplement 31 July 2013), Vol 1, 19-086 and 19-087).

85.
She goes on to submit that

i) Hillcrest and B&C consented to novation of HTA's Appointment, in terms materially identical to those signed by HTA on 26 October 2012, by sub-clause 1.6.5 of the Employer's Requirements and the draft novation agreement incorporated as Appendix F thereto and by the variation of sub-clause 1.4 thereof agreed between them; and

ii) HTA consented to the novation of its appointment on the said terms by signing the Novation Agreement on 26 October 2012, and in those circumstances, all parties having consented to its terms, the Novation Agreement is binding upon Hillcrest and B&C.

86.
In oral submissions, Ms Cheng made it clear that Hillcrest does not rely on a deemed novation but on what she submits was the factual tripartite consent of HTA, Hillcrest and B&C.

87.
She argues that the Appointment of HTA contemplated by the Employer's Requirements was the Fee Proposal dated 8 July 2010 included in Appendix H, which contained no agreement on the part of HTA to novate, and in those circumstances she submits that even if HTA had not agreed to novate prior to signing the Novation Agreement in October 2012 that is immaterial. Furthermore, she submits that by signing the Building Contract B&C agreed to the provisions of clauses 1.6.5.1 and 1.6.5.3 of the Employer's Requirements and that it was obliged to secure the execution of the Novation Agreement by HTA on the execution of the Building Contract. She argues that since the execution of the Building Contract involved B&C's agreement to the said clauses, it could not safely sign the Building Contract without having first confirmed with HTA that it consented to novation, otherwise (she submits) B&C took the risk that such consent would not be forthcoming.

88.
On the other hand, Mr Clarke for B&C submits that when HTA executed the Novation Agreement on 26 October 2012, the underlying appointment of HTA to be novated by such Agreement was fundamentally different to that contemplated by the Employer's Requirement, in that

i)
the latter included the agreement or obligation of HTA to novate (whereas no such agreement or obligation had been undertaken by HTA prior to its execution of the Novation Agreement in October 2012); and

ii)
what was contemplated by the Employer's Requirements was novation on the execution of the Building Contract, not novation some 18 months later and after practical completion of the works.

[At the commencement of the trial, Mr Clarke stated that he was not relying on the timing point, but later, following the adjournment of the trial, he made it clear that he was, albeit that the point had not been pleaded. Ms Cheng then stated that Hillcrest did not take a pleading point and was able to deal with the matter but that if B&C succeeded in reliance on this point there would be substantial argument on costs.]

89.
Further and in any event, Mr Clarke submitted that there was no novation because the Employer's Requirements and Building Contract contemplated the execution of a deed in the form of the draft included in Appendix F, and in the event the Deed had not been executed by B&C. (I did not understand him to rely upon Hillcrest's failure to execute the same).

90.
In my judgment, the execution by HTA of the Novation Agreement on 26 October 2012 was not effective to novate its appointment, for the following reasons:

i)
In my judgment, on the true construction of the Employer's Requirements, read as they must be as a whole, what was contemplated and required for there to be an effective novation was the execution by all three parties of a Deed in the form included as Appendix F. Clause 1.6.5.3 provided expressly that the novation should be "in accordance with the draft Novation Agreement included in Appendix F". That draft Agreement was a formal document which expressly provided for its execution by all parties as a Deed. I do not believe that what was contemplated was novation absent the execution of the Deed.

ii)
In any event the Employer's Requirements, by clause 1.6.5.3, expressly provided for novation to take place on the execution of the Building Contract, as was indeed contemplated by the draft Novation Agreement itself (in Recital B). In my judgment, the answer to Ms Cheng's submission is that B&C, by signing the Building Contract incorporating these Employer's Requirements, never consented to novation taking place at a materially later time, and certainly not after practical completion of the works.

iii)
Ms Cheng would no doubt argue that the timing is immaterial given that the Novation Agreement executed by HTA provided by clause 1.2 for novation from the inception of HTA's appointment. However, I disagree. The novation contemplated by the Employer's Requirements and Building Contract incorporating the same, on their proper construction, was a novation happening at the commencement of the works under the Building Contract, so that HTA would be in a contractual relationship with B&C throughout the execution of the works and would therefore know as those works progressed that there would be liability to B&C in the event of breach of their contractual duties. I consider a contractual relationship with rights and obligations throughout the execution of the works to be of material benefit to B&C; that, and not what actually materialised, is what B&C consented to under the Building Contract.

iv)
It follows that in my judgment, contrary to Ms Cheng's submission, B&C never consented under the Building Contract to novation being effected by the execution of the Deed in October 2012, and for present purposes, as stated in paragraph 9 above, I must also proceed on the basis that HTA only agreed to execute the Deed on or about 25 October 2012.

91.
I reject Ms Cheng's submission that it was for B&C to secure the agreement of HTA to novate on the execution of the Building Contract or to secure the execution of the Novation Agreement at that time. HTA's appointment by Hillcrest pre-dated the submission of the Employer's Requirements. Given the terms of paragraph 1.6.5 of those Requirements and of the draft Novation Agreement annexed thereto, B&C was entitled in my judgment to assume that Hillcrest had secured the agreement of HTA to novate prior to the Requirements being submitted to contractors (as indeed Hillcrest says that it had). Recital C to the draft Novation Agreement indeed asserted that "the Consultant has agreed to enter into this Agreement", and in my judgment B&C was not in breach of contract if there was no

pre-existing agreement on the part of HTA to novate and (as in fact occurred) HTA procrastinated in executing the Agreement until after practical completion.

92.
The Particulars of Claim allege that on the proper construction of the Building Contract and Novation Agreement B&C is estopped from denying that it is bound by the terms of the Novation Agreement. However, I cannot see how any estoppel can arise as a matter of construction, given that B&C never represented by executing the Building Contract that it consented to a novation occurring otherwise than as contemplated by the Employer's Requirements, nor (as Mr Clarke submits) is there any pleading or evidence that Hillcrest changed its position in reliance upon any conduct or representation on the part of B&C.

93.
In the absence of an effective novation, quite clearly

i)
clause 1.3 of the Novation Agreement (which is relied upon by Ms Cheng in support of her submission that on the proper construction of the Building Contract and/or Novation Agreement, Hillcrest and B&C agreed that the latter would, upon execution of the Contract, be deemed to have been HTA's counter party under the Appointment from inception in place of Hillcrest) is of no effect; and

ii)
HTA has throughout been an "employer's person" within the meaning of that clause as defined in clause 1.1 of the Building Contract.

b. Is B&C in breach of contract in refusing to sign the Novation Agreement?

94.
My answer to this question is apparent from the foregoing: B&C has not acted wrongfully in refusing to sign for the reasons set out in paragraphs 90 (ii) – (iv) above.

95.
For completeness, I should make clear that I reject certain other submissions relied on by B&C in its Defence. Specifically

i)
had the Employer's Requirements and Building Contract contemplated novation occurring after the execution of the Building Contract, I would not have considered HTA's lack of consent prior to the execution of the Novation Agreement as being material; and

ii)
I do not consider the Novation Agreement to be incomplete for lack of definition of the Appointment of HTA: all parties were aware that the appointment was as Structural Engineer pursuant to the acceptance of the fee proposal annexed to the Employer's Requirements.

However these matters are academic in view of my conclusions set out above.

96.
It follows that Hillcrest is not entitled to any of the declarations sought by way of final determination.

97.

On the formal handing down of this judgment, I shall of course consider consequential matters, including the appropriate form of order to give effect to its terms, and costs.