Neutral Citation Number: [2014] EWHC 54 (TCC)

Case Nos: HT-13-449 and HT-14-08

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 23rd January 2014

Before:

MR JUSTICE AKENHEAD

- -

Between:

WALES AND WEST UTILITIES LIMITED **Cla**

- and -

PPS PIPELINE SYSTEMS GmbH **Defe**

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- -

Frances Pigott (instructed by **Osborne Clark**) for the **Claimant**

Mark Chennells (instructed by **Fenwick Elliott LLP**) for the **Defendant**

Hearing date: 16 January 2014

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JUDGMENT

Mr Justice Akenhead:

1.
These two sets of proceedings relate to a dispute or possibly two disputes arising between the parties out of a contract dated 4 May 2012 ("the Contract") for the supply and construction by PPS Pipeline Systems GmbH (“PPS”) of a new gas pipeline from Llanwrin in Powys to Dolgellau in Gwynedd; some 24 kilometres of steel pipe was to be laid in Snowdonia. The Employer was Wales & West Utilities Ltd (“Wales”). The Contract value was some £8,629,060.18. The primary issues between the parties relate to the jurisdiction of the adjudicator in two adjudications known as Adjudication Nos. 2 and 3 and in particular the scope of the dispute referred to him in Adjudication 2. The second set of proceedings, by which a court order was sought for the appointment of an arbitrator, has been resolved, subject to questions of costs.

Background

2.
The contract was based on the NEC3 Engineering and Construction Contract (June 2005 Edition with later amendments) and provision was made for adjudication by way of Option W2. Apart from referring to disputes being "referred to and decided by the Adjudicator", there is little that assists otherwise. W2.3 (in the standard NEC3 present tense) states:

“(1) Before a Party refers a dispute to the Adjudicator, he gives a notice of adjudication to the other Party with a brief description of the dispute and the decision which he wishes the to Adjudicator to make…

(2) Within seven days of a Party giving a notice of adjudication he

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refers the dispute to the Adjudicator…

(4) The Adjudicator may

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review and revise any action or inaction of the Project Manager or Supervisor related to the dispute…”

3.

To understand the nature of the issues between the parties in this case, it is necessary to refer to a number of the Contract’s provisions:

(a) The NEC Conditions by Clause 16 provide for the Project Manager and the Contractor to give each other early warning of events which might increase costs, cause delays or impair performance of the completed works and then to cooperate as to how to overcome or address such events.

(b) Clause 60.1 identifies "compensation events" which may give rise to the Contractor becoming entitled to extensions of time and to payments for related costs. They include:

“60.1(1) The Project Manager gives an instruction changing the Work Information…

60.1(14) An event which is an Employer’s risk as defined under clause 80.1 of this contract.”

One of the standard compensation events was excluded by agreement namely the encountering of “physical conditions…which an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for them” (Clause 60.1(12)). Provision was made for notification of such compensation events, the submission of quotations and the assessment of compensation.

(c) One of the Employer’s Risks was identified in Clause 80.1 to be “Claims, proceedings, compensation and costs payable which are due to…a fault of the Employer or a fault in his design”.

(d) One of the incorporated contract documents was the “Works Information”, Clause 51 of which stated:

“Imported Sand Surround/Pipe Protection

The Contractor is deemed to have included within his submitted Lump Sum Price for the provision and placing/fixing of the following quantities in relation to imported sand surround/pipe protection:

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Sand surround, 150 mm bed, 150 mm to sides and 150mm depth of cover over the pipeline -21,500 m

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“Rockguard” HD or similar approved protective coating -2000m”.

4.

PPS was due to start work in January 2012 and complete in October 2012. It seems that it did finish on time. The major part of the works involved excavating and laying the steel pipe in the trenches. As appears from the Works Information, the pipes were to be laid in places with a coating which was to be a wrapping material which was clearly intended to guard against abrasive damage to the pipes. This was, it was common ground, to be used (if required) in areas where the excavation had been in rock and the steel pipe needed to be protected against damage from the rock.

5.
On 11 October 2012, PPS wrote to Wales in the following terms:

"**Reference: Llanwrin to Dolgellau HN307 Pipeline Replacement**

Early Warnings-Further Information

<u>Additional Rock and Exceptional Weather Conditions</u>

We are in receipt of your letter dated 4th October, 2012 and would like to thank you for allowing us the time to investigate these matters in greater detail before notifying you of the relevant clauses relating to why these matters entitle us to a Compensation Event under the Contract and/or otherwise entitle us to additional payment.

We will take each issue in turn setting out our position.

<u>Additional Quantity of Rock from that represented/detailed in the Contract</u>

The Contract sets out information in respect of the occurrence of rock on the Project in various key documents contained within the Site Information and in the Works Information…

We have based our tender offer on the content of these documents which [Wales] have provided to us at tender stage. At that time, we established a quantity of rock likely to be encountered from that information and made an appropriate allowance for the deletion of clause 60.1(12) of the Contract in respect of the risk of any "unforeseen rock". Both our price and this allowance were predicated upon the information provided by [Wales] being:

a. Accurate and plotted correctly as to location, and

b. Representative in a genuine way of the conditions to be encountered both in specific locations and more widely.

Having executed the works and in the knowledge of the actual conditions prevailing, we know that our reasonable assumptions in this regard were in fact mis-placed…

PPS consider that the inaccuracy and unrepresentative nature of the information provided constitutes an Employer's Risk Event in accordance with clause 80.1, in that it may be negligence and/or a fault of the Employer and/or a fault in the Employer's Design. This is a Compensation event under clause 16.1(14) and otherwise.

Elements of the Employer's Design are set out in the Works Information…

- Sand surround, 150 mm bed, 150 mm to sides and 150mm depth of cover over the pipeline -21,500 m

- "Rockguard" HD or similar approved protective coating -2000m

The above “pipe protection” is of two types: sand for cobbly/rough ground and Rockguard HD or similar to protect from excavated hard rock in the backfill.

This quantity of rock shown by the Site Information and the Works Information can be established by the Site Information as 2,700m and by the Works Information as being no more than would require 2,000m of Rockguard. In actuality PPS have installed some 8,000m of Rockguard and 23,000m of sand. These are clear changes to the Works Information which should have been instructed by the Project Manager.

The Works Information is at the very least misleading and it now appears that the Works Information was based upon incorrect information.

The required changes to the Works Information constitute Compensation Events under clause 60.1 (1) and otherwise under 60.1.

Further, and/or in the alternative, the numerous instances of notifications of the additional rock possibly constitute Force Majeure events as described in clause 94.2.

In addition to the contractual rights set out above, we are advised that we have a common law claim in Negligent Misstatement and/or Misrepresentation in respect of both the quantity of rock likely to be encountered and as to the nature and extent of the works required to deal with it.

We attached further supporting information that demonstrates matters outlined above.

Exceptionally Inclement Weather…

Summary

Notwithstanding the significant difficulties we have encountered during and throughout the construction period we have made every effort to complete the works safely, efficiently, on time and without damage to the environment…

We trust the above sets out our position and provides the required notices under the Contract that you have been kind enough to await pending further investigations…”

6.
On 18 October 2012, PPS sent to Wales an "Early Warning Notification” purportedly pursuant to Clause 16:

“Increased quantities of rock

The trench excavation and following operations have been seriously delayed due to rock. We have commissioned an expert report, which has highlighted the fact that the Works Information provided at Tender Stage is inaccurate. Not only has the quantity of rock encountered considerably increased throughout, the expected locations have been different…

For these reasons, we respectfully request that you consider payment for the additional costs incurred. As notified, we are prepared to allow Wales...to carry out a full audit to establish the actual costs incurred. We confirm that if this request is accepted, we will not seek contractual entitlement (i.e. any savings made will benefit the Project)…

The following activities may be affected:

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Topsoil Strip & Benching

•

Mainline Trench Excavation

•

Lower & Lay

•

Backfill

•

Reinstatement…"

7.

Wales wrote to PPS on 29 October 2012, its letter being headed "Re: HN037 Pipeline Replacement; and Early Warning Further Information". It does not refer specifically to the Early Warning Notice of 18 October 2012 but it does reply specifically to the letter of 11 October 2012:

"…Your letter dated 11th October 2012

This letter is headed up 'Early Warnings-Further Information'. We note therefore, and shall rely upon the fact that it is not a clause 61 notification of a Compensation Event…

Early Warning item 1: Additional Quantity of Rock

…We note you agree clause 1660.1 (12) as a Compensation Event was omitted…We further note that you now submit the information in the Site Information was inaccurate and unrepresentative. Accordingly you then leap to submit this is an Employer's Risk under clause 80.1 which gives you a right to claim as a Compensation Event under clause 60.1 (14).

…this clause provides…

In referring to this clause we are somewhat confused by your rationale…Therefore are you submitting that the Employer was negligent in that the boreholes were not taken in the right place?

If this is your case then your rationale is flawed. You do not dispute the information provided was correct, indeed nowhere have you evidenced the information provided was wrong. The boreholes for example stated what was there. Accordingly the information which has been provided by the Employer is correct…

However on a first principle basis your right to rely upon clause 80.1 is wholly misplaced. Clause 80.1 is for third party claims rather than PPS' costs…

You further submit that the additional rock possibly constitutes a Force Majeure event as described in clause 94.2. The clause says…

The matter of the alleged additional rock shall however fall short [sic] of having any claimable effect under the ambit of clause 94.2, not least given the effect of the wording of clause 60.2…

Finally regarding rock you make reference to your 'common law rights' in negligent [mis-statement] and or misrepresentation in respect of both quantity of rock likely to be encountered and as to the nature and extent of the works required to deal with it…

Early Warning item 2 Exceptionally Inclement Weather…

We trust that we have interpreted your Early Warning notice correctly and that you shall consider our comments herein or indeed take advice on the wording of your rights and obligations under the Contract.

As Project Manager I do not see, based on the information in my possession, that anything within your Early Warning Notices has any cause to notify or implement a Compensation Event…"

8.
There was shortly thereafter an adjudication, Adjudication No 1, which related to the impact of allegedly adverse weather conditions on the project.

9.
The next relevant stage involved the introduction of solicitors for Wales who wrote to PPS on 11 February 2013 with a Notice of Adjudication. It was headed "Dispute regarding a claim in respect of rock". It set out the "Parties to the Contract" and listed the Contract documentationbefore summarising a history of events which included the following:

"There are no force majeure events recorded in progress minutes…

- The existence of rock is not identified in progress minutes…

- On 3rd September 2012 PPS…wrote an early-warning confirmation to Wales… in respect of the weather and also rock conditions…

- On 11th October 2012 PPS…wrote to Wales…providing further information in respect of the early warnings relating to additional rock and exceptional weather conditions.

- PPS…belatedly notified an early warning in respect of rock on 18 October 2012…

- Completion of the project was achieved on 26 October 2012.

- Wales…made preliminary observations in respect of the early warning notice on 29 October 2012 concluding that there is nothing in the PPS…early warning that causes "to notify or implement a Compensation Event" [sic]…

- Discussions have been had between the parties in which Wales… have stated that it does not believe there is any contractual merit in the claim. This is confirmed in Wales'…letter dated 29th October 2012. Accordingly a dispute has arisen…"

10.
The letter went on:

"**The Dispute referred**

Further, Wales…contend that:

1. As stated, PPS took the contractual risk for physical conditions including all physical conditions including rock. PPS…assumed the contractual responsibility for rock as clause 60.1 (12)…in respect of physical conditions, was deleted. PPS acknowledge that no entitlement can exist.

2. No compensation event has ever been notified pursuant to clause 60.1 (12)…

4. No compensation event has been notified pursuant to Clause 60.1 (14). This clause doesn't apply on the facts, as physical conditions are not a stated Employer Risk.

5. PPS have no entitlement to a compensation event pursuant to clause 94…Properly construed clause 94 relates to termination…

7. Further, and in any event, PPS…have never notified a force majeure event pursuant to clause 94…

8. As no compensation event notices have been given…therefore clause 61.3 contractually bars any claim.

Accordingly PPS…do not have any contractual right to a compensation event in respect of the alleged existence of rock referred to in PPS'… early warning or in the letters referred to in this Notice to Adjudicate.

For the sake of clarity we confirm that the scope of this adjudication does not extend to consequential issues such as the quantity of rock encountered, alleged time or quantum impact. Wales…have not referred any consequential issues in this adjudication as it is clear that there is no entitlement in principle.

Crystallisation of dispute

The dispute had crystallised by the time of Wales'…letter of 29 October 2012 when [PPS'] claim in relation to rock was rejected, especially having regard to the events which preceded that time when there were earlier rejections.

Decision requested

Wales…requests a decision that PPS…have no entitlement in respect of the dispute identified above and a decision that PPS…pay the Adjudicator's costs…"

11.
Mr Robert Sliwinski was duly appointed the adjudicator for what has been called Adjudication No 2. Wales served its 17 page Referral Notice on 14 February 2013 which substantially amplified its Notice of Adjudication. The relief sought was "a decision that PPS…has no entitlement in respect of the dispute identified above…".

12.
PPS served its 8 page response on 28 February 2013 which observed at paragraph 2 that the characterisation and description of the dispute was vague and imprecise. Under a heading "Scope of Adjudication", PPS stated:

"7…it is PPS' position in this adjudication that in encountering increased quantities of rock in the installation of the pipeline ("the Rock Issue") they are entitled to a Compensation Event in respect of

an increase in the quantities of pipe protection installed because the increase in the quantities of pipe protection, and rock installed [sic] constitutes a change in the Works Information.

8. However, for the avoidance of doubt PPS does not seek a decision from the Adjudicator as to the time and quantum impact of the Compensation Event…

9. Finally, in this regard the Adjudicator is reminded that the dispute referred to by [Wales] is limited and relates solely to the question in principle of PPS’s entitlement to a Compensation Event or Compensation Event in respect of the Rock Issue.

Under the next heading, "Summary of PPS’s case", the following appeared:

“10. [Wales’] design for pipe protection in rock areas confirms that PPS was to include within its Contract price for the installation of 2,000m of Rockguard…to protect the pipe when installed in areas of rock excavated by PPS. PPS had in fact excavated rock and installed Rockguard to over 8,000m of the pipeline. Accordingly, this increase in the quantity of Rockguard actually installed is a change in the permanent works design and a clear change to the Works Information and accordingly a Compensation Event under 60.1 (1) of the Contract.

11. PPS’ alternative case is that both the increased quantity of the Rockguard installed and the increased quantity of rock required to be excavated in order to effect the Rockguard installation similarly constitutes a change to the Works Information and accordingly Compensation Event under 60.1 (1) of the Contract."

Over the next few pages, PPS set out this case in more detail and at Paragraph 32 set out the decisions which it was seeking:

“32.1 A decision that in principle PPS is entitled to a Compensation Event in respect of the increase in the quantities of Rockguard installed as described in this Response…

32.3 A decision that the Project Manager’s inaction in failing to instruct a change to the Works Information in accordance with Clause 60.1 (1) of the Contract in respect of the increase in the quantities of Rockguard installed as detailed in the Response should be reviewed and revised with a declaration that PPS are entitled to an appropriate Project Manager’s instruction…”

13.
Following e-mail correspondence between the parties and the adjudicator about whether the adjudicator had jurisdiction in respect of issues relating to Rockguard, Wales served its Reply dated 5 March 2013 effectively running the jurisdictional arguments which it maintains in these proceedings, namely that the dispute as referred to adjudication did not encompass any of the issues relating to the recoverability for the supposedly additional quantities of Rockguard. Subject to that reservation, Wales did address the argument and challenge it. PPS served its Rejoinder on 8 March 2013 responding on the merits but also maintaining that the issues relating to Rockguard were part of the dispute referred to adjudication and therefore within the jurisdiction of the adjudicator.

14.
The adjudicator issued his decision on 14 March 2013. He made it clear that he believed that he had jurisdiction to address what might be called the Rockguard issues and went on to analyse the respective contentions on the merits of the arguments as well as on whether the appropriate notifications were given on time. He decided finally as follows:

“1. PPS…has no entitlement to a Compensation Event in respect of physical conditions including rock.

2. The Project Manager's inaction in failing to instruct a change to the Works Information in accordance with Clause 60.1 (1) of the Contract in respect of the increase in the quantity of Rockguard installed should be reviewed and revised.

3. PPS…is entitled to an appropriate Project Manager's Instruction in respect of Rockguard."

As for his fees, he decided that each party should pay 50% namely £5,250 plus VAT each.

15.
History does not relate precisely what happened in the following few months. It seems that each party paid the adjudicator their share of his fees. PPS submitted a claim for £607,659.72 in respect of the additional quantities of Rockguard to which it said it was entitled following on from the decision in Adjudication No 2. There was no agreement about this claim and no Project Manager's instruction was received which recognised either the claim itself or the basis of it.

16.
On 4 October 2013, PPS through its solicitors served its own Notice of Adjudication in respect of its Rockguard money claim. PPS sought decisions:

"19.1…that PPS is entitled to a Project Manager's Instruction changing the Works Information in accordance with Clause 60.1 (1) of the Contract to reflect the increase in the quantity of the Rockguard actually installed including the assumptions required to provide a reasonable assessment.

19.2 a decision that the Clause 60.1 (1) Compensation Event be assessed at £607,659.72 or such other sum as the Adjudicator may decide…"

Interest and payment of the adjudicator's fees were also claimed.

17.
Mr Sliwinski having again been appointed as the adjudicator for Adjudication No 3, PPS served its Referral Notice on 9 October 2013. It referred to the decision in Adjudication No 2 contending in effect that Wales had not acted on that decision in relation to the Rockguard claim and setting out in detail the basis of the financial assessment of claim.

18.
Wales served its detailed response of 25 October 2013. It made it clear that it considered that the Adjudicator in Adjudication No 2 had "exceeded his jurisdiction by considering the new and separate Rockguard dispute" and that the decisions in Paragraphs 2 and 3 (see above) "can clearly be severed" (Paragraph 2.1 (c) of the Executive Summary). However, subject to that clear reservation, Wales argued on the merits that there was no entitlement to payment for additional quantities of Rockguard. PPS served its Replyon 4 November 2013 challenging much of the response.

19.
The Adjudicator issued his decision in Adjudication No 3 on 20 November 2013. He addressed the further jurisdictional challenge and resolved that he had jurisdiction. He stated, for instance in Paragraph 21, that his decision in Adjudication No 2 was clear and unambiguous to the effect that the Project Manager should have issued a formal Instruction as regards the increased quantities of Rockguard or some other action if Rockguard was not to be used. He did address the issue as to whether or not PPS should have used something other than Rockguard (Paragraph 25). He stated in Paragraph 31 that he accepted PPS' argument that until "such time as the decision [in Adjudication No 2] is challenged and found to be ineffective by the Courts the decision will remain temporarily

binding" and therefore that Wales should have assessed “the Clause 60.1 (1) Compensation Events as if a” Project Manager’s Instruction had been given by Wales. He then went on to review the quantum and found that £479,817.17 was due to PPS in respect of the Compensation Event, adding interest and he ordered that Wales should be responsible for his fees of £15,247.50 plus VAT. This formal decision apart from the financial consequences was:

“1 PPS…is entitled to a Project Manager’s Instruction changing the Works Information in accordance with Clause 60.1 (1) of the Contract to reflect the increase in quantity of the Rockguard actually installed including the assumptions required to make a reasonable assessment".

20.
PPS sent to Wales an invoice on 29 November 2013 for the adjudicator’s fees which it had paid initially and Wales paid that invoice within several days. On 2 December 2013, PPS sent its invoice to Wales for the other sums which was revised the following day. This was paid without qualification within several days (on 3 December 2013).

21.
On 5 December 2013, Wales’ solicitors served on PPS notice to concur in the appointment of an arbitrator essentially in relation to the issue as to whether there was any claim available in respect of the quantity of Rockguard actually installed on this project by PPS. Again this was not expressly qualified by reference to there being said to be no valid adjudication decision.

22.
The first set of (Part 8) proceedings was issued by Wales on 5 December 2013 seeking declarations that Paragraphs 2 and 3 of the decision in Adjudication No 2 was unenforceable because the adjudicator had no jurisdiction and that consequently the decision in Adjudication No 3 was unenforceable.

The Arguments

23.
In essence, Wales argues that the dispute which it referred to Adjudication No 2 was limited simply to whether or not there could in principle be a Compensation Event in respect of the suggested increase in quantities of the rock encountered and that this dispute did not encompass any issues relating to whether or not any suggested additional quantities of Rockguard were recoverable. This argument is based upon interpretationof the letters dated 11 and 29 October and the Early Warning Notification of 18 October 2012 and the Notice of Adjudication which, it is argued, made it clear that even if “consequential issues" could possibly have included the Rockguard issue in principle, "consequential issues" were expressly excluded from the dispute that was being referred to adjudication. It goes on to argue that because the decision in Adjudication No 3 was based on what it says was a part of the decision in Adjudication No 2 which is unenforceable as being made in excess of jurisdiction the later decision is itself unenforceable.

24.
PPS argues that the assertions of principle which it was putting forward in its letter of 11 October 2012 encompassed the claim to entitlement for additional Rockguard, that the whole claim to entitlement to a Compensation Event was rejected in the letter dated 29 October 2012 and that therefore the dispute being referred to adjudication by Wales encompassed intrinsically the Rockguard issue. It follows that the decision in Adjudication No 3 must also be enforceable; even if the adjudicator in Adjudication No 2 did not have jurisdiction, the adjudicator in Adjudication No 3

still had jurisdiction. In any event, PPS argues that by both paying and issuing the Arbitration Notice to Concur, without qualification or reservation, Wales has elected to accept the validity of the decision in Adjudication No 3. That is challenged.

The Law

25.
The Courts have sought to discourage losing parties in adjudications from "scrabbling around to find some argument, however tenuous" (see e.g **Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2005] BLR 310). The Courts however must still objectively consider and analyse all arguments about jurisdiction to see if they fall into the "tenuous" category; if they do, the Court's sanction will then be invariably by way of costs order, possibly by way of indemnity costs the more tenuous the argument has been.

26.
The cases involving jurisdictional challenges by reference to the scope or ambit of the dispute referred to adjudication are now legion. There are challenges, although less so in recent years, as to whether there is any dispute at all. That is not the case here. Scope or ambit issues however often result in a challenge to the decision of the adjudicator for either not deciding what was referred to him or her or for deciding something which was not referred to adjudication at all. In **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd**[2000] EWHC 75 (TCC), HHJ Lloyd QC said:

"14. It is thus first necessary to determine whether the adjudicator acted without jurisdiction, as suggested by KNS. When the jurisdiction of a person appointed to make a decision under a contract (such as an adjudicator) is called into question, it is always necessary to ascertain with precision what the decision-maker was authorized to do. The events leading up to KNS's notice of 9 March 2000 have to be examined in order to understand what dispute the adjudicator was appointed to resolve. In Fastrack Contractors Ltd v Morrison Construction Ltd [2000] BLR 168 at page 176 His Honour Judge Thornton QC gave a clear and full explanation of the nature of the inquiry which I gratefully adopt:

"During the course of a construction contract, many claims, heads of claim, issues, contentions, and causes of action will arise. Many of these will be collectively, or individually disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the referring party first intimates an adjudication reference. In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties."

21…As Judge Thornton said in Fastrack, "the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference". A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought. It takes the risk that its bluff may be called in an unexpected manner. The further documents which come into existence following the

notice of adjudication (such as "the referral" which is defined in clause 38A.4..1 of DOM/1) do not cut down or, indeed enlarge, the dispute (unless they contain an agreement so to do). The adjudicator is appointed to decide the dispute which is the subject of the notice and that notice determines his jurisdiction. The adjudicator's jurisdiction does not therefore derive from the further documents… although those documents are likely to help the adjudicator to find out what needs to be decided in order to arrive at a conclusion on the dispute…”

27.
What can be drawn from this and other decisions is as follows:

(i) To determine the scope and ambit of any given dispute, the Court needs to analyse the relevant exchanges between the parties.

(ii) It is open to a party which wishes to proceed to adjudication to refer only part of the crystallised dispute. Primarily, one must construe the Notice of Adjudication to determine the extent to which all or part of the crystallised dispute is being referred to adjudication.

(iii) It is open to the defending party to adjudication to run any factual or legal defence to the disputed claim which is being referred (see e.g. **Cantillon Ltd v Urvasco Ltd** [2008] BLR 250 at Paragraph 54).

(iv) However, none of the post-Notice of Adjudication documentation generated in an adjudication will alter the scope or ambit of the dispute referred, save by agreement or by operation of waiver or estoppel (see e.g **Lidl UK GmbH v RG Carter Colchester Ltd**[2012] EWHC 3138 (TCC))

28.
Another issue relates to the effect of the decision in Adjudication No 2 on the decision in Adjudication No 3. There are essentially two arguments where it is thought that the adjudicator in the earlier decision has either exceeded his or her jurisdiction or acted materially in breach of the rules of natural justice: either the decision is and remains binding unless and until it is declared by the Court to be unenforceable or it is unenforceable from the date of its issue. Often what happens in those circumstances is that the losing party does not pay out or act on the contentious decision and raises its challenge in court proceedings when the other party seeks to enforce it.

29.
In the first English Court decision on statutory construction adjudication, **Macob Civil Engineering Ltd v Morrison Construction Ltd**[1999] EWHC 30 (TCC), Mr Justice Dyson (as he then was) reviewed the new law as to what challenges could be made to the enforceability of adjudication decisions and how and when. Relevant parts are:

“13.Mr Furst submits that the word "decision," where it appears in clause 27, and where it appears in paragraph 23 of Part 1 of the Scheme, means a lawful and valid decision. Accordingly, where there is a decision whose validity is challenged, that is not a decision which is binding or enforceable as a contractual obligation until it has been determined or agreed that the decision is valid.

14. It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for adjudication…But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

18. For all these reasons, I ought to view with considerable care the suggestion that the word "decision" where it appears in section 108(3) of the Act, paragraph 23(2) of Part 1 of the Scheme and clause 27 of the contract, means only a decision whose validity is not under challenge. The present case shows how easy it is to mount a challenge based on an alleged breach of natural justice. I formed the strong provisional view that the challenge is hopeless. But the fact is that the challenge has been made, and a dispute therefore exists between the parties in relation to it. Thus on Mr Furst's argument, the party who is unsuccessful before the adjudicator has to do no more than assert a breach of the rules of natural justice, or allege that the adjudicator acted partially, and he will be able to say that there has been no "decision".

19.At first sight, it is difficult to see why a decision purportedly made by an adjudicator on the dispute that has been referred to him should not be a binding decision within the meaning of section 108(3) of the Act, paragraph 23(1) of the Scheme and clause 27 of the contract. If it had been intended to qualify the word "decision" in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all."

He then went on to consider the "analogous position that arises in public law" and considered the House of Lords case of **R v Wicks**[1998] AC 92, going on:

22. So too in the present case, the question of the meaning of the word "decision" is one of construction, both statutory and contractual. Neither party suggested that there was any difference between the meaning of the word as it appears in the Act and the Scheme on the one hand, and clause 27 of the contract on the other. As I have already indicated, I do not find any difficulty in giving the word "decision" what I conceive to be its plain and ordinary meaning. It may, however, be possible to argue that it is ambiguous in the same way as Lord Hoffmann thought that "enforcement notice" was ambiguous. I emphasise that no such argument was addressed to me. In that event, it would be necessary to ascertain the correct meaning from the scheme of the Act and the Scheme, and the background against which it was passed. Adopting that purposive approach to the construction of the word "decision", I am in no doubt that it should not be qualified in the way suggested by Mr Furst. The plain purpose of the statutory scheme is as I have earlier described. Mr Furst would not accept that his construction would drive a coach and horses through the scheme. On any view, it would substantially undermine it, and enable a party who was dissatisfied with the decision of an adjudicator to keep the successful party out of his money for longer than envisaged by the scheme.

24. I would hold, therefore, that a decision whose validity is challenged is nevertheless a decision within the meaning of the Act, the Scheme and clause 27 of the contract."

30.

There must be some qualification to this and indeed the learned judge averted to this at the end of Paragraph 19 of his judgment (see above). The decision of an "adjudicator" who has not been appointed in accordance with the contractual or statutory requirements would simply be considered as void. Another example where a decision would be considered unenforceable might be an adjudicator to whom Dispute A (say a claim for £10,000) has been referred who without agreement issues a decision on Dispute B (say a claim for £50,000 under the same or a different construction contract).

31.
I will review the impact of this and issues of election below.

Discussion

32.
The first stage in reviewing whether or not decisions 2 and 3 (relating to the Rockguard) within the Adjudication No 2 decision were not within the scope of the dispute referred to adjudication must be to analyse what the scope of the crystallised dispute was before the Notice to Adjudication was dispatched. It was common ground that the assertions relating to "Exceptionally Inclement Weather" can be ignored, largely because they were the subject matter of Adjudication No 1.

33.
PPS' letter of 11 October 2012 although entitled "Early Warnings- Further Information" was clearly and expressly concerned with whether or not the matters referred to in the letter "entitle us to a Compensation Event under the Contract and/or otherwise entitle us to additional payment." One of the "matters" is entitled "Additional Quantity of Rock…". Under this heading are in effect three bases of alleged entitlement, the latter two being Force Majeure and "Negligent Mis-statement or Misrepresentation". The first basis is an assertion that the alleged inaccuracies in the information provided in the contract documentation was or may be attributable to "negligence and/or a fault of the Employer and/or a fault in the Employer's Design" and that this "is a Compensation event under clause 60.1(14) and otherwise". Two specific elements of the Employer's Design are said to be the specification in the Works Information of sand surround and Rockguard quantities of 21,500 m and 2,000 m respectively; that is compared with what is said to be the installation of 8,000 m of Rockguard and 23,000m of sand. It is asserted that these were "clear changes to the Works Information which should have been instructed by the Project Manager" and that these changes "constitute Compensation Events under clause 60.1 (1) and otherwise under 60.1." It is of course not for the Court at this stage to form any view as to whether any of these assertions were good in law or in fact.

34.
The Early Warning Notification of 18 October 2012 does not really add very much although there is no reference to Rockguard as such.

35.
The Wales letter of 29 October 2012 on its face does not expressly respond to the Early Warning Notification of 18 October 2012 but it does expressly respond to the letter of 11 October 2012. In the response dealing with the first basis of claim, Wales expresses the view, rightly or wrongly that Clause 80.1 which addresses Employer's Risks does not apply because it is said to be "for third party claims rather than PPS's costs"; this is apparently based on the fact that the paragraph in Clause 80.1 relied upon by PPS is prefaced with the words "Claims, proceedings, compensations and costs payable which are due to…". The letter goes on to reject emphatically the second basis of claim relating to force majeure and the third common law basis. It is true that the letter does not specifically mention that Rockguard or challenge the assertions about the supposedly extra quantities of sand surround and Rockguard said to have been necessitated. There can be no doubt that Wales rejected the assertions put forward by PPS and that is confirmed by the paragraph at the end of the letter which states that the writer did not see that anything within the Early Warning Notices "had any cause to notify or implement a Compensation Event", by which he meant that the matters put forward by PPS did not qualify as Compensation Events under the Contract.

36.

It is not in issue that the letter on 29 October 2012 from Wales established or confirmed a dispute between the parties in that all of what was being put forward in relation to "Additional Quantity of Rock” was rejected by Wales’ project manager, albeit as a matter of principle in that the assertion was that PPS could not begin to justify any such entitlement because the contractual clauses relied upon did not support the claims (and because the common law claim was otherwise unjustified).

37.

The next issue relates to whether or not the Notice of Adjudication for Adjudication No 2 in some way sought to refer something less than the whole dispute which had crystallised by virtue of the letter of 29 October 2012. In my view, that letter simply does not cut down the scope or ambit of the dispute which had earlier crystallised. It expressly refers to the letters of 11 and 29 October 2012 and it asserts that the "dispute had crystallised by the time of Wales’… letter of 29 October 2012 when [PPS’] claim in relation to rock was rejected". Having summarised its position, Wales say that accordingly PPS "do not have any contractual right to a compensation event in respect of the alleged existence of Rock referred to in PPS’ early warning or in the letters referred to in this Notice to Adjudicate". What that is doing is simply confirming that the dispute being referred is that which comes out of the exchange of letters in October 2012. The fact that Wales go on to say that the scope of the dispute being referred "does not extend to consequential issues” does not in reality limit what is being referred because the dispute which has crystallised relates in any event to the principle or basis of entitlement. The examples given in the letter of consequential issues confirm this: "quantity of rock encountered, alleged time or quantum impact.” What was left and clearly intended to be left to be resolved in the adjudication was whether as a matter of principle there was any entitlement to a compensation event.

38.

That dispute as it had crystallised and as it was being referred to adjudication included the whole package of arguments put forward by PPS in its letter of 11 October and substantively rejected by Wales in its letter of 29 October 2012. That whole package included, for better or for worse, whether changes from the quantities of sand surround and Rockguard set out in the Works Information document said to be attributable to additional quantities of rock being encountered (a) "should have been instructed by the Project Manager" and (b) constituted "Compensation Events under clause 60.1 (1) and otherwise under 60.1". That was clearly part and parcel of the claim or asserted entitlement raised by these two letters. Interestingly, there was no claim in the letter of 11 October 2012 for any entitlement to extra costs of excavation in rock as such; the focus was on the increased quantities of sand and Rockguard.

39.

Ultimately the adjudicator in Adjudication No 2 did not address any "consequential issues” as defined in the Notice of Adjudication. All that he did was to address the issues of principle and, whether he was right or wrong as a matter of law, he decided in principle that there was no entitlement to a Compensation Event in relation to physical conditions including rock but that, in relation to Rockguard, PPS had an entitlement to a change to the Works Information to reflect increases in the quantity of Rockguard. He was acting within his jurisdiction because this was clearly part of the dispute which was referred to him.

40.

On the assumption that I am right about this, there can be no challenge in relation to Adjudication No 3. That is, properly, accepted by Counsel for Wales.

41.
If, however, I was wrong about that, I should address the arguments. I would in those circumstances still have decided that the decision in that later Adjudication was enforceable for the following reasons:

(i) There was a continuing dispute between the parties following the decision in Adjudication No 2 in which Wales took the point that the adjudicator had exceeded his jurisdiction in that earlier adjudication and in which Wales in any event challenged both the entitlement to compensation in principle as well as the quantum claimed by PPS.

(ii) Although Wales clearly had the opportunity in court to challenge the enforceability of decisions 2 and 3 in the Adjudication No 2 decision before Adjudication No 3, it did not do so.

(iii) Applying the logic of Mr Justice Dyson in the **Macob** case, the Adjudication No 2 decision was not in the category of being void as such but it was otherwise a "decision" within the meaning of the Contract and the 1996 statute from which construction adjudication emerged.

(iv) The decision in Adjudication No 2 was and remained binding on the adjudicator in Adjudication No 3 (who was the same person) in any event because also there had been no court or arbitration challenge to the earlier decision.

(v) Although the adjudicator in Adjudication No 3 considered (correctly in my view) that he was bound by his earlier decision, even if he was not, there is absolutely no reason to believe that he would have formed any other view than that PPS was entitled to compensation in principle.

(vi) It is not a logical jump for Wales to say on the one hand that the adjudicator in Adjudication No 3 had jurisdiction (and indeed acted fairly) but then say that, if the Adjudication No 2 decision was in part unenforceable, somehow the decision in Adjudication No 3 should itself not be enforceable. There are essentially only two or possibly three grounds of challenging the enforcement of an adjudicator’s decision: material breach of the rules of natural justice, excess of or no jurisdiction and fraud. None of those applies in this case.

42.
Even if it was established that for some reason Adjudication No 3 was unenforceable, 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). In **Shimizu Europe Ltd v Automajor Ltd**[2002] EWHC 1571 (TCC), the losing party in an adjudication had asked for slip rule amendments to the decision and had made some payment as decided but then sought to avoid enforcement by deploying various jurisdiction challenges. HHJ Seymour QC said:

“29. In my judgment it cannot be right that it is open to a party to an adjudication simultaneously to approbate and to reprobate a decision of the adjudicator. Assuming that good grounds exist on which a decision may be subject to objection, either the whole of the relevant decision must be accepted or the whole of it must be contested. It may, of course, be important correctly to characterise what constitutes a decision of the adjudicator. It is likely that, to be relevant for the purposes now under consideration, a decision will be the answer to a question referred to the adjudicator, rather than a conclusion reached on the way to providing such answer. For example, if the adjudicator has had referred to him or her for decision both the question how much money is due to a contractor and also the question to what extension of time for completion of construction works the contractor is entitled, it is likely that it will be open to a party to the adjudication to accept the determination in relation to

the sum due while disputing, if otherwise there are good grounds for so doing, the assessment of the extension of time, or vice versa. In such a case two separate questions would have been referred to the adjudicator. However, that situation is to be distinguished from the case in which in order to answer the question to what sum a party is entitled it is necessary to consider a number of elements of claim, or the case in which in order to reach a conclusion as to what extension of time is appropriate a number of grounds of possible entitlement to extension of time need to be considered. In each of these latter cases the result of the evaluation of the various elements will be a single cash sum or a single period of extension of time. It seems to me that the option available to a party who otherwise has good grounds for objecting to a decision that a particular sum is payable is to accept it in its entirety or not at all. He does not have the option of declining to accept the decision in its entirety, but to accept the reasoning which led to particular items being included in the overall total…

30…In my judgment by inviting Mr. Haller to correct the Award under the slip rule Berwins on behalf of Automajor accepted that the Award was valid. It is true that in its letter to Mr. Haller dated 6 November 2001 Berwins asserted that the Award contained an error which went to Mr. Haller's jurisdiction, but, if that were right, it would follow that the Award, or the relevant part of it, was a nullity. There would be nothing to correct. I accept the submission of Mr. Constable that the invitation to Mr. Haller to correct the Award under the slip rule is only consistent with recognising it as valid. I also accept the submission of Mr. Constable that by paying part of the sum the subject of the Award Automajor elected to treat the Award as valid. Otherwise there was no need to pay Shimizu anything, and it was not appropriate to do so. Consequently, had it been necessary to do so, I should have held that Automajor had elected to forgo any opportunity which it might otherwise have had to object to the Award.”

43.
In **PT Building Services Ltd v Rok Build Ltd** [2008] 3434 (TCC), a defendant in adjudication enforcement proceedings had paid the adjudicator’s fees and also deployed the decision in question to encourage a second adjudicator to resign. Mr Justice Ramsey said in that case:

“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.”

44.

I draw from these cases and those upon which they are based the same broad conclusions. Not only did Wales pay the adjudicator’s fees in relation to Adjudication No 3 it also paid the full amount awarded by the adjudicator. There was no reservation orally, in writing or by way of conduct. Wales of course always had a long-stop remedy which, in this case, was arbitration and it would be open to Wales to seek to recover the payment made in respect of the alleged compensation event. The adjudicator’s decisions are only temporarily binding until confirmed or reversed by the arbitrator. In my judgment, Wales has elected by making these unqualified payments to treat the Adjudication No 3 decision as valid and enforceable and it can not now challenge it, albeit that its rights in arbitration are such that they can seek to recover at least the payment for the alleged compensation event in that forum; this subject of course to any available defence in the arbitration.

45.

I would have been less sanguine on the election issue in relation to the reference by Wales to arbitration. The Notice to Concur in Paragraphs 8 and 9 makes it clear that at the very least Wales was then considering proceedings in court because it sought reimbursement of sums and fees "to the extent this repayment has not already been ordered by the court." That would amount, in my judgment, to a reservation such that the reference to arbitration in itself would not amount to an election to treat the adjudication decisions as valid and enforceable.

The Later Proceedings

46.

The Notice to Concur sent by letter dated 5 December 2013 proposed as arbitrator one of three well-known construction QCs and asked for agreement within seven days of one of these or an alternative nomination from PPS. On 12 December 2013, PPS’ solicitors replied objecting to be seven-day period because the Arbitration Act 1996 allowed for a 28 day period for appointment and going on to say that they did not agree any of the proposed arbitrators. On 18 December 2013 they wrote suggesting three alternative engineers. On 24 December 2013, Wales’ solicitors wrote back saying that the suggested engineers were not acceptable as arbitrators and suggested that TECBAR should alternatively be asked to appoint, saying that, if this proposal was not acceptable, an application would be made to court. Unfortunately, the solicitor dealing with the matter at PPS’s solicitors was away until 6 January 2014 and he e-mailed his opposite number saying that there would be a reply within seven days. However, due to the 28 day period called for in the Arbitration Act 1996, Wales felt it necessary to issue proceedings seeking an order appointing an arbitrator, which it did on 7 January 2014. On 13 January 2014, PPS’ solicitors agreed that the Chairman of TECBAR could appoint the arbitrator. There is thus agreement and the only issue outstanding is costs.

47.

I have formed the view that Wales should have its reasonable costs of these later proceedings paid for. Whilst I would not in any way criticise PPS or its solicitors for anything which they did or said before Christmas 2013, the letter of 24 December 2013 went unanswered. I attach no blame to the individual solicitor who must of course be entitled to some time off over Christmas but someone should have been deputed to respond particularly in circumstances in which there were dual reasons for some urgency, namely the expiry of the 28 day period under the Arbitration Act 1996 to agree upon an arbitrator and secondly the desirability of having the matter dealt with at the hearing on 16 January

2014. The total bill is £4,213.40. This was not a complicated matter in the context of the Court having to be apprised of the underlying disputes between the parties through the first set of proceedings. In my judgement a proportionate amount for such costs is £3,000.

Decision

48.

There will be judgment for PPS, the Defendant, on the Part 8 proceedings brought by Wales in relation to the enforceability of Adjudication Nos. 2 and 3. There will be judgement by consent for Wales in relation to the Arbitration Claim such that the Chairman of TECBAR should appoint the Arbitrator.

49.

So far as costs of the Part 8 proceedings are concerned, PPS' solicitors submitted a bill of £19,387.25 for summary assessment. This was challenged on the basis at least that the attendances on documents of just over 12 hours were excessive. In my view, overall an appropriate and proportionate allowance is £16,000; the collated documents were relatively minimal, the proceedings have been dealt with expeditiously and over a short period of time and the hearing was less than 2½ hours.

50.

Allowing for the £3,000 which I have awarded to Wales in respect of the Arbitration Claim, a net sum in relation to costs of £13,000 should be paid by Wales to PPS within 14 days.