Neutral Citation Number: [2015] EWHC 2915 (TCC)

Case No: HT-2015-000256

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

Royal Courts of Justice

Rolls Building, 7 Rolls Buildings

London EC4A 1NL

Date: 23 October 2015

Before :

MR. JUSTICE EDWARDS-STUART

- -

Between :

Imperial Chemical Industries Ltd **Cla**

- and -

Merit Merrell Technology Ltd **Defe**

- -

- -

Ms. Finola O'Farrell QC (instructed by **Clyde & Co LLP**) for the **Claimant**

Justin Mort Esq, QC (instructed by **Mills & Co LLP**) for the **Defendant**

Hearing date: 9th October 2015

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Judgment

Mr. Justice Edwards-Stuart:

Introduction

1.
This is an application by the Claimant, Imperial Chemical Industries Ltd ("ICI"), to enforce the decision of an adjudicator made on 15 June 2015. That decision was in the following terms:

"1. Imperial Chemical Industries Limited is entitled to the documents listed in Schedule 1 of the Notice of Adjudication and as repeated at Appendix 1 of this Decision.

2. I make no order for delivery up by Merit Merrell Technology Limited to Imperial Chemical Industries Limited.

3. Merit Merrell Technology Limited shall be responsible for the Adjudicator's fees in the sum of **£17,690 + VAT** . On Imperial Chemical Industries Limited paying in full the total Adjudicator's fees

then Merit Merrell Technology Limited shall reimburse to Imperial Chemical Industries Limited the total of the Adjudicator's fees forthwith."

2.
By way of enforcement ICI seeks a declaration in the terms of paragraph 1 of the Adjudicator's Decision and an order for payment of the Adjudicator's fees in accordance with paragraph 3 of the Decision. In addition, ICI seeks delivery up of all the documents listed in Appendix 1. The first and third parts of the relief claimed are opposed on the ground that the adjudicator had no jurisdiction to reach the decision he did. The second part of the relief claimed is resisted not only on that ground but also on other grounds, the principal one being that the Court cannot by way of enforcement make an order that the adjudicator expressly decided not to make.

3.
This was the second decision made by the same adjudicator ("Adjudication No 2"). Since then, he has made a third decision on a further referral by the Defendant, Merit Merrell Technology Ltd ("MMT"), but his decision in that case - in favour of MMT on a dispute as to which party terminated the contract - is not before the court.

4.
MMT contends that in Adjudication No 2 the adjudicator was nominated by the wrong nominating body and, further, either that ICI made contradictory submissions about which the procedural rules applied to the adjudication or that the adjudicator himself did not adopt the procedure stipulated by the contract. Each of these two factors, it submits, is sufficient by itself to make the decision invalid.

5.
ICI submits that the adjudicator had the jurisdiction to make the decision that he did and, further, that the only practical way in which to give effect to his first declaration is to make an order for delivery up of the documents.

6.
On the application before me ICI was represented by Ms. Finola O'Farrell QC, instructed by Clyde & Co, and MMT was represented by Mr. Justin Mort QC, instructed by Mills & Co.

The background

7.
MMT, a process engineering contractor, entered into a contract with ICI for the installation of Steelwork and Tank Works at ICI's new paint processing plant in Ashington, Northumberland. The contract was made on the basis of an amended NEC3 form of contract. The initial contract sum was for just under £2 million. It is not in dispute that during the course of the work MMT was instructed to carry out a great deal of extra work. MMT asserts that the value of its works is in excess of £23 million.

8.
In due course disputes arose about the quality of the welding carried out by MMT and as to the value of MMT's work. These resulted in a referral to adjudication in January 2015 by MMT ("Adjudication No 1") in which it claimed about £7,500,000 following service of an Interim Payment Notice on 21 November 2014. The adjudicator decided that ICI had not served a valid Payment Notice with the result that MMT was entitled to the sum claimed.

9.

In that adjudication the request for an appointment of an adjudicator was made to the Chartered Institute of Arbitrators ("CIArb"). In its Adjudication Notice MMT's solicitors, Mills & Co, said this:

"We note that the Contract Data Part One identifies the Adjudicator Nominating Body as The Chartered Institute of Arbitrators but Appendix 2 refers to the Nominating Body as The Royal Institution of Chartered Surveyors. Unless you advise otherwise by return we will be applying to the Chartered Institute of Arbitrators for the nomination of an Adjudicator."

ICI's solicitors, Clyde & Co, responded to this letter by asserting that TeCSA was the nominating body under the contract. In the event, the adjudicator was appointed by CIArb and the adjudicator recorded that there had been no challenge to his jurisdiction by ICI. So far as the rules for the adjudication are concerned, the Option W2 procedure was adopted by the adjudicator, apparently without objection from either side.

10.
During the course of that referral the contract was terminated. As I have already said, that gave rise to a third adjudication ("Adjudication No 3"). The same adjudicator was appointed by the same nominating body and the adjudication was conducted in accordance with the Option W2 procedure. Although I have not seen the decision, I understand that the adjudicator found in favour of MMT on the termination issue.

11.
The relevance of the termination is that it gave rise to an argument by MMT in Adjudication No 2 that it was not obliged to perform any further obligations under the contract, at least so far as the provision of documents was concerned, because it was discharged from doing so by the termination.

The relevant terms of the contract

12.
The contract, that was signed as a deed on 18 December 2012, set out the documents that formed part of it. They were as follows:

Invitation to tender letter.

The instructions to tenderers ("ITT").

This form of tender.

The Contract Data part one (and all Annexes)

Contract Data part two.

The form of agreement.

The Works information.

The Site information.

The scope of works, specifications and drawings provided by the Project Manager.

Agreed technical and commercial queries provided and authorised by the Project Manager.

The documents ran to nearly 400 pages.

13.

Page 3 of the ITT included the following, under the heading “Secondary Option Clauses”:

“This Engineering and Construction Contract conditions of contract are the core clauses, dispute resolution Option W2 and the clauses for Secondary Options X2, X4, X7, X13, X16, Y(UK)2, Y (UK)3, X18 and Z of the NEC3 Engineering and Construction contract June 2005 (with amendments June 2006 and September 2011) as amended by the Additional Conditions of Contract (Option Z).”

14.
About two months later, on 11 February 2013, the parties entered into a Memorandum of Agreement, which consisted of a schedule of amendments to the contract. It was signed by Mr. Masterson, the Commercial Director of MMT on 11 February 2013. One of the clauses amended by that schedule was Option W2.

15.
Option W2 is the Dispute Resolution provision in the NEC 3 contract. In its original form it looks like this:

“ **Option W2**

Dispute resolution procedure (used in the United Kingdom when the Housing Grants, construction and Regeneration Act 1996 applies) .

Dispute resolution W2

	W2 .1	(1) A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator . A Party may refer a dispute to the Adjudicator at any time. (2) In this Option, time periods stated in days exclude Christmas Day, Good Friday and bank holidays.
The Adjudicator	W2 .2	(1) The Parties appoint the Adjudicator under the NEC Adjudicators Contract current at the starting date . (2) The Adjudicator acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator. (3) If the Adjudicator is not identified in the Contract Data or if the Adjudicator resigns or becomes unable to act • the Parties may choose an adjudicator jointly or • a Party may ask the Adjudicator nominating body to choose an adjudicator The Adjudicator nominating body chooses an adjudicator within four days of the request. The chosen adjudicator becomes the Adjudicator. ”

The procedure goes on to provide time limits for certain steps to be taken, the powers of the adjudicator and so on. The Contract Data contained a provision stating that the Adjudicator nominating body was CIArb.

16.
In Schedule 1, which contains the Z clauses, page 43 is in the following form:

“ **DISPUTE RESOLUTION OPTION**

Option W2	Dispute resolution procedure (used in the United Kingdom when the Housing Grants, Construction and Regeneration Act 1996 applies)

Delete and replace with ‘The Contractor and the Employer acknowledge and agree that all Disputes shall be resolved in accordance with Appendix 2’.”

17.
Appendix 2 included the following:

[APPENDIX 2

Dispute Resolution Procedure

1. Disputes

Any Dispute shall be resolved in accordance with this Appendix 2.

2. Consultation

The Contractor and the Employer shall (without prejudice to any right they may have to refer any Dispute to adjudication in accordance with the Housing Grants, Construction and Regeneration Act 1996 (“Act”) or any replacement or amendment to such Act) consult in good faith in an attempt to come to an agreement in relation to the Dispute. Any Dispute shall be resolved in accordance with this Appendix 2.

3. Assistance to Dispute Resolution

...

4. Adjudication

Without prejudice to paragraph 2 above (Consultation) and save as set out below, the Contractor and the Employer acknowledge and agree that any adjudication shall be carried out in accordance with [the Adjudication Rules - 2011 Version 3.2 of the Technology and Construction Solicitors Association (‘Rules’) provided that rule 1.1 of the Rules shall not apply].

5. Nominating Body

The Parties acknowledge and agree that the nominating body in respect of any adjudication shall be the [Royal Institution of Chartered Surveyors].

...”

18.
Thus Appendix 2 provided, albeit in each case in square brackets, that the rules applicable to the adjudication were to be the TeCSA rules and that the nominating body was to be the Royal Institute of Chartered Surveyors (“RICS”). In the absence of Appendix 2, the rules applicable would have been those set out in Option W2 and the nominating body would have been CIArb.

19.

The Schedule of Amendments to the Contract which, as I have already mentioned, was signed on 11 February 2013, stated that it was to supersede all other provisions contained within the Contract. Under the heading "Dispute Resolution Option" were these words:

"Option W2 - Add new sentence 'Notwithstanding any provisions to the contrary, this contract is deemed to be a "construction contract" within the meaning of Part II of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009'."

20.
It is common ground that this schedule of amendments overrides the Option Z clauses in Schedule 1. It gives rise to an important issue as to the precise effect of the words on page 43 of Schedule 1, the Dispute Resolution Option, "Delete and replace with ...". The question is: does the verb "Delete" require the deletion of Option W2 in its entirety, or just the wording of Option W2, so that the heading "Option W2" and the reference to the 1996 Act remain?

21.
If the reference to Option W2 is deleted in its entirety, page 43 would then look like this:

" **DISPUTE RESOLUTION OPTION**

The Contractor and the Employer acknowledge and agree that all Disputes shall be resolved in accordance with Appendix 2."

22.
The relevance of the point is this. If page 43 is in this form, then there would be no clause entitled Option W2 to which the additional wording set out in the Schedule of Amendments could be added. A possible result of this would be to render this amendment pointless.

23.
However, an alternative approach is that the effect of the Schedule of Amendments is to reinstate the original wording of Option W2, together with the new sentence. This would give the provision a purpose. The additional wording would be added to the end of the first two lines of the heading to Option W2 (just after the reference to the 1996 Act). In other words, the effect would be to preserve the original Option W2 but with the addition of the further words.

24.
This is a very short point of construction. It is not in dispute that if there had been no reference to the Dispute Resolution Option in the Schedule of Amendments, then the effect of page 43 in Schedule 1 would have been to substitute the wording that I have set out above applying the procedure in Appendix 2.

Analysis

25.
In my view it is most unlikely that the parties, as reasonable businessmen, would have intended the amendment in relation to Option W2 to have no purpose at all.

26.
Mr. Mort submitted that the effect of the additional wording on page 43 is that, in the absence of the Schedule of Amendments, page 43 should be read as if it were in the following form:

“**DISPUTE RESOLUTION OPTION**

Option W2	Dispute resolution procedure (used in the United Kingdom when the Housing Grants, Construction and Regeneration Act 1996 applies)

The Contractor and the Employer acknowledge and agree that all Disputes shall be resolved in accordance with Appendix 2.”

It is to be noted that this involves deleting nothing on page 43 in its original form, it simply incorporates Appendix 2 as the new wording of Option W2 in place of the original.

27.
MMT’s case is that following the agreement to the Schedule of Amendments, Option W2 should look like this (see paragraph 18 of its Rejoinder in Adjudication No 2):

“ **DISPUTE RESOLUTION OPTION**

Option W2	Dispute resolution procedure (used in the United Kingdom when the Housing Grants, Construction and Regeneration Act 1996 applies)

The Contractor and the Employer acknowledge and agree that all Disputes shall be resolved in accordance with Appendix 2.

Notwithstanding any provisions to the contrary, this contract is deemed to be a ‘construction contract’ within the meaning of Part II of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009.”

28.
The difficulty with this argument is that page 43, in its original form, does not read “Delete the wording of W2 and substitute …”. In my view, in the absence of any stated object, the verb “Delete” must, as a matter of construction, refer to the text set out above it (apart from heading “Dispute Resolution Option”, which obviously remains applicable). Thus it deletes the heading “Option W2” and the reference to the 1996 Act and, consequently, the full wording of Option W2 as well. If this is right, then there would no longer be any reference to Option W2 in Schedule 1.

29.
Accordingly, it follows that the effect of the requirement in the Schedule of Amendments for the addition of new wording to Option W2 must be to restore the original Option W2 clause otherwise the new wording could not be added to it.

30.
This has the result that if no adjudicator is named in the Contract Data, then it is the nominating body identified in the Contract Data, namely CIArb, which becomes the nominating body under the contract. Thus in Adjudication No 2 the Adjudicator was validly appointed. Further, the applicable procedure governing the adjudication was that in Option W2.

31.
However, if I am wrong about this, and Appendix 2 applies, I need to consider what, if anything, is the relevance of the square brackets around the title of the nominating body in clause 5 of Appendix 2. It is common ground that the contract documents include the ITT, which in turn include a form of Memorandum of Agreement which was drafted with a view to being executed as a deed. In fact, it was not executed as a deed and simply forms part of the ITT as a document.

32.
Mr. Mort points out, correctly, first that the Memorandum of Agreement states in terms that, amongst other provisions, Option W2 is incorporated into the contract but as amended by the additional conditions of contract set out in schedule 1, and referred to as Option Z. Second, Mr. Mort referred to the provisions in the Memorandum of Agreement by which it, together with Option Z, has the highest priority in the hierarchy of documents and, in particular, takes precedence over the Contract Data.

33.
In these circumstances, had the nominating body in Appendix 2 not appeared in square brackets, Mr. Mort would be on unshakeable ground in submitting that the RICS, and not CIArb, was the nominating body. He submitted that the square brackets could be treated as mere surplusage and therefore ignored.

34.
I see no reason why the square brackets should be ignored (save for the redundant single square bracket in the title which must be there by mistake). There are several places in which Appendix 2 uses ordinary brackets and so the insertion of text in square brackets must, in my view, be deliberate. In my experience, square brackets are conventionally used in one of two ways. [1] First, when quoting extracts from judgements or other sources square brackets are often adopted to substitute a description of a person or thing in place of the name used in the original text. For example, when citing an extract from a judgment which refers to, say, “the submissions of Ms X”, it is common to replace counsel’s name with “counsel for the claimant/defendant” in square brackets. This enables the reader to make sense of the passage without the need for an explanation that X was counsel for the claimant/defendant.

35.
Second, when drafting documents it is common to put words in square brackets if they are intended to be provisional or the subject of further discussion. In my view, that is how the square brackets have been used in Appendix 2. So, in the case of the nominating body, it is to be the RICS unless another nominating body has been specifically identified elsewhere in the contract documents. I consider that this is so notwithstanding the fact that Appendix 2 takes precedence over the Contract Data. The RICS is, in effect, the default setting to be adopted if no other body has been identified.

36.
So if Mr. Mort is correct in his submission that Appendix 2 contains the dispute resolution procedure that is incorporated into the contract, that does not mean that the RICS is the nominating body. I consider that the clear choice of the CIArb in the Contract Data overrides the reference in square brackets to the RICS in Appendix 2.

37.
It follows, therefore, that the adjudicator was correctly appointed in Adjudication No 2 and so the challenge to the validity of his decision on this ground fails.

38.
I turn now to the question of which rules applied to the adjudication. If I am right about the incorporation of Option W2, this question answers itself because the only rules are those in Option W2. I therefore consider this question on the hypothesis that, contrary to the conclusion that I have already reached, Appendix 2 contains the applicable dispute resolution procedure.

39.

In both the Notice of Adjudication and the Referral Notice, ICI referred to Option W2 of the Contract and set out the words that appear on page 43 of the contract documents that I have quoted above: namely that disputes were to be resolved in accordance with Appendix 2. In both notices ICI went on to recite that Appendix 2 provided that either party had the right to refer any dispute to adjudication in accordance with the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009). In addition, the notices stated expressly that the Contract Data Part 1 provided that the adjudicator nominating body was the Chartered Institute of Arbitrators. There was no reference in either notice to the application of any particular set of rules.

40.
In its Response (at paragraphs 4-9), MMT challenged the jurisdiction of the adjudicator. It noted that the adjudicator had referred to the procedure in Option W2 as that applicable when making his directions, because that was the inference to be drawn from the adjudicator's letter of 7 May 2015 in which he said: "Accordingly the contract allows 14 days for the Response to be served". It was then asserted that the adjudicator's reference to the contractual provision for service of the response in 14 days therefore appeared to be incorrect.

41.
However, MMT went on to point out that Appendix 2 required, in the event of any dispute arising, that the parties were to consult in good faith in an attempt to come to an agreement in relation to the dispute. It then made the following submission:

"The inevitable conclusion appears to be that the parties' right to adjudicate is not contractual but statutory, so that part I of the scheme applies (and not the NEC procedure and not the TeCSA procedure)."

42.
In its Rejoinder, MMT submitted that ICI's original case was that Appendix 2 governed the adjudication and that that was the position in both the Notice of Adjudication and the Referral Notice, whereas now ICI was submitting that Option W2 contained the relevant procedure.

43.
In a letter to the adjudicator dated 1 June 2015 Clyde & Co, ICI's solicitors, contradicted the suggestion that ICI had contended (or was contending now) that the TeCSA rules applied to the adjudication. Further, they submitted that the right to refer a dispute to adjudication under Appendix 2 was not displaced by the consultation provision. They went on to say that it appeared to be common ground that the Option W2 procedure had been used to date in the adjudication.

44.
MMT's solicitors, Mills & Co, also wrote to the adjudicator on 1 June 2015 (a letter that appeared to have crossed with Clyde & Co's letter) in which they repeated that their client's position in relation to jurisdiction was reserved. They noted that the current position was that ICI was contending that Option W2 applied whereas that it was MMT's primary case that part I of the scheme probably applied. The letter then went on to say:

"2. We do not believe that the adjudicator in this case has jurisdiction to decide his jurisdiction. We acknowledge that the TECSAR [sic] v3.2 rules envisage this. However it is (now) ICI's stated case that the original NEC 3 clause W2 applies whereas it is MMT's primary case that part I of the Scheme probably applies. So neither party supports the TECSAR [sic] regime, as things stand.

3 In any event the adjudication was initially conducted (by the adjudicator) on the basis of the NEC3 procedure, although the referring party purports to have commenced the adjudication under the appendix 2 procedure, notwithstanding its present position. As we have indicated before we do not believe that it is possible to change procedures mid-adjudication."

45.
Submissions to very much the same effect were made to me by Mr. Mort. In his decision the adjudicator rejected MMT's submission that Appendix 2 was not compliant with the 1996 Act and then went on to record that both parties "say" that the TeCSA rules do not apply. He referred expressly to the letter from Mills & Co dated 1 June 2015. In his Decision the adjudicator said that the Option W2 provisions had been used in the adjudication.

46.
Mr. Mort referred me to three authorities for the proposition that application of the wrong rules during an adjudication could result in the adjudicator lacking jurisdiction. The first was a decision of mine in Twintec Ltd v VolkerFitzpatrick Ltd [2014] EWHC 10 (TCC), at paragraph 60. In my judgment, that case does not assist Mr. Mort. There, both I and the Court of Appeal in Pegram Shopfitters v Tally Weijl [2004] 1 WLR 2082, an authority to which I was referred, were considering the validity of the appointment of the adjudicator, not the rules adopted for the conduct of the referral.

47.
The second authority was a decision of Mr. Justice Ramsey in Laker Vent Engineering Ltd v Jacobs E&C Ltd [2014] EWHC 1058 (TCC). In that case, Ramsey J said this:

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

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

48.
That was also a case where the question was whether the adjudicator had been correctly appointed. However, I accept that Ramsey J went further than I did in Twintec, because he considered the position where the adjudication had been conducted under the wrong scheme. But, for the reasons that I have already given, if the Option W2 procedure was not the correct procedure, I have found that MMT waived any objection to the fact that the adjudication was not being conducted under the TeCSA rules and that its contention that the scheme procedure should be followed was misconceived.

49.
The third authority was the decision of His Honour Judge Havelock-Allan QC in Ecovision Systems Ltd v Vinci Construction UK Ltd [2015] EWHC 587 (TCC). In that case the judge did conclude that an adjudicator has no power to determine what rules of adjudication apply if there is a dispute about those rules and the dispute affects (i.e. makes a material difference as to) the procedure for appointment, the procedure to be followed in the adjudication or the status of the decision. However,

he made it clear (at paragraph 70) that this was subject to one exception, which is that the adjudicator can inquire into his jurisdiction and make such a determination with temporarily binding effect if his conclusion coincides with the claimant's contentions as to the contractual terms and the claimant is right. However, for the reasons I have already given, I consider that there was no dispute about the correct rules to be applied in Adjudication No 2 because MMT waived any reliance on the TeCSA rules and the only other candidate, the scheme, was (correctly) rejected by the adjudicator. That left only the Option W2 procedure, which is the one that the adjudicator followed.

50.
Accordingly, I do not consider that any of these authorities affects my conclusion in this case that MMT waived any right to insist on the TeCSA rules being followed.

51.
At the hearing before me Mr. Mort did not press the submission that Appendix 2 was non-compliant with the result that the scheme applied. The obligation to consult set out in clause 2 of Appendix 2 was expressly stated to be without prejudice to any right the parties had to refer a dispute to adjudication in accordance with the 1996 Act (as amended). In my view the adjudicator was correct to hold that the obligation to consult did not affect either party's right to refer a dispute to adjudication at any time. However, since the contrary argument was not pressed before me I need say no more about it.

52.
Drawing the threads together I conclude that the position is this. No rules were mentioned expressly in either the Notice of Adjudication or the Referral Notice. However, both Option W2 and Appendix 2 were referred to in the notices. The adjudicator decided that the appropriate procedure was that in Option W2, which is what he followed. Although MMT contended that by the terms of the contract the appropriate procedure would have been that set out in Appendix 2, it submitted that Appendix 2 was not compliant with the 1996 Act so that the provisions of the scheme applied. So, on any view, MMT was either not relying on the TeCSA rules or had expressly waived the right to assert that they were the rules that applied to Adjudication No 2. It seems to me that it is what the adjudicator actually did that matters, and in this case neither party asserted that he should apply the TeCSA rules. To the extent that MMT was contending for the scheme rules, that submission was correctly rejected by the adjudicator.

53.
Mr. Mort submitted that the assertion in the letter from Mills & Co dated 1 June 2015 that neither party supported the application of the TeCSA rules had to be understood in the context of the fact that MMT was contending that Appendix 2 was not compliant with the 1996 Act. Logically, therefore, if MMT was wrong in its primary case about the application of the scheme it must have been contending in the alternative that the TeCSA rules applied. However, that is not what the letter said.

54.
Whilst I can see the theoretical basis for the submission, the plain fact is that the adjudicator, who, like all adjudicators, had to operate within a very tight timeframe, decided to follow one procedure in preference to another. That was because he concluded that the other procedure (the scheme) was not applicable. I cannot see on what basis the adjudicator could properly have followed the TeCSA rules when, as at 1 June 2015, neither side was asserting that he should do so. He applied the Option W2 rules throughout and, in the light of the positions being taken by the parties, in my judgment he was

entitled to do so. There was no breach of natural justice and no want of jurisdiction. Accordingly, this ground of challenge to the decision must fail.

The application for an order for delivery up of the documents in Schedule 1

55.
The dispute resolution procedure in this case, whether it is that in Option W2 or the TeCSA rules, provides that a decision of an adjudicator would be “enforceable” by the other party. This reflects the purpose of the 1996 Act which is to ensure that decisions of adjudicators are complied with, and the courts have held repeatedly that, where they are not, they will be enforced. See, for example, the statement of principle by the Supreme Court in Aspect v Higgins [2015] UK SE 38, at [14].

56.
In any application to enforce an adjudicator’s decision, therefore, the first question before the court is whether or not there has been compliance with the decision: see, for example, Multiplex v Mott MacDonald [2006] EWHC 20 (TCC), per Jackson J at [23] to [28]. This raises the question of what MMT had to do in order to comply with the adjudicator’s decision. In the case of the third part of the decision, the position is straightforward. It is equally straightforward in relation to the second: since the adjudicator has made no order for delivery up, MMT cannot be in breach of it.

57.
So, in the absence of any non-compliance is there any basis on which the court should make some order in support of the adjudicator’s decision? It is the first part of the decision that in my view gives rise to this question. Of course, the adjudicator has not ordered anyone to do anything. He has simply declared that ICI has a legal entitlement to the documents listed in Schedule 1. Ms. O’Farrell’s beguiling submissions really come down to this: a decision that someone is entitled to something can only be effectively enforced by an order that he or she should be given it. But in my opinion it is not as simple as that. Since the adjudicator declined to do precisely that, by ordering delivery up of any of the documents sought, the court would be going further than the adjudicator was prepared to go. Further, since in this respect there has been no breach of the adjudicator’s decision, there is nothing to enforce. On this short ground alone, therefore, I would refuse the application for delivery up of the documents.

58.
However, Ms. O’Farrell submits that the adjudicator did not order delivery up for one reason only, namely because he considered that five days was too short a period for MMT to find and assemble the documents and that no other period had been asked for. Whilst this is correct so far as it goes, it was a consequence of this conclusion that the adjudicator did not consider whether or not it would be appropriate and proportionate to make an order for delivery up of all the documents in each of the categories sought.

59.
As a matter of judicial discretion and proportionality, the court would not ordinarily order a party to a contract to deliver up documents that were unlikely to be of any use, or at least any immediate use, to the other party. As a consequence of his approach, it was not necessary for the adjudicator to consider this aspect.

60.
Ms. O’Farrell submits that plenty of time has now elapsed since the adjudicator's decision so that the five-day timetable is no longer a relevant factor. This being so, she is in effect inviting the court to

determine the issue of delivery up which the adjudicator would have had to consider if there had been no constraint in the form of the five day time limit.

61.
ICI's solicitor, Mr. Morris, gives three reasons why delivery up of the documents would be required to give effect to the adjudicator's decision and why damages would not be an adequate remedy for the failure to do so. These are:

i)
The Plant cannot be operated by ICI without the Project Documents. ICI cannot demonstrate that the Plant is safe to operate from a health and safety perspective, or that the Plant has been constructed in accordance with the relevant statutory requirements or British Standards.

ii)
The Health and Safety Executive furthermore will not permit ICI to start up the Plant without the Project Documents that ICI has sought from MMT, and to which ICI is entitled. Moreover, should there be any form of emergency on site, there is currently no Health and Safety file to be passed to emergency services to enable them to deal with any emergency at the Plant.

iii)
Finally, ICI needs copies of the Project Documents in order to carry out the necessary repairs to the defective welds that have been discovered within MMT's works, and complete the Works.

62.
The categories of document required by ICI are extensive. A copy of Schedule 1 to the Particulars of Claim is appended to this judgment. This is the same schedule that was considered by the adjudicator. By way of example, the breadth of the request can be seen from the inclusion of the following categories of document:

i)
procurement information all materials;

ii)
delivery information of all materials;

iii)
pressure testing documentation.

63.
One aspect of the dispute raised by MMT is that in relation to some of the welds the reason for their inadequacy was not bad welding but the fact that the standard of the original specification was insufficient. If in the case of parts of the plant that is indeed the case, then I would question the relevance or utility of documents recording, say, the results of pressure tests to the items of plant that may have to be replaced or, at least, re-welded in any event through no fault of MMT. There is, at the very least, a triable issue about this.

64.
A further point raised by Mr. Matthew McGrady, MMT's financial director, in a witness statement dated 15 July 2015, was that in Adjudication No 2 ICI relied on a witness statement of a Mr. Brugman. According to Mr. McGrady, in that witness statement Mr. Brugman asserted that he had seen documentation produced by MMT but:

"… the documents were in a poor state and would not have been acceptable to ICI."

65.
This evidence does not assist ICI: far from it, it casts doubt on the value to ICI of some of the documents that it is seeking. This again gives rise to a triable issue.

66.
The sparse information given by Mr. Morris in relation to ICI's need for the documents, together with the dispute about the reason for the inadequacy of some of the welds, point strongly to the conclusion that not only are there triable issues but also there does not exist sufficient information upon which the court can make a decision about the extent of the disclosure that ICI really needs. I suspect that a significant part of the documentation listed in Schedule 1 would, if provided, be of limited, if any, use to ICI. Conversely, I can understand that there may be some documents for which ICI does have an immediate need. The difficulty is that, upon the information presently available, it is impossible to know where to draw the line.

67.
From this it must follow that the court is not in a position to formulate an order for delivery up that would fairly reflect the adjudicator's declaration of entitlement, even if it would otherwise be appropriate to do so. Indeed, as I have already mentioned, even if it were possible to draw up such an order - in other words to identify the documents that ICI really needed - I consider that to make such an order would be going further than a mere declaration of entitlement would warrant.

68.
This is an application for summary judgment, so unless the position is very clear relief should be refused. This is particularly so if the relief that is sought is for specific performance or a mandatory injunction to deliver up documents: see the observations of Dyson J (as he then was) in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93, at 100.

69.
In my view the only way in which the position might be preserved, and effect thereby given to the adjudicator's declaration of entitlement, would be by way of an interim injunction requiring MMT to preserve the documents until further order so that relevant documents, if sufficiently identified, could be the subject of a more focused application for delivery up. However, ICI has not made such an application and so it would not be appropriate to grant relief in that form on this application.

70.
So far as the declaration is concerned, the question of ICI's entitlement to the documents is not one that has been explored before me on the merits. It would therefore be inappropriate for the court to make any declaration of entitlement, but what it can and should do is to declare that the adjudicator's decision is valid and binding. That means that the adjudicator's declaration of entitlement will stand unless and until it is overruled by a decision of the court made on the merits.

71.
So far as the adjudicator's decision in relation to his fees is concerned, that should plainly be enforced. ICI is therefore entitled to summary judgment for the amount of those fees, plus VAT, together with interest to date.

72.

If necessary, I will hear counsel on the precise form of the relief and any questions of costs that cannot be agreed. However, in relation to the latter I would say by way of preliminary indication that this is a case where both sides have achieved some success. ICI has established the validity of the decision and has obtained judgment in respect of the adjudicator's fees. MMT has successfully resisted the application for delivery up of the documents. Although the latter might be said to be the more significant issue, I strongly suspect that in terms of costs more time and money has been spent on the issue about the validity of the decision. In the circumstances my provisional view is that there should be no order for costs.

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[1] For present purposes I am ignoring the convention by which the numbers of paragraphs in judgments carrying the neutral citation number are put in square brackets.