Case No: HT-2016-000108
Neutral Citation Number: [2016] EWHC 1148 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 23/05/2016

Before :

SIR ROBERT AKENHEAD

(Sitting as a Judge of the Technology and Construction Court)

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Between :

J. MURPHY & SONS LIMITED **Cla**

- and -

W. MAHER AND SONS LIMITED **Defe**

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- -

Mr Simon Hughes QC (instructed by **Hawkswell Kilvington**) for the **Claimant**

Mr Edmund Neuberger (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 12th May 2016

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Judgment

1.
These Part 8 proceedings between a sub-contractor, J. Murphy & Sons Ltd (“Murphy”), and its earth shifting sub-sub-contractor, W. Maher & Sons Ltd (“Maher”) raises a short and simple but interesting point about the jurisdiction of an adjudicator, namely, where there is a dispute as to whether there has been a full and final settlement agreement between the contractual parties of the final account, whether the dispute arises “under” the sub-contract or under the alleged settlement agreement or both. I have used Maher’s Counsel’s Skeleton Argument as a basis for reciting the largely undisputed facts.

The Facts

2.
Murphy was engaged as a sub-contractor by Balfour Beatty Civil Engineering Ltd in 2013 to carry out shaft and tunnel work on what was called the Man Trunk 0178/0222 project at Trafford Park, Manchester.

3.

By a sub-sub-contract made in February 2014, Murphy engaged Maher to provide “all labour plant, material and supervision” to carry out spoil (or arisings) removal in relation to this project and in particular to piling, shaft and tunnel excavations. The sub-sub-contract was contained in or evidenced by Murphy’s Order dated 25 February 2014 which incorporated much of the NEC 3 Engineering and Construction Subcontract form (June 2005 with June 2006 and September 2011 amendments). A Payment Schedule identified 9 payments with applications between 17 November 2013 and June 2014 and corresponding payment due dates between January and August 2014. An Activity Schedule identifies what appears to be a lump sum of £406,190 for work to 3 shafts and 2 tunnels as well as 4 rates for materials “from other activities”.

4.
Option W2 for the NEC3 Conditions provided that: “Any dispute arising under or in connection with this subcontract is referred to and decided by the Adjudicator”. Part 1 of the completed Subcontract Data section identified that the TCC was to be the “Adjudicator nominating body”.

5.
Maher started work in January 2014 and made some 16 payment applications for payment until and including for April 2015. Murphy paid some £466,832, which was less than applied for. It is common ground that there were some extra works. Although Maher carried on further work pursuant to the Subcontract its later monthly payment applications for payment yielded, it is said, neither acknowledgement nor further payment. Work by Maher of removing arisings and supplying aggregate, it is said, continued for the Project until early September 2015, with the last call off for work then occurring in around September 2015.

6.
Maher submitted to Murphy what has been its final payment application (No.21) on 28 September 2015 for a gross sum of £763,980.24 with a net sum of £297,149 said to be due. Murphy, it is said, did not acknowledge or respond to this Application for Payment No.21 and did not respond to Alistair Kirk’s of Maher covering email. On 8 October 2015 Maher wrote to Murphy as follows:

“Despite efforts to contact yourselves about our outstanding payments, we still await both a reply and payment from yourselves.

Our June & July applications for payment are overdue, August is due shortly and September will be due for payment in a few weeks. As no certificates of withholding/payment notices have been issued for June & July these are now due in full.

July’s balance being £304321.00…”

7.
Maher’s claims consultants, BEA, wrote to Murphy on 3 November 2015 as follows:

“We have been instructed to act on behalf of W Maher & Sons Limited in matters arising out of their contract with J Murphy & Sons Limited under which they were to carry out spoil removal the MAN Trunk project (the Subcontract Works). Please note our interest.

A dispute exists which if not resolved within the next 14 days will be referred to Adjudication.”

8.
There followed a number of communications between Mr Meaney of Murphy contacted and Mr Kirk of Maher, by way of correspondence and by telephone, in relation to the final sum due to Maher. Maher’s

case is that in a telephone conversation on 12 November 2015 a ‘final account sum’ was agreed at £720,000. Since Maher had received £466,831, this meant a net payment of £253,169. This alleged agreement of £720,000 was subsequently confirmed in writing by email from Mr Kirk to Mr Meaney on 12 November 2015:

“Further to our discussions yesterday, we confirm out discussions that we agree to a final account sum of £720,000.00 (Seven Hundred and Twenty Thousand Pounds) as offered to bring this account to a conclusion.

Please can you arrange a payment as discussed in the next “couple of weeks” and also forward any paperwork that may also need completing for your records to prevent the payment being delayed.”

Mr Meaney replied on the same day:

“Thank you for the confirmation, I will prepare the paperwork and the associated information in the next couple of days to close out the account with an update of the exact dates.”

9.
There was no written challenge by Murphy to what Mr Kirk had written notwithstanding reminders on 25 November and 11 December 2015. No further payment was made in spite of further e-mails. On 2 March 2016 Mr Kirk emailed Murphy again, recording that Maher had been told ‘on the telephone that payment would be made on Friday 26/02/16’. Murphy’s answer was that it was awaiting sign off from head office, adding:

“I am currently awaiting for the final sign off from head office as to the payment situation and I should be able to give you a full update tomorrow. Apologies for the further delay.”

10.
Murphy by letter on 3 March 2016 wrote to Maher, not referring to any agreement relating to £720,000 but setting out its gross valuation of Maher’s work at £483,529.03. The small balance as against what had been paid to Maher has not been paid.

11.
BEA issued Maher’s first Notice of Adjudication on 7 April 2016, stating it to be “pursuant to Option W2 of the NEC 3 Engineering and Construction Subcontract” and noting that, given the reference in the Subcontract Data to the Adjudicator nominating body being the TCC, an application would be made to RICS. Mr Paul Jensen was appointed by the RICS as adjudicator and the Referral Document served. Murphy’s solicitors (“HK”) wrote to Mr Jensen on 15 April 2016 raising two jurisdictional issues and asking him to resign, firstly, because the specified nominating body was not a nominating body, there was no contractual basis for Maher to apply to RICS, continuing:

“Indeed, if a contractual adjudication provision is in any way deficient (which appears to be the case in this instance), it is trite law that the adjudication provisions contained in [the Scheme] must apply in their entirety…”

The secondly point was that Mr Jensen had no jurisdiction as a dispute in relation to the alleged settlement agreement and that it must be pursued through the Courts.

12.
Maher replied on 18 April 2016:

“The Referring Party will be pragmatic if the Respondent wishes to take this point. The Referring Party can serve a New Notice of Adjudication pursuant to the Scheme and can make a new application to RICS for nomination of an adjudicator today.”

It was also pointed out that there has been no “settlement agreement”, but the dispute concerned payment under the terms of the existing Subcontract. The Adjudicator declined to resign.

13.
Maher applied for a new appointment to the RICS, serving a second Notice of Adjudication on 19 April 2016. Although he formally resigned from his first appointment as adjudicator, Mr Jensen, as confirmed in his email of 20 April 2016 was again appointed as Adjudicator. In its second Notice of Adjudication Maher stated that the dispute was referred pursuant to the Scheme (as amended). In later correspondence, Murphy maintained the second of its previous jurisdictional challenges, which it elaborated on in its letter of 25 April 2016 and it still maintains.

14.
This second Notice of Adjudication dated 19 April 2016 was contained within a letter from BEA, on behalf of Maher, to Murphy is in the following terms, so far as is material:

“We have been instructed to act on behalf of [Maher] in matters arising out of their Sub-Contract with [Murphy]…

On behalf of our client we hereby issue formal Notice of Adjudication upon you that our client intends to refer the dispute outlined below to Adjudication pursuant to the Scheme…

The dispute that is hereby referred to adjudication is [Murphy’s] failure to make payment of the final payment.

[Maher’s] Mr Kirk and [Murphy’s] Mr Meaney in a telephone conversation on 11 November 2015 agreed the final account and the final payment. The parties agreed the final account of £720,000 in relation to [Maher’s] last interim application for payment no. 21 dated 28/09/15 in the sum of £763,980.24.

[There is then set out verbatim parts of e-mails dated 12 November 2015 in relation to such agreement]

[Murphy’s] reply can only be taken as a confirmation of the previous day’s agreement to a final account of £720,000 and that the appropriate payment would be made within days …

The parties concluded a binding agreement on the 11 November 2015. [Murphy’s] obligation arising from the acceptance of [Maher’s] off was to raise the necessary paperwork and associated information to make payment of the sum due

[Murphy] is bound by the terms of the agreement and should have at least paid the balance due…

[Murphy] did not make payment to [Maher] in accordance with the agreement evidenced.

On 3 March 2016 [Murphy] served a letter that attached an alleged Payment Notice in relation to application no.21 dated 28/09/15…[Murphy] had ignored the agreement and was now belatedly and spuriously valuing the works at £483,529.03…

[Maher] is entitled to a further payment of £253,169.00 (£720,000 less previous payments of £466,831.00) or [such] sum as the adjudicator deems reasonable.

Our client will claim interest in accordance with clause 51.3 51.4 at 2% above base rate…"

15.
On 29 April 2016, Murphy issued the current proceedings seeking declaration in effect that the adjudicator has no jurisdiction under the Scheme provisions to entertain a dispute arising out of the alleged final settlement. This is predicated on the argument that such a dispute does not arise "under" the original sub-sub-contract.

The Arguments and the Law

16.
Essentially, Murphy argues that, as the (second) Notice of Adjudication is predicated on there being a cause of action based on an allegedly binding settlement agreement, the adjudicator has no jurisdiction because there is no adjudication agreement applicable to that agreement and this disputed claim does not arise "under" the original sub-sub-contract and the alleged settlement agreement was a standalone agreement and not some sort of variation agreement. There is reliance specifically upon **McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas PLC** [2006] EWHC 2551 (TCC), [2007] BLR 92 and other cases referred to in the judgment of Mr Justice Jackson as he then was including **Shepherd Construction Ltd v Mecright Ltd [2000] BLR 489**.

17.
Maher argues that its claim, albeit related to the settlement agreement, arises "under" the original sub-sub-contract, the settlement agreement can be considered as a variation to the original sub-sub-contract and the words in the adjudication clause about "arising under or in connection with" this sub-sub-contract disputes being referable to adjudication still has effect or at least some contractual resonance and sufficiently covers a disputed claim under the settlement agreement. There is reliance on authorities and specifically on in **Quarmby Construction Co Ltd v Larraby Land Ltd** (TCC Leeds 14 April 2003), **Westminster Building Company Ltd v Beckingham** [2004] EWHC 138 (TCC), **L Brown & Sons Ltd v Crosby Homes (North West) Ltd** [2005] EWHC 3503 **and Premium Nafta Products Ltd v Fili Shipping Co. Ltd** "The Fiona Trust" [2007] UKHL 40.

18.
The starting point is the **Mecright** case, which was not reported on Bailii and I assume was an ex tempore judgment. HHJ LLoyd QC in that case was considering in an adjudication context an agreement between a main contractor and a sub-contractor:

"We, Mecright Ltd, accept the sum of £366,000 in respect of manufacture, supply, delivery and installation ... in full and final settlement of all our claims under the above contract but without prejudice to our outstanding obligations."

All or most of this was paid by Shepherd (Para.10) but Mecwright commenced adjudication proceedings claiming that the compromise agreement had been made under duress and seeking more. Shepherd sought a declaration that the adjudicator had no jurisdiction. The judge accepted that, but for the plea of duress, the compromise would have the effect of extinguishing all the disputes that existed beforehand (Para. 14). The adjudication clause related to disputes "arising under this Subcontract". The judge held (Para 17):

"In my judgment where parties have reached an agreement which settles their disputes there can thereafter be no dispute about what had been the subject matter of the settlement capable of being

referred to adjudication under [such] a provision…or otherwise for the purposes of section 108 of the Housing Grants Construction and Regeneration Act 1996…"

He continued, albeit probably obiter at Para. 16:

"…I should make it clear that in my judgment a dispute about a settlement agreement of this kind could not be a dispute under the sub-contract since the effect of a settlement agreement is one which replaces the original agreement to the extent to which it applies…A dispute about an agreement which settles a dispute or disputes under a construction contract is not a dispute under that contract. The word "under" in the Act was plainly chosen deliberately. It has been followed in this subcontract. It is not, nor is it accompanied by, words such "in connection with" or "arising out of "which have a well-established wider reach."

The **Mecright** case was one in which the issue as to whether the settlement agreement was binding did arise solely in relation to the settlement agreement itself which was said to be voidable for duress.

19.
The **Quarmby** case is reported as a headnote. HHJ Grenfell disagreed with HHJ Lloyd's approach about Section 108 saying that it should not be construed restrictively. Section 108 is in these terms:

"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

(2) The contract shall —

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

If the construction contract does not comply only with subsections (1) to (4), the Scheme is statutorily imposed. It is noticeable that there is nothing in these sub-sections expressly requiring as such nomination of an adjudicator by some outside body.

20.
In the **Beckingham** case a JCT Intermediate Form was found to be applicable with disputes arising "under the contract" referable to adjudication and after some time a "capping agreement" was reached which re-arranged retention payments, restricted liquidated damages after a certain date, identified when the defects liability period would start, provided that a certain sum was payable on account and provided that total fees would not exceed a certain figure. Thereafter, two certificates were issued which were not paid on the basis that otherwise the "cap" would be exceeded. The dispute was referred to adjudication. The adjudicator's decision was challenged on the basis of the **Mecright** case. HHJ Thornton QC said:

"That case is, however, not relevant to this one. First and foremost, the agreement of 20 February 2003 was not a settlement agreement settling all disputes or a stand alone agreement. It was clearly and clearly intended to be a variation agreement varying the terms of the underlying contract. It is to be read with and as part of that underlying contract. Furthermore, it does not settle all disputes, it merely provides a new contract sum or cap, albeit that that cap is subject to unspecified deductions. Thus, a dispute as to whether it is enforceable is one arising under the contract since its terms form part of, and are to be read with, the underlying contract."

21.
The **McConnell** case examined the authorities to date in the context of an NEC Contract containing an adjudication agreement; although not referred to in the judgment, I assume that the adjudication clause was similar to that in the current case with words such as "any dispute arising under or in connection with" the contract. A "Supplemental Agreement" was signed which settled claims to date in full and final settlement of Compensation Events and all "additional costs, losses, damages and expenses associated with carrying out the Works", reset dates for completion. The preamble said: "The terms of the Contract shall continue with full force and effect save and except to the extent to which the terms of this Supplemental Agreement modify, alter or vary the terms contained in the Contract." Disputes arose later which were referred to adjudication and jurisdictional issues were raised to the effect that there were no referable disputes under the original contract and the adjudication because the issues between the parties concerned the meaning and effect of the Supplemental Agreement which did not contain an adjudication clause. The judge considered the **Mecright**, **Quarmby** and **Westminster Building** cases. Material parts of his judgment were:

"42. Let me now stand back and review those three authorities. It seems to me that in each case the relationship between the first agreement and the second agreement was crucial. The reason why the adjudicator had jurisdiction in Beckingham was that the second agreement operated as a variation of the first agreement. The second agreement was not a stand alone agreement. Both agreements were subject to the same adjudication provisions, and, therefore, the adjudicator had jurisdiction to determine the effect of the second agreement. On the other hand, in both Shepherd and Quarmby the second agreement was a stand alone agreement, which did not incorporate and was not subject to any adjudication provision. Accordingly, in each of those cases the court analysed the second agreement in order to determine whether there was a surviving dispute which could be adjudicated.

43. With the benefit of this guidance from earlier decisions of the Technology and Construction Court, I must now turn to the present case. The crucial question to consider is the relationship between the

contract and the supplemental agreement. Mr Nissen submits that the Supplemental Agreement operates as a variation of the contract, and therefore, both are subject to the same adjudication provisions. Mr Baatz, on the other hand, submits that the Supplemental Agreement is "carved out" from the original contract. The Supplemental Agreement does not contain an adjudication clause. Matters compromised by the Supplemental Agreement ceased to be disputes referable to adjudication under the contract.

44. On this issue, I prefer and accept the submissions of Mr Nissen. In my judgment, the Supplemental Agreement operated as a variation of the original contract, and was subject to the same adjudication provisions. I have reached this conclusion for five reasons:

(1) The Supplemental Agreement varied the contract sum and the contractual completion dates. (See clauses 2.1 and 2.3 of the Supplemental Agreement).

(2) The Supplemental Agreement defined, as it had to, (a) which matters were covered by the increased contract sum and (b) which matters were not so covered and therefore may be the subject of a claim for additional payment under the terms of the original contract. (See clause 2.2 of the Supplemental Agreement).

(3) Recital C, upon which Mr Baatz placed much emphasis in argument, seems to me to support the proposition that the Supplemental Agreement varies the original contract and is not a stand alone agreement.

(4) The officious by-stander test, which Mr Baatz has invited me to apply, supports this conclusion. The contract and the Supplemental Agreement are mutually intertwined. It would not make commercial sense to have one procedure for resolving disputes under the contract and a different procedure for resolving disputes under the Supplemental Agreement. Suppose that an officious by-stander had been present on 12th December 2002 and had asked whether the dispute resolution machinery of the contract would apply to disputes under the Supplemental Agreement. Both parties would have testily turned round to the officious by-stander and said "Yes, of course".

(5) The reasoning of Mr. Justice Ramsey in L. Brown & Sons Limited v Crosby (Technology and Construction Court, 5 th December 2005) strongly supports the above analysis (see in particular paragraph 51 of Mr. Justice Ramsey's judgment).”

22.
The **L Brown** case referred to is of interest also. The adjudication clause was found to be one relating to “disputes or differences arising under, out of or in connection with the contract”. The adjudication related to various entitlements arising out of various “side agreements” later reached. Ramsey J held materially:

“51. In addition, I bear in mind that it is quite common in the construction industry for parties to enter into side or supplemental agreements which add to or vary the terms when matters arise during the course of the contract. Those agreements frequently do not have their own provisions for dispute resolution, including adjudication. If the officious bystander had asked such parties what dispute resolution methods applied, I consider that they would invariably assume that those in the underlying contract would apply. The idea that different or no provisions applied to such additional changed obligations would, in my judgment, be an impossible situation and make adjudication unworkable for such projects.

52. In this case, I consider that the side agreements fell into this category of agreement. It was necessary to have regard to the underlying Contract, in particular to see what liquidated damages had been waived. As a result, because, in my judgment, the side agreements were variations to the contract, I consider that the disputes under those side agreements would be properly categorised as disputes under the contract.

53. The phrases "out of or in connection with" are wider than "under" the contract. They cover matters which arise out of the performance of the contract and in connection with that performance. The side agreements and the disputes under them arose out of the performance of the contract or in connection with them. Therefore, even, if contrary to my view, the side agreements were separate obligations without sufficient connection to amount to variations of the contract, then disputes under those side agreements would, in my judgment, arise out of or in connection with the contract.

54. I therefore find that the dispute under the side agreements which gave rise to the sums determined in the decision of the adjudicator, were disputes under the contract, but in any event, would have been disputes arising out of or in connection with the contract."

23.
Reliance is placed on an arbitration related appeal in the House of Lords, **the Fiona Trust**, which involved a number of charterparties. There were two connected issues "first, whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery and secondly, whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause" (Para.2). The arbitration clause related to "any dispute arising under this charter". Relevant parts of the leading judgment of Lord Hoffmann are:

"5. Both of these defences raise the same fundamental question about the attitude of the courts to arbitration. Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by

misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

8. A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so.

10. There was for some time a view that arbitrators could never have jurisdiction to decide whether a contract was valid. If the contract was invalid, so was the arbitration clause…the question was put beyond doubt by section 7 of the Arbitration Act 1996:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

10. This section shows a recognition by Parliament that, for the reasons I have given in discussing the approach to construction, businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way.

11. With that background, I turn to the question of construction. Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes "arising under" and "arising out of" the agreement. In Heyman v Darwins Ltd [1942] AC 356, 399 Lord Porter said that the former had a narrower meaning than the latter but in Union of India v E B Aaby's Rederi A/S [1975] AC 797 Viscount Dilhorne, at p. 814, and Lord Salmon, at p. 817, said that they could not see the difference between them. Nevertheless, in Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63, 67, Evans J said that there was a broad distinction between clauses which referred "only those disputes which may arise regarding the rights and obligations which are created by the contract itself" and those which "show an intention to refer some wider class or classes of disputes." The former may be said to arise "under" the contract while the latter would arise "in relation to" or "in connection with" the contract. In Fillite (Runcorn) Ltd v Aqua-Lift (1989) 26 Con LR 66, 76 Slade LJ said that the phrase "under a contract" was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to Mackender v Feldia AG [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that a clause in an insurance policy submitting disputes "arising thereunder" to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.

12. I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously

regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at paragraph 17) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in section 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But section 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined."

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

Although this obviously refers to arbitration and involves questions of construction, there may well be useful analogies to adjudication.

Discussion

24.
The first issue in logic is to consider what the adjudication clauses or other arrangements were or became. The reality is that the sub-sub-contract arrangements as to adjudication were those adumbrated by the NEC standard form and the NEC arrangements are basically compliant with the 1996 Act; put another way they comply with Section 108(1) to (4) of the Act. They permit disputes "arising under or in connection with this subcontract" to be referred to adjudication. Although this goes wider than the 1996 Act, it covers what the Act calls for. The only reason why the sub-sub-contract might be said not to comply is that in the sub-sub-contract order (forming the basis of the contract between the parties) sent out by Murphy itself there was an error, which I assume was accidental, namely the adjudicator nominating body was expressed to be this court, the TCC which has no statutory function or power to appoint.

25.
Murphy's position in this case is very unmeritorious. Having made the error of identifying an ineffective adjudicator nominating body in its order to Maher (albeit not picked up by Maher at the time), it then raised the error on the first attempt at adjudication suggesting that the Scheme should apply so that, to avoid an unnecessary issue, Maher persuaded itself that it should go down the Scheme route which is what it did through its second Notice of Adjudication. That done, Murphy is then able to argue that a dispute relating to the alleged settlement agreement does not arise "under" the original sub-sub-contract, albeit Mr Hughes QC very properly conceded that a claim based on the alleged settlement would be covered by the original wording relating to what could be referred to adjudication because it would "arising under or in connection with" the sub-sub-contract". One appreciates that a consideration of the merits alone on jurisdictional issues does not resolve them but they may point to what is in law the right answer.

26.

I do not consider that Section 108(5) of the 1996 Act has the effect of avoiding the adjudication provisions in the sub-sub-contract. I raised this point with Mr Hughes QC in argument who referred me to the decisions of **Yuanda (UK) Co Ltd v WW Gear Construction Ltd** [2010] EWHC 720 (TCC) but Mr Justice Edwards-Stuart simply emphasised what Section 108(5) says:

"Where non-compliance with the adjudication provisions arises, that is to say non-compliance with section 108 of HGCRA, the position seems to me to be reasonably clear. The words of the section should be taken to mean what they say, namely that if the contract does not comply – in any respect – with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme apply. As we have already seen, the adjudication provisions in the Scheme are those contained in Part I. So if there is any non-compliance, the adjudication provisions in Part I of the Scheme are brought in – lock, stock and barrel."

27.
The adjudication provisions as such do not offend against Section 108(1) to (4). Those sub-sections do not as such require there to be a named adjudicator appointing entity. They are concerned with there having to be a "right to refer a dispute arising under the contract for adjudication under a procedure complying with" Section 108, and requirements for an adjudication notice to be given at any time, a timetable to secure appointment and referral within 7 days of the adjudication notice, for decisions within 28 days (usually), for impartiality and for initiatives by the adjudicator for ascertaining facts and law. Additionally, the contract must require decisions to be temporarily binding and for the adjudicator not to be liable save in very limited circumstances. The only possible question here is if there is no agreed adjudicator and no adjudicator appointing authority: can it be said that there was provided "a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice". As a matter of construction of the sub-sub-contract, it is clear that the parties agreed unequivocally that there could and should be adjudication and that, at least in the absence of an ad hoc agreement on a particular individual, it should be way of a responsible institution which offered that service; the obvious such body is the RICS but the ICE, the RIBA, TECBAR and TeCSA are equally responsible.

28.
It follows from this that I accept the submissions of Mr Neuberger that the adjudication clauses in the sub-sub-contract survived and it is common ground that they are broad enough to cover a dispute arising under the alleged settlement agreement because that later agreement undoubtedly arose in connection with the original sub-sub-contract.

29.
Logic suggests that the events and discussion between Mr Kirk and Mr Meaney on 11 November 2015 could fall within a number of permutations:

(a) A final and binding agreement in relation to the value of work carried out by Maher to date or to the date of Application No 21, with the net balance payable.

(b) A temporarily binding agreement to similar effect, whereby there could be a final reckoning at a later stage.

(c) A non-binding but mutual recognition that £720,000 represented an agreeable final account sum.

(d) There was no discussion let alone agreement about £720,000 being an acceptable amount.

From the evidence from Mr Kirk and Mr Meaney, there is likely to be common ground that the “single aim of the discussion was to see if the whole account could be closed off” (see Mr Meaney’ statement, Para. 14.). Although there is no explanation in these proceedings as to why Mr Meaney did not challenge Mr Kirk’s e-mail off 12 November 2015 referring to their agreement “to a final account sum of £720,000” for almost 4 months in spite of reminders, I cannot and indeed should not make any findings about this, given that sufficient factual challenge is now made.

30.
There can be no dispute that if the factual scenarios set out at (c) and (d) above apply, the claim for any sums outstanding would be referable to adjudication “under” the sub-sub-contract. The scenario at (b) is, even on the argument of Mr Hughes QC, more problematical for Murphy because agreements such as this must be reached every day on construction projects when (usually) monthly valuations are agreed between employer/contractor, contractor/sub-contractor and sub-contractor/ sub-sub-contractor. The suggestion that such agreements cannot be referable to adjudication, when one side reneges, is far-fetched and unrealistic.

31.
The commercial common sense spoken of by Lord Hoffman in the **Fiona Trust** case has a particular resonance, albeit that it relates to a contract and arbitration, in at least the following ways:

(a) Adjudication is expected to be consensual, albeit underpinned by statute such that one cannot exclude it from construction contracts and that there are basic requirements which must be incorporated (Section 108(1) to (4)).

(b) Parliament must be taken to have intended in relation to construction contracts and parties who agree to enter into them must have envisaged that there would be some socio-economic or commercial purpose for there to be adjudication. It is well known that Parliament intended to improve cash flow and a speedy, temporarily binding and relatively uncomplicated dispute resolution process, adjudication, so that the parties could know where they stood in a short period. To borrow Lord Hoffman’s words by prescient analogy Parliament and the parties “want a quick and efficient adjudication and do not want to take the risks of delay”.

(c) It is most doubtful that Parliament and the parties would want as a rational legislature and business people respectively “only some of the questions arising out of their relationship were to be submitted to [adjudication] and others were to be decided by” their chosen tribunal for the final dispute resolution. If there “is no rational basis upon which [Parliament and] businessmen would be likely to wish to have questions” about entitlement under the original contract to be “decided by one tribunal and questions about” whether some or more of claims arising under that contract had been “decided by another, one would need to find very clear language before deciding that they must have had such an intention”.

(d) “A proper approach to construction therefore requires the court to give effect, so far as the language used by [Parliament] the parties will permit, to the [policy and] commercial purpose of the arbitration clause.

(e) If there were to remain “the distinctions” between arbitration, and by analogy adjudication, clauses which require arbitration or adjudication for disputes on the one hand “under” and, on the other hand, arising “out of” or “in connection with” the underlying contract between the parties they reflect no credit upon English commercial or statute law.

(f) In adjudication cases under the 1996 Act (coincidentally the same year as the Arbitration Act) the Court “should start from the assumption that [Parliament] and the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal”.

(g) There is no logical reason for thinking that there should be any difference in meaning or application between dispute resolution clauses (or even dispute resolution arrangements adumbrated in a statutory instrument such as the Scheme) whether in arbitration or adjudication which call for disputes arising “under” the contractual or statutorily imposed dispute resolution regime to be treated jurisdictionally differently from those “arising “out of” or “in connection with” the underlying regime.

32.
In this context, I consider that the Courts at the highest level have strongly signposted a departure from such previous distinctions and that the Courts on adjudication cases should follow this direction. It follows that a dispute as to whether all or some of the alleged entitlements which one contractual party has against the other has been settled in a binding way arises “under” the original contract. That is wholly logical because what is supposedly settled is the alleged entitlement to be paid “under” the original sub-sub-contract (in this case) of Maher. It would be extraordinary and illogical if the parties here or Parliament had intended that an otherwise properly appointed adjudicator would have jurisdiction if addressing what entitlement a contractor or sub-contractor might have to be paid in all circumstances save in relation to where a dispute arises as to whether that entitlement had been settled. If Murphy was right, save by ad hoc agreement, one could never adjudicate in a construction contract on an interim or final account which had been agreed in some binding way; that makes commercial and policy nonsense in circumstances in which such agreements must occur all the time and should be encouraged and supported by retaining the right to adjudicate if one party seeks to challenge the settlement on one basis or another.

33.
It is probably unnecessary to seek to explain or distinguish the authorities upon which each part relies. The **Quarmby** and **L Brown** cases are consistent with a broader and more inclusive meaning being given to the words “Dispute under the” contract in question. **Mecright** was more concerned with whether there could be a dispute if the claim underlying that dispute had been settled, the judge in effect holding that where the only challenge was, not that the settlement agreement in that case had been reached but, whether it was voidable that dispute did not arise “under” the original agreement; the remainder of the judgment could properly be considered obiter. In any event, it does not and should not in logic apply to where the issue is whether in fact and law there was any agreement, binding or otherwise. There is of course logic in the proposition that where a claim has been unarguably settled in a binding way there can no longer be a subsisting dispute which is referable to adjudication (or arbitration); that is different to the position here. The **McConnell** case involved a review of these authorities and Jackson J did not say that the only way in which a later settlement agreement could be adjudicated upon was if it was classifiable rather than some sort of standalone agreement. In any event, he did not have the benefit of a consideration of the **Fiona Trust** case which came out a year later.

34.
If I had to decide the issue, I would have said that the alleged agreement of November 2015 was in effect a variation of the earlier agreement. It was substituting a figure as due for whatever else was due by way of resolving a claim under the sub-sub-contract (Application No. 21). If it was simply

confirming the sum actually due under the sub-sub-contract, there might be no consideration and no binding settlement contract but then the claim would be obviously referable to adjudication “under” the sub-sub-contract.

Decision

35.
It follows from the above that Murphy’s claim fails and there should be judgment for Maher. Having indicated the outcome to the parties at the end of the hearing, I dealt with costs and, there being no issue that Murphy should pay Maher’s costs, I summarily assessed those costs at £11,000.

36.
There was some discussion about whether there should be a declaration. As indicated during the oral argument, I indicated that there could be real advantages to the parties but also importantly to the adjudicator, to know the outcome. In my discretion, there should be a declaration to the following effect: the dispute set out in the notice of adjudication dated 19 April 2016 can be referred to adjudication by the adjudicator, Mr Paul Jensen, under the sub-sub-contract between the Claimant and the Defendant, evidenced by the Order dated 25 February 2014 of the Claimant to the Defendant or under the Scheme for Construction Contracts.

37.
I would be sympathetic to an application for permission to appeal, albeit only on the basis that it would be helpful for there to be an appellate decision on the issues raised and that it is arguable that previous decisions may leave some uncertainty in this arguably important area of construction law.