Case No: HT-2017-000033

Neutral Citation Number: **[2017] EWHC 723 (TCC)**

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 5 April 2017

Before :

THE HONOURABLE MR JUSTICE FRASER

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Between :

AECOM Design Build Limited **Cla**

- and -

Staptina Engineering Services Limited **Defe**

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- -

Charles Pimlott (instructed by BLM LLP) for the **Claimant**

Alexandra Bodnar (instructed by Walker Morris LLP) for the **Defendants**

Hearing date 28 March 2017

Draft distributed to parties 31 March 2017

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Judgment

Mr Justice Fraser :

Introduction and background to the dispute

1. This is a Part 8 claim brought by AECOM Design Build Ltd (“AECOM”) against Staptina Engineering Services Ltd (“Staptina”) seeking certain declarations in relation to a decision by an adjudicator dated 10 January 2017 (“the Decision”). The adjudicator was Ms Gaynor Chambers, and the Decision came as a result of the third adjudication that she conducted between the parties. The subject matter of the first two adjudications, and her decisions in those proceedings, are not relevant to the Part 8 claim. The declarations sought by AECOM in these proceedings are to the effect that certain paragraphs of the Decision (paragraphs 54 to 67) and two sentences (the second sentence of paragraph 7.2 and the second sentence of paragraph 74.2) are unenforceable. The reasons for this are said to be that, in those limited respects identified in those paragraphs and those two sentences, the adjudicator acted outside her jurisdiction and/or in breach of natural justice. AECOM does not however seek to impugn the enforceability of the Decision as a whole, merely those parts of it identified. It seeks to have those parts severed from the remainder of the Decision.

2. AECOM was the main contractor to Thames Water Utilities Ltd for certain treatment works at the Long Reach treatment works. AECOM entered into a sub-contract with Staptina dated 23 May 2014 whereby AECOM engaged Staptina to undertake mechanical installation works at Long Reach. This sub-contract was on the NEC Engineering and Construction Short Subcontract form June 2005, with amendments dated September 2011, and other bespoke amendments attached to it at Appendix 1 ("the sub-contract"). The sub-contract works were commenced by Staptina, and the first adjudication concerned a dispute in relation to the validity of a Pay Less notice in respect of Application No.17. The decision in the first adjudication was dated 18 March 2016. Thereafter, by a letter dated 30 March 2016 AECOM terminated its sub-contract with Staptina ("the Termination Letter"). The Termination Letter stated that the termination was pursuant to Clause 90.3 of the sub-contract. It read "we terminate the Contract pursuant to Clause 90.3 – final sentence – Reason 5". The relevant sub-contract terms are dealt with below.

3. The Termination Letter also stated, amongst other things, as follows:

"Termination of the Contract does not affect Staptina's ongoing obligation to correct Defects. A list of Defects as at the date of this letter is attached as Appendix 2 to this letter. You are fully aware of these Defects and have been requested to return to site on numerous occasions to carry out Defect correction. This includes, without limitation, requests made on; 29 February 2016, 08 March 2016, 18 March 2016, 25 March 2016.

If these Defects are not corrected within two (2) weeks of the Termination Date the Defects will be corrected by a third party. Pursuant to Clause 42.1 of the Contract you will be responsible for these third party costs."

A second adjudication followed this, and this concerned a disputed entitlement by AECOM to make deductions from the gross valuation of Staptina's works, those deductions being for delay damages and the absence of final documentation. The decision in that adjudication was dated 18 July 2016. Both the first and second adjudications were conducted by Ms Chambers.

4. Thereafter, the parties remained in dispute about other matters. Staptina appointed a company of construction consultants, BEA, to act on its behalf and in a letter dated 28 October 2016 BEA wrote to AECOM setting out its involvement. It also issued an application "for payment of the amount due on termination". The letter from BEA continued:

"On the 30 March 2016, your company served a termination certificate pursuant to 'Reason 5'. As your company, did not terminate for reasons 1, 2, 3 or 4 then there is no entitlement to deduct costs for your company completing the works, see clause 92.2".

BEA also provided a calculation and stated that a net amount was due to Staptina of £547,105.54, after taking account of the value of previous payments made by AECOM, which amounted to just over £2.02 million. The calculation was provided on a separate sheet headed "The Amount Due on Termination 30 March 2016", and identified in conventional fashion (although at a high level) the sub-contract work value and certain Compensation Events, which demonstrated how the overall figure was calculated.

5. The reply to that letter by AECOM is important because it is relied upon by Ms Bodnar for Staptina as part of her submissions about how the dispute referred to adjudication should be construed. In a lengthy response dated 18 November 2016, with accompanying appendices, AECOM set out its

assessment of the application for payment brought by BEA on Staptina's behalf. This assessment did not accept that the amount advanced by BEA was correct. The following passages are relevant:

1. In one section, headed "Staptina Outstanding Works and Defects assessed by AECOM" it was said that Staptina had been notified on 14 April 2016 "that Staptina had failed to return to site to correct the notified Defects and outstanding works. In accordance with the terms of the Sub contract the costs of these works have been assessed by [AECOM]. These are further detailed in Appendix 3".

2. In a section headed "The application for payment dated 28th October 2016 and AECOM valuation" it was stated "Our intention to pay less is based on our valuation of the Subcontract Works; your entitlement to financial adjustments for Compensation Events (CE); our assessment of delay and prolongation costs, our entitlement to deduct Delay Damages, our entitlement to deduct the cost of Defects not rectified".

3. In Appendix 3, AECOM had identified a number of defects. Three columns appear in the appendix against each entry above a sub-heading "defects". Three other columns appear above another sub-heading, "outstanding works". Each set of three columns has the same entries – "Forward", "DCS" and "AV".

6.
I was told at the hearing of the Part 8 Claim that Forward and DCS relate to sub-contractors' charges or costs to do each item of work, and are the names of different sub-contractors. AV means the average of those two charges or costs by each of those companies to arrive at an average price for the work said to be required to correct each particular defect. These different figures lead to a total for defects, namely an average, of £220,622 which appears at the foot of the final column for defects on the last page of Appendix 3.

7. The letter concluded with an invitation from AECOM to Staptina to reassess its claim, and in certain circumstances, also to provide further particulars. The parties could not agree and BEA, acting for Staptina, issued a Notice of Adjudication dated 24 November 2016.

The adjudication

8. The third adjudication in the series then commenced. There is in fact currently underway a fourth adjudication, but that does not affect the matters before the court on this application, although that adjudication has certain peculiarities to which I will return later in this judgment. That adjudication is before another adjudicator, Mr Wood, and is not before Ms Chambers. The Notice of Adjudication in the third adjudication was from BEA on behalf of Staptina, was addressed to AECOM, is dated 24 November 2016 and states the following, inter alia:

"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 clause 93 of the NEC Engineering and Construction Short Subcontract.

The dispute between our client and yourself that is hereby referred to adjudication relates to whether you can make any deductions from our client following your termination of our client's employment under the Sub Contract on 30 March 2016.

The dispute arose on or before 18 November 2016 when, by your letter of that date, you notified our client of your assessment of our client's termination account and that you intend to pay less than the

sums applied for because, amongst other things, of your alleged entitlement to deduct the cost of Defects not rectified.

On a proper construction of the amount due on termination pursuant to Reason 5 (your reason for termination of our client's employment under the Sub Contract) you are not entitled to deductions for the cost of Defects or for any other reason.

The Referring Party's claim is for a declaration that following termination pursuant to Reason 5 of the Sub-Contact the Respondent was/is not entitled to make any deductions against the Referring Party's termination account for alleged Defects not rectified or at all, or such declaration as the Adjudicator deems proper".

9. In view of the court's experiences of some other adjudications, in which what might be called tactical manoeuvring by the parties takes place on a considerable scale, this adjudication then proceeded relatively smoothly. However, it would not be correct to say that tactical manoeuvring was wholly absent. The adjudicator was contacted and her availability was confirmed. She stated to the parties in an e mail dated 28 November 2016 that she could accept the appointment subject to the effect of the forthcoming Christmas/New Year break. She indicated that she could issue her decision by 22 December 2016 if the matter were straightforward, but if it were not, she would need an extension "to say Friday 6 January". BEA responded by saying that Staptina considered the matter was straightforward, but if AECOM did not agree to what was called a "stay between the 23/12 to 3/1" then Staptina would agree a 14-day extension. The solicitors acting for AECOM, BLM Law, sent an e mail to the adjudicator dated 29 November 2016, timed at 16:04 and explained:

"It might assist if I explain that on Friday of last week I requested clarification of the matters that Staptina wishes to refer to adjudication (and reserved AECOM's position in respect of jurisdiction pending receipt of such clarification). Staptina did not respond to that request and I repeated it today because, understandably, AECOM wishes to know the subject matter of the proposed adjudication before it agrees to a particular timeframe and considers the implications of a 'stay' for Christmas." The e mail went on to explain that the Referral had now been received, would be reviewed, and "in principle AECOM is not averse to your proposal and if this can be sensibly adopted for this particular matter I do not foresee any objections".

10. I am not sure how "clarification of the matters that Staptina wishes to refer to adjudication" – with or without a reservation as to her jurisdiction – was required by AECOM in order properly to consider agreeing a slightly different timescale within which the adjudicator was required to give her Decision. Further, given AECOM had the Notice of Adjudication, any lack of clarity cannot have been particularly marked, if there were any in reality at all. It does not appear to me to be unclear what dispute was being referred. To quote from the Notice, the following are relevant:

1. The dispute "relates to whether you can make any deductions from our client following your termination of our client's employment under the Sub Contract on 30 March 2016."

2. The date the dispute arose was stated as being "on or before 18 November 2016".

3. The reason for the dispute was that AECOM had stated that it intended "to pay less than the sums applied for because, amongst other things, of [AECOM's] alleged entitlement to deduct the cost of Defects not rectified."

4. Staptina's position on this point was that "on a proper construction of the amount due on termination pursuant to Reason 5….[AECOM] are not entitled to deductions for the cost of Defects or for any other reason."

5. The relief sought was "a declaration that following termination pursuant to Reason 5 of the Sub-Contact [AECOM] was/is not entitled to make any deductions against [Staptina's] termination account for alleged Defects not rectified or at all, or such declaration as the Adjudicator deems proper".

11. Clause 93.3(6) of the sub-contract imposed a time limit on production of a decision by an adjudicator within four weeks of the referral, which could be extended by up to two weeks with the consent of the referring party (or by any other period if that is agreed by the parties). Accordingly, the time scale suggested by Ms Chambers, giving her until 6 January 2017, did not require consent of AECOM or its solicitors. Staptina could have simply consented to the extra two weeks available for the production of a decision under that clause. However, even if the use by BEA of the phrase "or for any other reason", or the phrase "or at all" in the declaration sought did seriously lead to the need by AECOM for clarification about the dispute which was being referred (which I doubt) the Referral dated 29 November 2016 was promptly served by BEA. This document was headed "Referral Document Adjudication 3".

12. A further e mail was then sent on 30 November 2016 at 16:46 by AECOM's solicitors BLM Law which stated as follows (again, I only reproduce the relevant part of the e mail):

"I have now considered the Referral Notice and note in particular paragraphs 6, 14 and 15 and the decision sought at paragraph A, in line with the first paragraph on the second page of the Notice of Adjudication. (I take the view that paragraph B is superfluous and in any event cannot alter the scope of the Notice of Adjudication). On that basis, I understand that the dispute that Staptina wishes to refer is indeed a question of contractual interpretation as Staptina suggests, namely whether, as a matter of principle, following a termination under clause 90.3 for reason 5 the Contractor is entitled to take account of Defects in calculating the amount due under clause 92. (I presume that the capitalisation of the term "Defects" in the Referral Notice is an indication that Staptina is adopting the contractual definition).

If I have misunderstood Staptina's intentions, I should be grateful if [BEA] would confirm the correct position. If not, then I am inclined to agree with him that this matter raises a question of principle that should be capable of disposal on or before 22 December 2016. On that basis, AECOM is happy to agree to your appointment on the basis suggested in your e mail at 12:53 on 28 November 2016."

(emphasis added)

The reference to "Referral Notice" is the correct description of the document headed "Referral Document Adjudication 3" and nothing turns on that slightly different terminology.

13. There are five parts of the Referral Notice referred to in that e mail and in order to understand the parties' arguments in these proceedings, it is necessary to set them out.

1. Paragraph 6 stated: "The Referring Party seeks a decision that it is entitled to a declaration that following termination pursuant to Reason 5 of the Sub Contract the Respondent was/is not entitled to make any deductions against the Referring Party's termination account for alleged Defects not rectified or at all, or such declaration as the Adjudicator deems proper".

2. Paragraph 14 stated: “Following well-known principles of contractual interpretation, the Referring Party contends that the meaning of these provisions is clear: if the Respondent chooses to terminate under Reason 5 the Referring Party does not, indeed, cannot return to site and the Respondent is not entitled to make any deductions of any kind from the Referring Party.”

3. Paragraph 15 stated: “The Respondent had a choice of which termination Reason to use and it chose Reason 5; if the Respondent wanted to make any deductions from the Referring Party it could have chosen to terminate under Reasons 1 to 4 which, pursuant to clause 92.2. clearly would entitle it to make deductions”.

4. Paragraph A was the first declaration and stated that Staptina sought: “A declaration that following termination pursuant to Reason 5 of the Sub-Contract the Respondent was/is not entitled to make any deductions against the Referring Party’s termination account for alleged Defects not rectified or at all, or such declaration as the Adjudicator deems proper.”

5. Paragraph B stated that Staptina sought: “Such other relief as the Adjudicator deems proper”.

Whether the writer of the e mail was correct and Paragraph B was “superfluous” or not, Paragraph A made it clear that the relief sought did not attempt to confine the Adjudicator to the making, or not making, of only one particular declaration.

14. The adjudication then proceeded, with AECOM serving a Response dated 9 December 2016; Staptina a Reply dated 12 December 2016; and AECOM serving a Rejoinder dated 16 December 2016. Ms Chambers then produced the Decision dated 10 January 2016.

15. In the Decision, she considered the matter of principle which had been referred to her for determination. It was clearly understood by the parties and the adjudicator that the dispute concerned the principle of deductions, and not the actual calculation(s) in terms of how much money could be deducted for each, if AECOM’s case were successful, and deductions were permitted. Staptina’s case was that no deductions were permitted at all, because Staptina did not have the opportunity to correct such alleged defects as were present. The Decision stated:

“31. All that is referred pursuant to the current Notice is the underlying principle, namely whether or not termination for convenience pursuant to Reason 5 leads to a right in principle for AECOM to make the two relevant deductions from Staptina’s application.

32. However, I am empowered to decide how the sums to be deducted are to be assessed in the event that I find that deductions can be made, rather than simply stating that some form of deduction can be made in principle and no more.”

16. She decided that AECOM were in principle entitled to make deductions, but that those deductions must be confined to the sum it would have cost Staptina to remedy the relevant Defect either before Completion or during the defect correction period. The relevant parts of her Decision are as follows:

“58. Clauses 40 to 43 deal with Defects, and provide that the Subcontractor is to correct Defects before Completion.

59. After Completion, the Subcontractor has a time period up to the end of the defect correction period to correct a Defect. It is only if the Subcontractor has not corrected a notified Defect within its defect correction period that the Contractor is to assess the cost of having the Defect corrected by other people and the Subcontractor is obliged to pay this amount.

60. In order to address this issue, I need to consider who is at fault in this instance. Had the termination been for Reasons 2, 3 or 4, Staptina would have been at fault (on the assumption that the termination was valid). It would therefore have been Staptina which had prevented itself from taking advantage of the defects provisions of the subcontract and it would have been a fair and equitable result for Staptina's account to be reduced by the deduction of a sum for the additional cost of completion of defects.

62. This means that it is AECOM which has prevented Staptina from having the opportunity to correct notified Defects either before Completion (if these would prevent the Contractor, Employer or others doing their work) or during the defect correction period

63. Accordingly, the act of prevention in this instance was AECOM's rather than Staptina's. The consequence is that:

63.1. AECOM has entirely lost the right to make any deduction for Defects; or

63.2. Alternatively, its right is confined to a claim for the sum it would have cost Staptina to carry out the relevant rectification works had the termination not taken place. This sum could be negligible if for instance Staptina would have been able to compel its own subcontractors to carry out rectification works. It could be in effect equal to the sum AECOM has or will pay third parties to rectify the relevant Defects. Or it could well be something between the two figures.

64. In my determination, it would be wrong to completely bar AECOM from making a deduction for Defects following determination for convenience, as this would be a windfall for Staptina as the subcontractor.

65. However, any such deduction must be confined to the sum it would have cost Staptina to remedy the relevant Defect either before Completion or during the defect correction period.

66. The relevant sum is a matter for evidence, as is the nature and extent of the actual Defects in the works (if any). Neither of these matters are before me in this adjudication which is solely concerned with issues of principle.

67. Accordingly, I find and declare that AECOM is also entitled in principle to deduct the cost of proven Defects from the sum due to Staptina at termination. This right is however confined to a deduction of the sum (if any) it would have cost Staptina to carry out the relevant rectification works had the termination not taken place."

Ms Chambers did not deal with any quantification or calculation of what money sums AECOM could, as a matter of fact, deduct. She directed that Staptina pay her fees.

The issues on this application

17. Put very simply, AECOM do not consider that the adjudicator should or could have gone on to deal with the second aspect that she in fact decided, namely that the deductions which she found AECOM were entitled to make were limited to the sums that it would have cost Staptina to remedy the relevant defect either before the works were completed, or during the defect correction period. AECOM submits that this element or aspect of the dispute was not referred to the adjudicator for determination at all. Accordingly, it is said by AECOM that Ms Chambers had no jurisdiction to deal with that matter. AECOM submit that all she was entitled to do by way of answering the dispute was simply to answer the dispute referred to her as either "yes – AECOM are entitled to make deductions for defects" or "no – AECOM are not entitled to make deductions for defects".

18. Even if the adjudicator did have jurisdiction to deal with that aspect of the matter, AECOM submits that there was a breach of natural justice because it did not have a chance to meet that case against it concerning how, in principle, the deduction(s) for defects were to be quantified. AECOM does however wish to retain all the other parts of the adjudicator's Decision. Accordingly, therefore, even if AECOM are right and the adjudicator conducted this reference to her sufficiently unfairly that it ought not to be enforced in the ordinary way, AECOM maintains that the objectional passages should simply be severed from the remainder. The net effect of this approach by AECOM would be to take a scalpel to the Decision in a surgical fashion, removing isolated sentences as well as several paragraphs, but leaving intact the simple finding by the adjudicator that AECOM could make deductions for defects, without saying anything about how those deductions, in principle, were to be calculated. This would then leave AECOM free to go about making deductions from the Staptina termination account for defects – because the adjudicator would have decided that such deductions were permitted as a matter of contractual interpretation – but in an entirely different fashion to how she decided that contractual mechanism was to work.

19. That latter point, severance, was agreed by Staptina in what Ms Bodnar explained was a pragmatic approach to the matter going forward, were AECOM to succeed in persuading me that it ought to be granted the declarations which impugn the identified parts of the Decision. Ms Bodnar did however have a number of other arguments against AECOM's case. The point about whether severance was suitable in this case was therefore not contentious, and not argued. I expressed certain preliminary observations about that as a suitable course to adopt, given the way the points on natural justice were put, but it is not necessary either to recite them or consider the point further, given the parties' agreement.

20. This then brings me to what I have described as the peculiarities in the fourth adjudication currently underway before Mr Wood. Although there are no documents before the court in respect of that fourth adjudication, I was told by counsel that this adjudication was proceeding as though the Decision the subject of these Part 8 proceedings was not a fully valid and binding Decision. I was also told that this was not a course agreed by both parties. In other words, therefore, it appears as though an assumption was made that the Part 8 proceedings brought by AECOM would succeed. The application in these Part 8 proceedings is dated 10 February 2017, yet the fourth adjudication was instituted before that, on 9 February 2017. An order was made for expedition of the Part 8 proceedings by Coulson J on 23 February 2017 and the matter was heard before me on 28 March 2017. Although I reserved judgment, the draft of this was made available to the parties within a matter of days of the hearing. That is in accordance with the standard approach of the Technology and Construction Court to matters concerning adjudication enforcement, which has formulated a rapid procedure to deal with adjudication business.

21. It is entirely inappropriate, in my judgment, and contrary to authority to commence an adjudication on any dispute if part of that has already been resolved by an adjudicator in a previous decision, unless the subsequent adjudication is on the basis that the decided dispute is binding upon that subsequent adjudicator. Simply because AECOM considered there was something objectionable in the Decision, and/or sought to obtain declarations in Part 8 proceedings to have part of it set aside, does not entitle AECOM to behave as though the Decision (or that part of it) had already been set aside. Although that peremptory behaviour by AECOM does not have any effect at all upon the substantive issues arising on the Decision under scrutiny in these proceedings, such behaviour is to be firmly discouraged. Apart from any considerations of oppression – and here it should be noted that the fourth adjudication was started against Staptina merely one day before the Part 8 proceedings

were commenced against Staptina too – it runs the very real risk of incurring considerable wasted costs, duplication of effort, and potentially (in other cases) proceedings for injunctive relief. It is simply not open to a party in a subsequent adjudication to advance a case which relies upon an earlier adjudication decision being treated as not binding upon the parties, unless that decision has been overturned by litigation or arbitration (in terms of the substantive dispute) or for some reason been found not to be enforceable.

The parties' submissions

22. Mr Pimlott for AECOM put his challenge to the Decision on two bases, namely lack of jurisdiction and breaches of natural justice. Firstly, he challenged whether that part of the decision that decided how deductions for defects should be calculated was part of the dispute that was referred to Ms Chambers at all. This is therefore a challenge to her jurisdiction. If the court was against him on that, he advanced an argument that the proceedings were therefore unfair because AECOM had no opportunity of meeting the case against it in that respect.

23. In particular, Mr Pimlott defined the dispute that was referred to the adjudicator as whether deductions were permitted by AECOM, but not how. He accepted that the first element – "whether" – was decided in AECOM's favour, but submitted that the second element - "how" – was simply not before her at all. In terms of the element "whether", he submitted that this was a simple choice for the adjudicator of either "yes" or "no".

24. Ms Bodnar, on the other hand, defined the dispute in the following way. She explained that the dispute that had been referred to the adjudicator was what she called "a wide point of principle". It was whether deductions could be made by AECOM, following a termination for Reason 5, in respect of defects and outstanding works. She submitted that this was not a dispute to which the answer could narrowly be restricted to only being either a simple "yes" or "no". The adjudicator could, when considering that dispute, answer with what Ms Bodnar described as a "qualified yes". Another way of putting the same point is to state that the answer provided was "yes, but only if those deductions are confined to a deduction of the sum (if any) it would have cost Staptina to carry out the relevant works".

25. Ms Bodnar made it clear that she challenged the interpretation by AECOM of the narrow jurisdiction of the adjudicator, and also challenged the breaches of natural justice. Even if there were any such breaches, she submitted, they were not material. I have only briefly summarised the competing submissions. I was very grateful to both counsel for the efficiency and clarity of their submissions, both written and oral, which assisted me greatly and have contributed to the prompt preparation of this judgment.

The legal principles

26. It should be remembered that adjudication is not a final resolution of any particular dispute. I stated in Amey Wye Valley Ltd v The County of Herefordshire District Council [2016] 2368 EWHC (TCC) at [30] the following, as a way of a reminder to parties generally rather than stating any innovative principle:

"Adjudicator's decisions will be enforced by the courts, regardless of errors of fact or law. This has been stated many times. Carillion v Devonport Royal Dockyard [2005] EWCA Civ 1358 is the most often quoted appellate authority, including as it does an exhortation (sometimes ignored) that

dissatisfied parties should take steps finally to resolve the substantive dispute, rather than waste time and money opposing enforcement. Adjudication is a merely temporary resolution of any dispute."

It is for that reason that the only way in which AECOM can avoid the temporarily-binding effect of the Decision is by demonstrating either that it was made without jurisdiction or in breach of the principles of natural justice. Here, AECOM only bring the challenge(s) on each of those grounds against part of the Decision, but the basic principle remains the same.

27. In Stellite Construction Limited v Vascroft Contractors Limited [2016] EWHC 792 (TCC); [2016] BLR 402 Carr J set out certain principles concerning how the question of construing a dispute referred to adjudication should be approached. At [48] she stated that the Notice of Adjudication defines the ambit of the adjudicator's jurisdiction and that any jurisdictional issues will be considered by reference to the nature, scope and extent of the dispute identified in that notice. This statement reflects that of Coulson J in Penten Group Ltd v Spartafield Ltd [2016] EWHC 317 (TCC). However, Carr J also stated that the Notice of Adjudication and Referral Notice are not necessarily determinative, as the background facts also need to be considered, as set out in Witney Town Council v Beam Construction (Cheltenham) Ltd [2011] EWHC 2332 (TCC), a decision of Akenhead J. At [32] of that case, the judge had stated:

"However, over the years both in the law and practice relating to adjudication and arbitration, confusion has often arisen as to what a dispute is. The answer to this is that, to borrow from Mr Justice Jackson (as he then was) in Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339 (TCC) , the circumstances in and by which a dispute may arise are "Protean". It is almost impossible to give a definition which will work in every case as to what a dispute is. It will usually involve a claim or assertion which is expressly or by implication challenged or not accepted. It may be broad or narrow. It may be a one or a multiple issue dispute."

28. In the cases of Witney Town Council v Beam Construction (Cheltenham) Ltd, Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), [2008] BLR 250 (cited in Witney Town) and also Stellite Construction Limited v Vascroft Contractors Limited itself, all three judgments stated that courts (and adjudicators and arbitrators) should not adopt an overly legalistic analysis of what the dispute between the parties is. The ambit of the reference to adjudication can also, unavoidably, be widened by the nature of the defence or defences advanced by the responding party.

29. Two paragraphs of Stellite Construction Limited v Vascroft Contractors Limited merit reproduction in full, namely [52] and [53]. These state

"52. To determine whether an adjudicator's decision is responsive to the dispute referred to him it is necessary to:

a) Determine from the adjudicator's decision what he actually found (Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd [2009] 127 Con LR 110 per Akenhead J at paragraph 50);

b) Analyse what claims and assertions were made by the referring party prior to adjudication "[b]roadly, and in the round" (Balfour Beatty (supra) at paragraphs 51 and 55. Thus, a dispute "somewhat like a snowball rolling downhill gathering snow as it goes, may attract more issues and nuances as time goes on" (see Witney Town Council (supra) per Akenhead J at paragraph 33);

c) Analyse whether the whole of the pre-adjudication claims and assertions were referred to adjudication (Balfour Beatty (supra) at paragraph 56);

d) Consider the pleadings in the adjudication to determine what "the dispute encompassed, or through the response and the reply and the evidence deployed by both parties during the adjudication became" (Balfour Beatty (supra) at paragraphs 59 to 60).

53. Generally, given the limited timetable allowed by adjudication, on the question of the scope of the referred dispute the "courts are going to have to give adjudicators some latitude" and not take an "unduly restrictive" view (see Penten Group Ltd (supra) per Coulson J at paragraph 28).”

30. I am firmly of the view that the submission, that the adjudicator was only entitled to answer the issue of whether AECOM was permitted to make deductions for defective work with an answer of either “yes” or “no”, is one that must be rejected. The first point to note in this respect is that a dispute cannot be defined by its potential answers. It is a wholly circular approach to considering the scope of jurisdiction of an adjudicator, and the nature of the dispute that was referred to her, by reference to one of two (or even any) potential answers. A dispute is defined by the matters in the various documents, namely those identified in the different authorities, a useful list of those appearing in [48] to [53] of Stellite. These include the Notice of Adjudication, and also the pleadings in the adjudication (which will encompass the defences raised) but also the pre-adjudication correspondence claims and assertions, and also the evidence submitted to the adjudicator.

31. All that I can add to what has been stated already, in authoritative terms by a variety of judges of the Technology and Construction Court, in the different cases identified in Stellite, is that attempting to define a dispute by reference to there being only two permissible answers is one fraught with difficulty for conceptual reasons. It is fraught with even more difficulty when one considers that, almost uniquely in quasi-judicial resolution of disputes, adjudicators are entitled to be wrong in the answers that they give, both in fact and law. If there are only two answers available, yet an adjudicator were to choose (perhaps incorrectly) a third, that does not go to her acting outside her jurisdiction. That would be answering the right question but in the wrong way. That is not the same as answering the wrong question, which is what AECOM’s case is in these Part 8 proceedings.

32. I am however not persuaded in any event that, regardless of the points in the immediately preceding paragraphs, the Notice of Adjudication and Referral did not define the dispute by reference to how, in principle, the deductions were to be performed. I consider that these documents did, in express terms. The Notice of Adjudication stated in part that:

“The dispute….. that is hereby referred to adjudication relates to whether you can make any deductions from our client following your termination of our client’s employment under the Sub Contract on 30 March 2016.

The dispute arose…..when…..you notified our client of your assessment of our client’s termination account and that you intend to pay less than the sums applied for because, amongst other things, of your alleged entitlement to deduct the cost of Defects not rectified.

On a proper construction of the amount due……you are not entitled to deductions for the cost of Defects or for any other reason.

The Referring Party’s claim is for a declaration that following termination pursuant to Reason 5 of the Sub-Contact the Respondent was/is not entitled to make any deductions against the…. termination account for alleged Defects not rectified or at all, or such declaration as the Adjudicator deems proper”.

(emphasis added)

The issue of deductions, and whether this encompasses “the cost of Defects”, is expressly included within the Notice.

33. It was agreed by the parties that the calculation of the money cost of the defects was not to be dealt with in the third adjudication, but only points of principle. When the Dispute as defined in the Notice expressly stated – as it does – that the point (or one of the points) in issue concerned “deductions for the cost of defects”, it is difficult to see the logic of a suggestion that the dispute did not include how such deductions (if AECOM were permitted to make deductions at all) were to be calculated.

34. However, even if I were to be wrong about that, there is a further point on jurisdiction which arises as a result of the contents of the Response, dated 9 December 2016, and served by BLM for AECOM setting out its response to the Referral Notice. This also has some bearing on the submissions on natural justice too, to which I will come later in this judgment. As set out above, in the Termination Letter AECOM had referred to a specific clause of the sub-contract and stated, referring directly to the cost to AECOM of remedying defects being the amount of the claimed deduction(s):

“If these Defects are not corrected within two (2) weeks of the Termination Date the Defects will be corrected by a third party. Pursuant to Clause 42.1 of the Contract you will be responsible for these third party costs .”

(emphasis added)

35. Clause 42.1 of the sub-contract is one of a number of clauses in the sub-contract, namely Part 4, which is headed “Defects”. Clauses 40.1 and 40.2 deal with “Searching for and notifying Defects”. Clauses 41.1 to 41.2 deals with “Correcting Defects”.

1. Clause 42.1 comes under the heading “Uncorrected Defects” and states: “If the Subcontractor has not corrected a notified Defect within its defect correction period, the Contractor assesses the cost of having the Defect corrected by other people and the Subcontractor pays this amount” (italics present in original).

Accordingly, it is a point raised within the Termination Letter, and indeed contained within clause 42.1 itself, how the cost of correcting defects is to be dealt with.

36. Clauses 92.2 and 92.3 are part of the sub-contract terms that deal with payment on termination.

1. Clause 92.2 states: “If the Contractor terminates for Reason 1, 2, 3 or 4, the amount due on termination also includes a deduction of the forecast additional cost to the Contractor of completing the subcontract works.” (italics present in original).

2. Clause 92.3 states: “If the Subcontractor terminates for Reason 1, 6 or 7 or if the Contractor terminates for Reason 5, the amount due on termination also includes 5% of any excess of a forecast of the amount due at Completion had there been no termination over the amount due on termination assessed as for normal payments”

37. It should be borne in mind that Staptina’s case was that AECOM was not entitled to make deductions at all. The following paragraphs of the Response served by AECOM stated, in response to that case, as follows:

1. “21. Moreover, clause 42.1 provides that “If the Subcontractor has not corrected a notified Defect within its defect correction period, the Contractor assesses the cost of having the Defect corrected by

other people and the Subcontractor pays this amount." This means that the Contractor is entitled to make its assessment by reference to the cost of third party correction. This falls within the first and/or third bullet point of the definition of "the amount due". In the context of the third bullet point, it is an amount to be 'paid by … the Subcontractor'." (emphasis added)

2. "24. This same presumption is engaged when one considers that the position for which Staptina contends is that a Subcontractor can, as here, repeatedly fail to correct notified Defects and then be free of any 'deduction' for this following termination….."

3. Paragraph 26 compared the two termination regimes in the following way: "…clauses 92.2 (fault) and 92.3 (no fault). Under clause 92.2, having terminated for Subcontractor default, in addition to assessing the amount due in the way described above, the Contractor '….also includes a deduction of the forecast additional costs to the Contractor of completing the subcontract work.' (emphasis added)".

That paragraph of the Response makes it clear – and emphasises it even more by underlining "additional" in the phrase "additional costs" – that it is the extra cost to AECOM that is the amount which AECOM claimed in the adjudication could be deducted. That extra or additional cost is obviously capable of being assessed, in principle, in different ways.

4. Paragraph 27 stated: "If would be paradoxical if on a fault based termination the Contractor was entitled to this additional cost, yet had to pay the Subcontractor for work the Subcontractor had not yet undertaken. Arguably, it would create a circular logic whereby all costs paid to complete would then be additional costs because the Contractor would have to pay both the Subcontractor and a third party for the outstanding/defective work". (emphasis added)

5. Paragraph 31 stated: "It is clause 92.1 where account is taken of the proper progress of the works and any payment by the Subcontractor required by clause 42.1".

38. Given that clause 42.1 expressly deals with "the Contractor assesses the cost of having the Defect corrected by other people and the Subcontractor pays this amount", it plainly concerns deductions for defective work, and the principle of how those deductions are to be calculated, namely the cost of having the defects "corrected by other people" as the clause itself puts it. This is the point that AECOM submits formed no part of the dispute referred to the adjudicator. I reject that submission. Even if there were no jurisdiction to deal with this point based on the Notice of Adjudication itself (an argument I have already rejected), one of the defences raised by AECOM to the case against it in the adjudication was that such deductions were permitted by the subcontract terms, and that these deductions were to be calculated by reference to what it would cost to have the defects corrected by others. In those circumstances therefore, the jurisdiction of the adjudicator would have been widened by the Response to encompass the point in any event.

39. Mr Pimlott sought to explain the sentence in paragraph 21 of the Response in the following terms in his written skeleton argument:

"The single sentence in paragraph 21 [of the Response] referred to above was written in support of AECOM's case as to why it was entitled, in principle, to make deductions in respect of defects. Thus:

a)
at paragraph 17 of the Response, AECOM submitted as follows:

“17. In short, Staptina claims that following a termination for Reason 5 it is entitled to be paid for work not done, either properly or at all. It does so in spite of its failure to correct notified Defects. For the following reasons, Staptina is wrong to do so”

b)
One of the “following reasons” referred to in paragraph 17 was set out at paragraph 21, as follows:

“21. Moreover, clause 42.1 provides that “If the Subcontractor has not corrected a notified Defect within its defect correction period, the Contractor assesses the cost of having the Defect corrected by other people and the Subcontractor pays this amount.” This means that the Contractor is entitled to make its assessment by reference to the cost of third party correction. This falls within the first and/or third bullet point of the definition of “the amount due”. In the context of the third bullet point, it is an amount to be “paid by … the Subcontractor”.

Notably, these submissions refer to “the Contractor” rather than AECOM, reflecting the fact that they were considering matters in the abstract. They did not seek to apply clause 42.1 to the facts of the case, in particular the chronology of events on the Project, as the Adjudicator later sought to do.

Accordingly, read in its proper context and having regard to the dispute referred in the Notice of Adjudication, the single sentence in paragraph 21 of the Response underlined above did not have the effect of widening the dispute referred so as to encompass the question of how deductions for defects should be assessed in the event that, contrary to Staptina’s case, such deductions fell to be made. In order successfully to defend Staptina’s claim, all AECOM needed to do was to establish that it was entitled to make deductions for defects in principle: it did not need to establish how such deductions should be assessed in the event they fell to be made.”

40. That argument is ingenious, and was attractively put, but I reject it. Regardless of whether AECOM needed to establish more in the adjudication than the mere bare fact that it was (on its own case) entitled to make deductions, it did in fact go further and make submissions that this should be by reference to the cost of having others perform the work, and by reference to the terms of clause 42.1. Yet further, Appendix 3 of the letter dated 18 November 2016 was one of the documents that was before the adjudicator, and that expressly listed the costs against each alleged defect of having them rectified by two other different sub-contractors, and calculated an average charge to AECOM of those two sets of third party costs. It cannot remotely be said, in my judgment, that this point was not put before the adjudicator by AECOM, even if not before her already (which I consider it was).

Natural justice

41. Those findings resolve the issue of jurisdiction. It is then necessary to deal with the allegations by AECOM of breach of natural justice. Mr Pimlott submits that even if the question of deductions for defects being made by reference to the cost to Staptina of remedying them, rather than the cost to AECOM of engaging other sub-contractors, was within the adjudicator’s jurisdiction, this was not a point that AECOM had the opportunity of addressing. He submitted that this was one of those cases where a central finding by the adjudicator was made by her “going off on a frolic of her own”, and she should have drawn the parties’ attention to her intention and invited submissions. He said a list of issues should have been drawn up by the adjudicator at the commencement of the adjudication, and comment invited upon that list from the parties.

42. In Roe Brickwork Ltd v Wates Construction Ltd [2013] EWHC 3417 (TCC) Edwards-Stuart J at [22] to [28] identified the relevant approach of the court where it is said by a losing party that a point has

been decided by an adjudicator that was not argued. In those paragraphs, he cited with approval the judgment of Akenhead J in Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), [2008] BLR 250 at [57](e). The whole of that latter paragraph is of relevance to this case, and states as follows where breaches of natural justice are alleged:

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

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

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

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

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

43. Edwards-Stuart J also stated in Roe Brickwork Ltd v Wates Construction Ltd [2013] EWHC 3417 (TCC) at [24] that "there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator".

44. In my judgment, that latter passage of Edwards-Stuart J aptly summarises the position here. The adjudicator decided a point of importance on the basis of the material before her, and on a basis for which neither party had contended, and she was entitled to do so. The point was one of contractual construction, and the way that deductions could be applied by AECOM (if at all) given the termination that had occurred. The parties were aware of all the relevant material – this comprised the subcontract, the Termination Letter the letter dated 18 November 2016 and Appendix 3. All of these documents were before the adjudicator, and each party provided submissions in relation to them. Staptina's case was that AECOM had no entitlement to make any deductions for defects. AECOM contended that there was such an entitlement, and it was by reference to the cost of having others remedy the defects. As put in paragraph 21 of the Response, AECOM's case was that "….the Contractor is entitled to make its assessment by reference to the cost of third party correction". The issues in my judgment were therefore fully canvassed. The adjudicator was perfectly entitled to reach the conclusion that she did, namely that AECOM was entitled to make deductions, but by reference to the cost to Staptina of performing the works, rather than the "cost of third party correction". She was not bound to accept only one of the two alternatives put to her by the parties. Questions of contractual interpretation in particular will often (if not usually) be capable of more than two possible answers, and so the correct answer (as the adjudicator may see it) may not have been expressly proposed by either one of the parties. That does not mean that by choosing a different answer, the adjudicator is

breaching natural justice by failing to notify the parties of this and inviting further submissions. I reject the notion that an adjudicator in particular, with the very tight timescales that govern the process, must inevitably consult the parties again on her draft findings. Ms Chambers did not, in my judgment, go off on a frolic of her own in the Decision, of the type that Akenhead J was referring to in [57](e) of Cantillon Ltd v Urvasco Ltd. She simply chose what she considered to be the correct answer, which was not one of the two potential answers that had been urged on her, one by either party.

45. AECOM or its advisers may, upon receiving the Decision, have wished that they had put more comprehensive submissions to the adjudicator on the point concerning deductions, but that is not the same as there having been a breach of natural justice, still less a material breach, in this case. They plainly made submissions on the point in any event.

46. Finally, a certain amount of time was spent at the oral hearing debating what was called the "catch all" provision in the Notice of Adjudication, which was the wording whereby Staptina sought a declaration in certain terms "or such declaration as the Adjudicator deems proper". In the Referral Notice, this was repeated in Paragraph A and Paragraph B in the Relief section also sought "such other relief as the Adjudicator deems proper". The adjudicator considered that this wording was wide enough to entitle her to provide the answer she considered to be correct – in other words, to go outside the two potential answers proposed to her, one by either party. This is clear from paragraph 32 of her Decision, which stated:

"…I am empowered to decide how the sums to be deducted are to be assessed in the event that I find that deductions can be made, rather than simply stating that some form of deductions can be made in principle and no more. That is inherent in the wording of the Notice, which requests that I am to make "such declaration as the Adjudicator deems proper".

47. In the e mail of 30 November 2016 at 16:46 by AECOM's solicitors BLM Law it had been stated that "I take the view that paragraph B [of the Referral Notice] is superfluous and in any event cannot alter the scope of the Notice of Adjudication". Depending upon how one interprets the expression "alter the scope", this statement could be interpreted as meaning "have any effect upon the jurisdiction of the adjudicator". Given the points made in Stellite and the other authorities referred to in [27] to [31] of this judgment, it is highly risky for any party receiving a Notice of Adjudication or Referral to conclude that a particular part of it has no effect.

48. That wording did however make it clear that Staptina was inviting the adjudicator, if she did not accept the case that no deductions were permitted, to make such declaration as she thought proper in relation to the Dispute. That was entirely conventional, proper, and the declaration that she made was in my judgment wholly regular in terms of natural justice. I do not need to consider whether it was in law and fact right or wrong, for reasons that are well known.

49. It is in any event not necessary to answer the "catch all" point definitively, given the nature of my findings above. My views on that particular point do not therefore have any effect upon the success of the Part 8 proceedings. I would however suggest that the authorities to which I have referred at [27] to [31] above set out clearly how the dispute that is referred is to be considered. Such wording inviting alternatives of relief, which is often found in Notices of Adjudication and Referral Notices, will be part of the material to be considered by the court in each case, as each of the Notice of Adjudication and Referral Notice may contain it. However, such wording is most unlikely to be determinative on its own, and should not be seen by parties as giving any adjudicator carte blanche to go outside the scope of the dispute referred to them in any particular case.

Conclusion

50. It follows therefore in my judgment that AECOM are not entitled to the declarations that are sought in the Part 8 proceedings and these will be dismissed. Issues of costs and any other consequential matters will be dealt with on the formal handing down of this judgment to the parties, if they cannot be agreed.