JUDGMENT : MR. JUSTICE AKENHEAD : TCC. 15th August 2008.

Introduction

1. By a Sub-Contract made on or about 6 August 2007, William Verry Limited ("Verry") employed CJP Builders Limited ("CJP") carry out brickwork, blockwork and stonework at a construction project known as Tally Ho, 9 Fortress Road, Kentish Town, London NW5 1AA. Following Verry's non-payment of CJP's interim payment application for Valuation No 15 (submitted on 25 January 2008) CJP gave Notice of Adjudication dated 25 April 2008, the RICS nominated the well known adjudicator, Mr. Anthony Bingham, as the adjudicator and CJP served its Referral.

2. Verry did not serve its Response to the Referral within the requisite seven day period apparently called for in the sub-contract or within an extension of time permitted by CJP. Verry was some five to six hours late in serving the substantial part of its Response. The Adjudicator formed the view that he had no discretion to permit any extension of time and having told the parties of his views about this he informed them that he could have no regard to the contents of that Response. Perhaps unsurprisingly, he then produced his reasoned decision on 6 June 2008 ordering Verry to pay the full amount outstanding on CJP's Valuation 15 in the sum of £94,692.40 plus VAT plus interest plus the Adjudicator's fees and expenses and the RICS nomination fee.

3. Issues have arisen in two sets of proceedings between the parties, CJP's claim for the enforcement of the decision and Verry's claim for declarations in relation to the meaning of the sub-contract, as to whether the Adjudicator had any jurisdiction at all and, even if he did, whether there was a material breach of the rules of natural justice in the Adjudicator's decision to disregard the delayed Response.

The Two Sets of Proceedings

4. CJP issued proceedings first, HC-08-173 on 19 June 2008. In simple terms CJP seeks enforcement of the decision of the Adjudicator. The total amount due pursuant to the decision was £103,913.03. The proceedings were coupled with an application under CPR 24 for the summary judgment. I gave directions on 27 June 2008 for the disposal of those proceedings with a hearing fixed for 1 August 2008.

5. A detailed Defence was served by Verry dated 11 July 2008. Verry sought to avoid enforcement of the decision on the grounds that the Adjudicator had no jurisdiction because in fact he had been appointed under the wrong appointment regime. It is said that the adjudication rules and appointment regime were those contained in the main contract between Verry and its employer which stipulated appointment by TeCSA and adjudication in accordance with TeCSA rules. In the alternative it was said that the statutory Scheme for Construction contracts applied to any adjudication. Verry asserted that the Adjudicator had materially breached the rules of natural justice in excluding the Response thereafter refused to consider any information from Verry; it follows, it argued, that the decision was not enforceable.

6. On 11 July 2008, Verry issued its own proceedings, HC-08-198 in which it sought various declarations as to which contract terms applied, which adjudication regime was applicable and what was the correct contractual payment regime.

7. On 14 July 2008 I gave further directions ordering that the issues raised in this second set of proceedings should be determined at the same time as CJP's summary judgment application in the earlier claim.

The Sub Contract

8. It is accepted by both parties that there is a written construction contract as between the two parties contained in and/or evidenced by Verry's Order of 6 August 2007. The order is on a Verry pro-forma form and sets out in "boxes" amongst other things completion dates, the site address, the first evaluation date (23 July 2007), valuation periods (fortnightly), final payment time (14 days from valuation certificate date). The form of contract was specified to be:

   "DOM/2 1981 Edition incorporating Amendment 1 (1987), Amendments 2, 3, 4, 5 and 6 (1989), Amendments 7 (1992) and 8 (1999)".

9. There was then listed 15 "Sub-Contract Documents", the most relevant of which are:

   "1. Invitation to tender dated 19 and 22 January 2007 pages 1-6 inclusive [enclosed] 2. Pre Order Meeting Minutes dated 31 May 2007 - pages 1-17 inclusive, including Schedule of Attendances - pages 1-3 inclusive [enclosed] 3. Schedule of Amendments to the Domestic Sub-contract conditions DOM/2 Pages 1-7 [enclosed] 4. Preliminaries - pages 1.1-1.23 [enclosed] ... 6. Contract Sum Analysis – pages 1 and 2 inclusive [enclosed] … 9. Valuation Schedule - in 1 No page [enclosed]...

   15. Verry Construction Standard Conditions Sub-contractors - Title Pages [2 No] accompanying pages 1-12 [enclosed]"

   I will consider each of these documents below.

10. The invitation to tender to CJP was by way of letter dated 19 January 2007, CJP's attention was drawn to the following:

    "Main Contract conditions: as detailed within Main Contract Preliminaries. Sub-contract Conditions: as enclosed. See Schedule of sub-contract amendments and Main Contract Preliminaries".

    It appears that no such Verry Schedule of the sub-contract amendments was attached or enclosed with this letter, certainly not in the form annexed to the Order.

11. The Pre-Order Meeting minutes are clearly recorded electronically on a pro-forma Verry form. There was a note at the beginning before paragraph 1.0 which stated:

"The minutes of this meeting will be attached to the Sub-contract Order and will form an integral part of the Order and will take precedence over any Sub-contractor conditions".

This was mirrored in paragraph 15.00 which was entitled *"Verry Construction Subcontractors and the Clients Conditions":*

"The following documents will supersede and take precedence over the Sub-contractors terms and conditions:

The Minutes of this Pre-Contract Meeting

Verry Construction sub-contract Conditions The Main Contract Conditions If the subcontractor issues an Acknowledgment of Order that is at variance with any of the above Contract Documents, then the minutes of the Pre-Contract Meeting will take precedence in all respects".

It was argued by CJP that these references to *"sub-contractor's"* terms and conditions meant sub-contract conditions. Given that, elsewhere in the Pre-Order Meeting Minutes, there is reference to the form of sub-contract I can see no force in that argument. Given that this is a pro-forma, these references simply refer to what would happen if there were any conditions or terms, in standard form or otherwise, put forward by the sub-contractor in the various sub-contract documents which form part of any given Verry order.

12. Paragraph 3.00 of the Pre-Order Meeting Minutes, identified various types of information such as drawings adjacent to which were two columns entitled "*The information already received by the Sub-contractor within letter dated 22 January 2007"* and *"The Following Information is Required by the Sub-contractor"*. Thus in respect of Architect's drawings a number were listed in the information received column whilst a number of other drawing references were indicated as being required by the sub-contractor. Against paragraph 3.09 which related to *"Schedule of Sub-contract Amendments",* the expression *"N/A"* was put in the information received and information required columns. This effectively confirmed that the Schedule of Sub-contract Amendments had not been received earlier and, at least as far as the subcontractor was concerned was not required by CJP.

13. Paragraph 6.0 of the Pre-Order Meeting Minutes contained the Contract Details. For instance the order value was identified as £329,227 and it was a lump sum and fixed price until January 2008. The Form of Main Contract was stated by paragraph 6.10 to be *"JCT 1998 with Contractors design inc amendments 1-5"* whilst paragraph 6.11 identified *"The form of Sub-contract"* as being *"Domestic sub-contract DOM/2 inc. Amendments 1-8".* Paragraph 6.13 identified that the valuation period would be fortnightly with the final date for payment being 14 days thereafter; paragraph 6.14 identified that the valuation dates would be as per the valuation schedule whilst paragraph 6.15 stated that the "*first sub-contract valuation date (i.e. Date of next known contract valuation certificate"*) was 23 July 2007.

14. The third in the list of Sub-Contract Documents referred to on the order is the one which gives rise to the bulk of Verry's contractual arguments. Again, it is clear that this document is a standard Verry document which it seems to use in its sub-contracts. It is dated June 2006. It contained a number of amendments to the DOM/2 form of sub-contract both so far as the articles for agreement and the conditions thereof were concerned. Article 1.3 was to be amended with the following edition:

"The Articles, Agreement and the Sub-contract Conditions shall have effect as modified by the Schedule of Amendment ...."

15. Clause 1.3 which is the definition clause in the DOM/2 conditions provided for amendments as follows:

"Delete definition of 'Appendix' all references in Contract to 'Appendix' shall be deemed to refer to Pre-Order Meeting Minutes."

16. That this Schedule of Amendments was standard is evidenced by clause 5.3.1 by which, although design clearly was not part of CJP's obligation, CJP was to warrant that it had exercised and would continue to exercise *"all the reasonable skill, care and diligence to be expected of a properly qualified and competent designer ..."*

17. Clauses 5.4.1 to 5.4.3 were deleted. It was suggested that this was specifically agreed between the parties. I do not accept that, certainly on the evidence. It has all the hallmarks of having been done unilaterally by Verry. So far as I can ascertain from all the documents in evidence put before the court, this Schedule of Amendments was first produced along with the Order, albeit thereafter accepted by CJP.

18. Various amendments to Clause 21 of the DOM Conditions were set out whereby certain words were to be deleted and new words or clauses inserted. I will return to this later in the judgment.

19. The following relates to Clause 38 which in the DOM/2 Contract relates to the settlement of disputes:

" Clause 38

Settlement of Disputes

Insert new clauses as follows:

Clause 38.1

Either Party shall be entitled to refer any dispute or difference to adjudication in accordance with the Housing, Grants, Construction and Regeneration Act 1996 and any such adjudication shall be undertaken in accordance with the Main Contract."

Clause 38.2

The Adjudicator is named in Article 3.1 of the Sub-contract.

Clause 38.3

Subject to the above, any dispute or difference which arises between the Parties shall be resolved in accordance with the dispute resolution forum stipulated in the Main Contract".

Several matters need to be noted. There was no Adjudicator named anywhere in the Sub-contract documents notwithstanding Clause 38.2. Secondly there was no suggestion that Clause 38A of the DOM/2 Conditions (for which see below) was to be deleted.

20. The Preliminaries (Document 4) of the Sub-Contract Documents was clearly the Main Contract Preliminaries document which identified in more detail what the form of the Main Contract was to be, amongst other things.

21. It is worth noting in passing that Document 8 which contained CJP's tendering documents refer from place to place to CJP's "*offer and conditions*".

22. Sub-Contract Document 9 identified nine valuations starting 13 July 2007 with fortnightly intervals thereafter. The *"certificate date"* was 10 days after the actual submission dates. The *"final dates and notification"* were five days after the certificate date whilst the "*final dates from notice of setoff"* were five days after that. The *"final dates for payment"* were three days thereafter. For each of these dates specific calendar dates were given.

23. Finally Verry's "*Standard Conditions for Sub-contractors"* were in fact to do with health and safety.

24. The DOM/2 Conditions provide for adjudication by Clause 38A, the following sub-clauses of which are of relevance:

> *"1. Clause 38A applies, where pursuant to Article 3, either Party refers a dispute or difference arising under this Sub-Contract to adjudication."*
>
> *2. The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application via the company party, an individual to be nominated as the Adjudicator by the person named in the Appendix part 8 ("the Nominator") …*
>
> *4.1. When pursuant to Article 3 a Party requires a dispute or difference to be referred to adjudication, then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. Within seven days from the date of such notice or the execution of the JCT Adjudication Agreement by the Adjudicator if later the Party giving the notice of intention shall refer the dispute or difference to the Adjudicator for his decision ('the referral'); and shall include within that referral particulars of the dispute or difference together with the summary of the contentions on which he relies, the statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party …*
>
> *5.1.1 The Adjudicator shall immediately upon receipt of the referral in its accompanying documentation confirm that receipt to the Parties.*
>
> *5.1.2. The Party not making the referral may, by the same means stated in the Clause 38A.4.2, send to the Adjudicator within seven days of the date of a referral with the copy to the other Party, a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider.*
>
> *5.1.3. The Adjudicator shall within 28 days of his receipt of the referral and its accompanying documentation under clause 38A.4.1 and acting as an Adjudicator for the purposes of s 108 of the Housing Grants, Construction and Regeneration Act 1996 and not as an expert or an arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days; by agreement between the Parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision …*
>
> *5.1.5. In reaching his decision the Adjudicator shall act impartially, set his own procedure and at his absolute discretion may, take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:*
>
> *1. using his own knowledge and/or experience;*
>
> *2. opening up, reviewing and revising any direction, opinion, decision, requirement or notice issue given or made under the Sub-Contract as if no such direction, opinion, decision, requirement or notice had been given or made;*
>
> *3. requiring from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement provided by the Parties including the results of any tests that have been made or of any opening up …*
>
> *5. visiting the site of the Works or any workshop where work is being or has been prepared for this Sub-Contract.*
>
> *6. obtaining such information as he considers necessary from any employee or representative of the Parties …"*

25. I will return to a consideration of Clause 21 of the DOM/2 conditions when considering the relatively short issue as to whether as a matter of principle CJP is contractually entitled to be paid the amount of its applications as

claimed in the event that no payment notice or no withholding notice is served. This is an issue which arises on Verry's claim.

The History of the Adjudication

26. Valuation 15 was dated 4 February 2008. It showed a total "cumulative" valuation of £424,905.64 but in handwriting someone has, properly, deducted 3% retention to produce a gross amount payable of £411,488.21. Allowing for payments which had been made to date, a net sum of £94,692.40 was thus claimed as due and owing to CJP. The valuation attached detailed backup documentation, including measurement and variation information. The sum said to be outstanding was not paid within any reasonable time or at all. It was or must have been clear to the parties after a few weeks that they were in dispute as to whether this valuation was payable or not.

27. By letter dated 25 April 2008, CJP's solicitors wrote to Verry attaching their "*Notice of Adjudication*" and stating:
"We have proposed three names of adjudicators and request your comments on the proposed names, should we not hear from you by 4 p.m. on Tuesday, 29 April 2008 we propose to make an application to the RICS for a nomination of an Adjudicator."

28. The Notice of Adjudication made the point that "*the adjudication provisions applying to the accountancy contract are contained in Clause 38A of the DOM/2 form*". The dispute was identified as relating to Verry's non-payment of valuation 15 and the redress sought was the payment by Verry of the sum of £94,690.40 plus VAT plus interest plus Adjudicator's fees and expenses. Three names were put forward as possible Adjudicator.

29. Verry replied on 29 April 2008 in the following terms:
" We confirm receipt of your letter dated 25 April 2008 giving notice of CJP's intention to refer a dispute to the RICS for a nomination of an Adjudicator.
We do not accept or agree that a dispute has arisen between CJP ... and Verry such that the RICS should be asked to appoint an Adjudicator.
However, your letter is clear that you intend requesting of same; we, therefore, state our objection for good reasoning to the appointment of the names you have requested to preside over the matter...
We, therefore, request that should you continue with this notice to refer, you do so on the understanding that the appointment of an Adjudicator is by the independent service of the RICS only, and not one of your preferred named party as stated."

This letter was copied to the RICS.

30. Subject to argument that Clause 38A and any appointment made pursuant to it was unjustified, no issue is taken (as it was not before the Adjudicator) that the RICS was the wrong body to nominate if Clause 38A is applicable.

31. On the same day, 29 April, 2008, CJP's Solicitors asked the RICS to nominate. By 2 May 2008, the adjudicator had been nominated by the RICS. On that date he sent to the parties his Adjudicator's Notice No 1 and schedule of terms. In paragraph 5 it was stated:
"The Responding Party is invited to serve its Response to comply with the Clause 38A timetable."

32. On 2 May 2008, CJP's solicitors served on the Adjudicator and on Verry their Referral Notice. It described what CJP asserted was the Sub-Contract and the terms, in particular the *"key"* contractual term Clause 21 relating to payment of the sub-contractor. The version of Clause 21 was the DOM/2 version, that is, not amended by the Schedule of Amendments. There was reference to the Valuation Schedule in the Sub-Contract. Under a heading *"The Dispute"*, there was then set out a history relating to and the non-payment of Valuation No 15. There is reference to the fact that there was no payment notice or withholding notice. CJP said this:
"28. Verry failed to issue either a payment notice or withholding notice in respect of Valuation No 15 as required by Clause 21.3.2 and 21.3.3 of the DOM/2 conditions incorporated in the Sub-Contract. Further, by the final date of payment on 18th April 2008, Verry had made no payment to CJP, in breach of the Sub-Contract payment conditions...
30. Verry has failed to make payment in respect of Valuation No 15 in accordance with the payment provisions contained in the Contract and has failed to give notice as required by the Contract of any withholding, which Verry was obliged to do (see Clause 21.3.3…) if it intended to withhold payment from CJP. Verry is not entitled to withhold any sums against Valuation No 15."

The "*Redress*" sought was that Verry pay the outstanding balance resulting from Valuation No. 15.

33. By letter dated 6 May 2008, Verry's consultants wrote to the Adjudicator saying as follows:
"We are in receipt of your Adjudicator's Notice Nr. 1 and note your invitation for Verry to serve its Response in accordance with the Clause 38 timetable. Unfortunately this will not be possible albeit Verry will be in a position to serve its Response by 5.00 p.m. on 19 May 2008. Of course Verry will agree to any commensurate extension of time that you might require to reach your decision. Whilst writing, Verry notes that the Referral fails to mention that the Sub-Contract Works are seriously defective such that Verry's position in these proceedings is that, as a result of the extensive nature of the defective works, the Sub-Contract Works have been overvalued such that CJP has been overpaid and thus suspended the performance of its obligations under the Sub-Contract works without good cause. Verry will address this issue fully within its Response but due to the fact that the defects issue is fundamental to Verry's Response we have decided to bring this matter to your attention at an early stage."

34. By e-mail of the same day, CJP's solicitors objected to any extension of time being granted for the service of the Response.

35. The Adjudicator's Response to Verry's letter was as follows:

"[The Adjudicator] is content that the Response is served on Monday 19th on the basis:

1. *The 19th becomes day 7 of the adjudication.*
2. *The unilateral right of CJP to extend time by 14 days is preserved.*
3. *The date for decision becomes 19th + 21 days + BH = 10th June.*
4. *If there is to be a Reply to Response the 21 days runs from the service date of that Reply to Response.*
5. *Wm Verry has foreshadowed defects as part of its Response. Please forthwith indicate to CJP the essence of the complaints (if not already done so) to enable CJP to immediately begin an inquiry without waiting for Wm Verry's Response."*

36. The Adjudicator wrote later on 7 May stating:

"The Adjudicator has no power to go behind the Clause 38 contractual adjudication rules. Wm Verry is obliged to enter its Response as per the timetable in the contract.

The Respondent has asked for relief from the DOM/2 timetable. At the moment it stands thus:

1. *The Referral was served Friday 2nd.*
2. *The Response is due "within 7 days of the date of Referral" = 9th.*
3. *If the date is to move from 9th to 19th then the Parties themselves have to agree.*
4. *[The Adjudicator] is content if CJP agrees to 19th ..."*

37. On 8 May 2008, CJP's Solicitors by e-mail agreed to extend the time for the Response until Monday 12 May to take account of the day lost for the bank holiday but no further.

38. Also on 8 May 2008, Verry's consultants wrote to the adjudicator as follows:

"With regard to the date for service of the Response we note CJP's reference to clause 38A.5.2 of DOM/2 but we are concerned that Verry will not be in a position to respond before close of business on Monday 19 May 2008 as previously advised to you.

Verry enquire to what extent CJP has any reasonable objection to not agreeing the extension of the period for service of the Response as this will allow all issues to be dealt with in a cost-effective and sensible manner and, in this regard, Verry confirms that it is quite prepared to agree to an extension of the period in which you are to reach your decision to accommodate its requests for further time to serve its Response.

If CJP refuses to agree to such an extension then Verry would respectfully refer to you Clause 38A.5.5 of DOM/2 which allows you, as the Adjudicator, to set your own procedure and, at your absolute discretion, enable you to take the initiative in ascertaining the facts and the law. In particular, Clause 38A.5.3 of DOM/2 empowers to request from the party's further information to that contained in the referral and we would urge you to utilize these powers to ensure that you would provide both parties with fair opportunity to put its case. Whilst writing Verry would also state that due to the nature of the defects Verry's feel that in order to fully represent their case a site visit would be essential, and respectfully ask that suitable dates for all parties is arranged."

39. On 9 May 2003, CJP's solicitors responded to this latest e-mail:

"... I ... find it remarkable that the Responding Party considers that it should simply be granted a 10 day extension of time without any justification. It remains the Referring Party's position that the Response may be served on Monday, 12 May to take account of the bank holidays.

With regard to the unspecified allegation of defects, I confirm that the only lists of defects received by the Referring Party has been a faxed list from Zurich Insurance which on examination contains historical defects which have already been corrected. There is no dispute in respect of any defects not notified ...

... Although I am awaiting my client's instructions on the site visit it is clear that there would be difficulty with such a site visit if the works are not in the state they were when the Referring Party left site ..."

40. Later that day, Verry's position on extension changed to some extent:

"We thank you for extending the time until Monday 12 May 2008, but would ask you to consider extending the time for our submission of the Response until close of business on Wednesday 14 May 2008, as I am away on Monday 12th.

We shall in any case submit our Response on Wednesday 14 May 2008, and would expect the Adjudicators to take the Response into consideration, if this were not the case we do not see how any decision that went against Verry would be enforceable ..."

CJP's solicitors responded several hours later:

"... I can confirm agreement to extend time to 4 p.m. on Tuesday 13 May with service of the Response but no more."

41. On 12 May 2008, Verry's consultants e-mailed CJP's solicitors copying the adjudicator :

"I have just been informed by my IT department that essential work will be carried out during the day tomorrow on our servers and individual laptops such that we will not be in a position to serve Verry's Response by 4 p.m. tomorrow. I would therefore request that your client agrees some further dates for service of Verry's Response such that this will now be served by 5 p.m. on Wednesday 14 May 2008. I am sure that this will cause no difficulty for the Adjudicator

and Verry of course will agree to a commensurate extension to the period in which the Adjudicator is to reach his Decision should this be necessary."

42. Several hours later, CJP's solicitors wrote saying:
"... I would agree an extension until 12 noon on Wednesday [14 May 2008] to take account of your apparent problem so that my client and the Adjudicator can have a copy of the Response considered during the course of Wednesday."

43. At 12.18 on 14 May 2008, CJP's solicitors wrote to the adjudicator indicating that the Response had not been received in any form by the noon deadline agreed to by them on 12 May 2008. They continued:
"Therefore unless you have received a Response I would invite you to proceed to decide this adjudication based on the Referral and to disregard any Response subsequently received."

44. At 12.43 that day, Verry's consultants wrote via e-mail to the Adjudicator saying that Verry would be submitting a response by e-mail later that day.

45. At 13.42 on 14 May 2008, CJP's solicitors wrote to the Adjudicator by e-mail:
"I ... confirm that a Response has not been received from the Responding Party in accordance with the extension granted. I note that the Responding Party has decided to ignore the time limit set on production of the Response and suggests that it will seek to serve the Response 'later today', it has clearly not been the Responding Party intention to comply with the procedure clearly set out in the contract. Without prejudice to the contention set out in my previous e-mail, I would refer the Responding Party to the note attached to all e-mails from this office and to the terms of Clause 38A.4.2 regarding service of documents.
I would invite you to draw the appropriate adverse inference in the Responding Party's conduct of this adjudication to date. I would repeat my request that you disregard any submission now received and proceed to make your decision based on the Referral."

46. At 17.26 on 14 May 2008, Verry's consultants e-mailed to the Adjudicator and to CJP's solicitors Verry's Response document and appendices. Although the Response was not in the papers put before the Court, both Parties by their counsel accept that it was a substantial document which sought to challenge the whole of CJP's claim under Valuation 15. Five separate e-mails containing attachments arrived over the next 16 minutes.

47. It is possible that the hard copy documentation which arrived over the next day or two contained some additional information to that which had been e-mailed. On 16 May 2008 Verry's consultants requested the Adjudicator by e-mail to make a visit to inspect the works. On 16 May 2008, CJP's solicitors e-mailed the Adjudicator:
"I would submit that if you are minding to allow the Response then before any site visit can take place CJP must be entitled to reply to the allegations made. To this effect if your mind is to direct that the Response be allowed then my client will wish to submit a Reply to Response ..."

48. On 16 May 2008, the Adjudicator e-mailed the Parties:
*"Richard Bailey for CJP seeks **"a direction"** that the Adjudicator will proceed to **"make your decision based on the Referral"** (only). The reason is understood by the Adjudicator to be that the Response was not served in accordance with the DOM/2 adjudication rules being the timetable as extended by consent.*
Here is a re-cap:
1 ... the Response is contractually due 9th May. Verry sought relief to serve 19th.
2: The Adjudicator explained that he had no power vested in him to give relief from that date; relief had to be via Party & Party agreement. ...
6: Verry sought agreement of CJP to serve by 5 p.m. Wed 14th May. CJP said noon 14th.
7: Service of the Response was eventually made via e-mail by 6 p.m. It was late.
8: CJP refuses to give relief. The Adjudicator has no power to give relief. The Response is therefore out of time.
*9: The Direction sought by CJP is that the Adjudicator proceeds to decide the dispute in the Notice of Adjudication by way of a Referral only. The Adjudicator has no power to **"give a Direction"**. He is simply not entitled to take into account materials that are out of time. The Adjudicator is fettered by the rules which in the case of the timetabling for entering a Response he regards as mandatory.*
10: Note: the Adjudicator observed in his e-mail 7th May that if Verry could not meet the contractual time deadline it was open to Verry to begin its own adjudication for the alleged defect. On 8th May the Adjudicator urged Verry to ensure CJP was sufficiently aware of the Defects list since it may well be that a dispute is yet to crystallise in that regard.
11: For the avoidance of doubt the Adjudicator is now obliged to proceed on the material served in the Referral together with the Notice of Intention to Adjudicate."

49. By letter e-mailed to the Adjudicator on 16 May 2008, Verry's consultants said:
"... Verry would respectfully submit that if you do proceed without considering the Response as you have intimated you intend to, then this will be a serious breach of the principles of natural justice and would render any Decision you reach unenforceable. Accordingly, Verry request that you reconsider your position in the light of the following."

50. In this four page letter, they relied upon the provisions of Clause 38A of DOM/2's conditions. It seeks to argue that Clause 38A in effect gave the Adjudicator a broad discretion so far as the service of documents was concerned.

51. The Adjudicator's Response to the letter of 16 May 2008 was on the same day:

"It is a fact that service of the Response was later than the time agreed by the Referring Party. The Adjudicator has no discretionary power to defeat the new deadline. It was an inter partes waiver of the DOM/2 Rules. CJP will recognise all the risks inherent in insisting that Verry had to comply. Verry has to appeal to CJP for relief.

It is a short point that could be forthwith taken in the TCC. Alternatively [The Adjudicator] will make himself available to accept the Verry Referral in a concurrent adjudication."

52. Also that day, CJP's solicitors responded to the same letter challenging the contention that there would be a breach of the rules of natural justice.

53. Verry's consultants did seek to persuade the Adjudicator by e-mail dated 19 May 2008 that the Adjudicator would be falling foul of the same failures that dogged an adjudicator in another case, ***Buxton Building Contractors Ltd v Governors of Duran Primary School*** [2004] EWHC 733. They were concerned about how the Adjudicator intended to proceed. CJP's solicitors e-mailed back on the same day stating that in effect the Adjudicator was justified in his decision and that Verry was the author of its own misfortune.

54. Later that day on 19 May 2008, one can discern a "*change of tack"* by Verry's consultants in their e-mail timed at 17.05:

"It has come to our attention that CJP has misled you as to the procedural rules governing these proceedings. Whilst CJP has continually referred the rules in DOM/2 as setting the timetable, it is apparent that, in fact, the TeCSA Adjudication Rules apply by virtue of amended Clause 38 of DOM/2 [see Referral Tab 1 page 36] which provides as follows: *'Either Parties shall be entitled to refer any dispute or difference to adjudication in accordance with the Housing, Grants, Construction and Regeneration Act 1996 and any such adjudication shall be undertaken in accordance with the Main Contract'*. Amended Article 3 of the Main Contract (copy attached) provides as follows: *'Any dispute which by virtue of Part II of the Housing, Grants, Construction and Regeneration Act 1996 is to be referred to adjudication shall be referred to adjudication in accordance with the Technology and Construction Solicitors Association Adjudication Rules ... current at the time of reference, which are incorporated herein by reference. The decision of the adjudicator shall be binding on the Parties until the dispute is finally determined by a court or judge thereof, and a court or judge thereof shall also have jurisdiction to open up, review, revise, end, replace and quash in whole or in part a decision of the Adjudicator'*. Accordingly, Verry contends that you are not bound by the timetable set out in Clause 38A of DOM/2 but, by virtue of paragraph 20 of the TeCSA Rules (copy attached), you are to establish the procedure and timetable for the adjudication. Verry contends that, in accordance with the above, you are not fettered by the DOM/2 provisions and are at liberty to set whatever procedure and timetable you see fit. Of course should you now permit Verry's Response Verry is content to agree a suitable period in which CJP is to Reply should it wish to do so".

55. CJP's solicitor later that day by e-mail contested the assertion that Clause 38.1 was incorporated in effect into the Sub-Contract. That was responded to paragraph by paragraph by Verry's consultants on 20 May 2008. There was no reservation made by Verry's consultants as to jurisdiction. There was simply an argument put forward as to the priority of various sub-contract documents. In terms, later in the day, CJP's solicitors challenged that.

56. On 21 May 2008, the Adjudicator indicated that his decision on whether the TeCSA Rules applied was that they did not; he said that the reasoned decision would become part of his final decision. The Adjudicator also responded to Verry's e-mail which had expressed concern as to how the adjudication was to proceed.

57. On 28 May 2008, having heard further representations from the Parties, the Adjudicator e-mailed the Parties' representatives:

"Notwithstanding the Adjudicator's earlier request for comment from CJP to Gary Kitt's e-mail 12.28 here is the over-view of the Adjudicator since it may assist both Parties.

1: *All that is before the Adjudicator is the Referral. As it stands no further help is needed to decide whether the Application No 15 is payable.*
2: *There is no justification in the Adjudicator re-valuing the Application.*
3: *If Verry says that its letter of 6th May foreshadowing its Response is now to stand as its Response, please say so. The Adjudicator will likely conclude that its bare allegations are not made out and as such the allegations of defects will fail. For the avoidance of doubt the Adjudicator will not visit the site to enquire into an unparticularised allegation of defects."*

58. By 3 June 2008 Verry had commenced a second adjudication against which sought to bring into question *"the seriously defective nature of the Sub-Contract Works executed by CJP"*, as set out in their e-mail to the Adjudicator dated 3 June 2008. The same adjudicator was appointed.

59. On 6 June 2008 the Adjudicator issued his decision. It is unnecessary to set out in detail how the Adjudicator reached his decision that Verry should pay the sums claimed paid plus interest plus fees and expenses plus the Adjudicator's nomination fee. Interestingly at Paragraph 20 he stated this:

"For the avoidance of doubt, the Adjudicator indicates that if DOM/2 Rules apply to this Adjudication (as argued prior to 19th May) he is bound by the time provision in DOM/2 for service of Response by 09 May 2008. He was then bound by the relief given by CJP to noon on Wednesday 14 May 2008. Service at 5.30 p.m. was out of time. ***Note this please****: If the Adjudicator has discretion i.e. not fettered by the Rules, he would have allowed in the e-mail service at 5.30 p.m. via those discretionary powers, provided the hard copy which was not received by CJP until*

Monday 19th May contained NO additional material such that service 5-days after the e-mail version that causes real prejudice."

60. As to the question of whether the TeCSA Rules applied, the Adjudicator considered the Sub-contract order. He stated this at paragraph 22:

" The main contract refers to the "TeCSA Rules".

The "Pre-Contract Meeting Minutes" indicates at 3.09 of "Schedule of Sub-Contract Amendments": Not Applicable.

But when the Order comes along Verry brings in 7 pages of Sub-Contract Amendments.

There is conflict within the documents said to apply by the Order. The conflict is that the 'Minutes' say there will be no amendment. Given that the work began on site 09 July 2007 the intentions of the Parties appear to be that the contract is to be as the 'Pre-Contract Meeting Minutes' since the attempt to bring in the 7-pages of amendments is after the formation of the Contract. Thus the "TeCSA Rules" do not apply.

If that is wrong, the alternative position is that the 7-pages of amendments apply. Fenwick Elliott points out that DOM/2 is thereby amended at clause 1.3: ...

Clause 1.3 characterises the Pre-Order Meeting Minutes as the "Appendix" to DOM/2. If there was a conflict between what the Appendix says and what DOM/2 Conditions says, the Appendix shall prevail (See Clauses 2.2 of DOM/2). In those circumstances the attempted changes to Clause 38 conditions are ousted by the Appendix (being the "Pre-Order Meeting Minutes"), which says there are no amendments to DOM/2. So, for that reason the Amended clause 38 does not bite. The "TeCSA Rules" do not apply."

61. With regard to the substantive issue as to whether CJP was underpaid on Valuation No 15 the Adjudicator decided that:

"... absent a rejection by Verry of the CJP Application/Valuation No. 15, the Application will stand as "The Amount Due" (DECISION). Further there is no evidence that Verry made any calculation of sums due for Valuation 15 and it is decided that no Valuation was made by Verry.

The Adjudicator also decides that it was then open to Verry to withhold monies from "The Amount (otherwise) Due" provided a 'Withholding Notice' was served in accordance with DOM/2 Clause 21.3.3 (DECISION).

No Withholding Notice was served in time or at all [DECISION].

Therefore the "Amount Due" is £94,692.40 excluding any VAT (DECISION)."

62. So far as is material the second adjudication proceeded before the Adjudicator. Apart from the fact that there was a site visit, there is virtually no evidence before me as to what happened on this second adjudication. However, attached to CJP's counsel's skeleton argument was a copy of his second decision dated 2 July 2008. The decision was that Verry's claim with regard to defects was dismissed. It recorded as far as material what happened:

"On 16th June the site visit took place. By now the defective Works allegations had been canvassed by Verry in the Referral and answered by CJP in its Response. It appeared from those answers in evidence taken at the site visit that Verry was in difficulty making out much of its complaint, not least because key senior management personnel at Verry were no longer in its employ and were not at this meeting. Verry's Managing Director explained to the Adjudicator that the dispute had 'moved on' because bolts (to support brick, block and stonework brackets) were hopelessly installed but only discovered on 19 May 2008. Verry addressed this aspect of their case and although the other allegations of 'defects' were not dropped it was indicated by the Adjudicator that the evidence in CJP was here and now on site more convincing ... It is fair to say that the site visit, inspection and discussions were providing a bleak indication of its [Verry's] success at least as at 16 June 2008. Verry was asked to say if it would be providing a "Reply to Response". Driver Consult said it would say so by close of 16th. But nothing was heard that day, or next ...

Instead the Adjudication took another turn. Verry (via Driver Consult) said it wanted to stop Adjudication No. 2 all together. It wrote on 18 June 2008 that it had "taken stock of whether it was sensible and cost-effective to proceed with Adjudication No. 2", it intended to "obtain clarification from the Court on a number of issues touching and concerning the contract and disputes and Adjudications No. 1 and No. 2" and "we hereby withdraw our Notice of Adjudication and Referral and Adjudication No. 2".

Verry pressed for Adjudicator to resign (on 19th) and pointed to authorities. Absent Party and Party agreement, it appeared to the Adjudicator that it is not open to a Referring Party to unilaterally pause or postpone an excellent Adjudication "To take stock". ... It would be bizarre if the Referring Party could hop-on and hop-off the Adjudication, but as it alone saw fit.

The Adjudicator was not persuaded to stop. At 0932 on 20 August 2008 [presumably 20 June 2008] the Adjudicator e-mailed the Parties and said he had a duty to continue to now publish an Award. The proceedings would continue ex-parte from 4 p.m. that day 20th. Verry said no more."

Verry elected not to submit a Reply and so far as can be ascertained took no further part in the adjudication.

63. Taking stock, I conclude in relation to the first adjudication from the above as follows:

(a) The Adjudicator formed the view that he had no discretion to extend the seven day time for the Response.

(b) He accepted that, if he had a discretion, he would have allowed the extension of time until the time on 14 May 2008 when the Response was substantially served by e-mail.

(c) There was no objection to an appointment of an adjudicator being nominated by the RICS. Indeed if anything, nomination by the RICS was encouraged by Verry's consultants.

(d) The Parties proceeded in fact upon the basis that Clause 38A applied until the afternoon of 19 May 2008 when Verry's solicitors suggested a contractual argument by which it could be said that the TeCSA Rules applied which meant that the Adjudicator was not bound by the timetable.

(e) It is impossible for me on the evidence to determine whether or not the Adjudicator in the second adjudication would have reached a different decision if Verry and its consultants had continued to take an active part in the adjudication from about its mid point in terms of time. I simply do not have enough evidence to determine that.

The Adjudicator's Jurisdiction-Discussion

64. A number of issues arise. The first, chronologically, is whether or not the Adjudicator was to be appointed according to the TeCSA Rules. This depends in turn upon whether or not Clause 38.1 as set out was effectively added to the DOM/2 Conditions by the Schedule of Amendments. If it was not, it is accepted by Verry that the Adjudicator was properly appointed.

65. There is no doubt that the DOM/2 contract, Articles and Conditions, were incorporated in the Sub-Contract. Paragraph 6.11 of the Pre-Order Meeting Minutes expressly concerns that. The very fact that Document 3, the Schedule of Sub-Contract Amendments, was entitled "*Schedule of Amendment to the … DOM/2*" Sub-Contract supports that. Verry abandoned in argument a contention that unless and until a formal Sub-Contract was signed and/or field the DOM/2 contract could not be incorporated.

66. It was argued by CJP that because in Paragraph 3.09 the expression *"N/A"* appeared against the words *"Schedule of Sub-Contract Amendments"*, it was intended that the Sub-Contract amendments would not be applicable. That contention is, in my view, wrong. The expressions "*N/A*" appear below columns headed *"The information already received"* and *"The following information is required"* by the sub-contractor. Paragraph 3 itself is headed "*Information Received/Required by the Subcontractor"*. All that this means therefore is that the Schedule of Sub-Contract Amendments had not already been received by the sub-contractor prior to the Pre-Order Meeting and was not as such required by the sub-contractor.

67. If one seeks to read the Schedule of Amendments (Document 3) with the DOM/2 contract (Articles and Conditions), one is left with a straight conflict. On the one hand Clause 38A provides a clear and comprehensible code for adjudication whilst Clause 38.1 seems to require that *"adjudication shall be undertaken in accordance with the Main Contract"*, which has a different code.

68. I have formed the view that what has happened here is that Verry in putting together the Sub-Contract documentation did not think clearly about the consequence of inserting Clause 38.1 without deleting Clause 38A of the DOM/2 conditions. What it has done is to create an ambiguity between the two so that one is left in very real doubt as to what it was that was mutually intended. It is clear that the Schedule of Amendments, although a standard form and created over a year before Verry's order to CJP, was simply and as a matter of standard form referred to as one of the Sub-Contract documents on the order form. The Schedule of Amendments was not specifically prepared for this Sub-Contract; it was itself a Verry standard set of amendments. The fact that Clause 38.2 refers to a named adjudicator is evidence of that: there was no named adjudicator.

69. Some assistance is provided by Clause 2.2 of the DOM/2 conditions:

"If any conflict appears between the DOM/2 Conditions and Appendix, then the Appendix shall prevail. If any conflict appears between the terms of Sub-Contract DOM/2 and the Numbered Documents, the terms of Sub-Contract DOM/2 shall prevail. If any conflict appears between the provisions of the Main Contract and the terms of Sub-Contract Documents, the terms of the Sub-Contract Documents shall prevail."

The Schedule of Amendment deletes the ordinary DOM/2 definition of "*Appendix"* and states that *"all references in Contract to 'Appendix' shall be deemed to refer to Pre-Order Meeting Minutes"*. Thus the reference in Clause 2.2 in the first sentence should therefore read:

"If any conflict appears between the DOM/2 Conditions and the Pre-Order Meeting Minutes, then the Pre-Order Meeting Minutes shall prevail."

70. Although there is an element of circularity in this point, there is a conflict between the Pre-Order Meeting Minutes with its unqualified requirement that DOM/2 (including standard Amendments 1-8), which suggests one adjudication code is to be incorporated and the Schedule of Amendments which suggests another such code. Applying Clause 2.2, it is my view that Clause 2.2 can be used to resolve the clear ambiguity that arises. Thus so far as the adjudication provisions are concerned, the unamended Clause 38A was agreed to be the applicable adjudication code. Even if I was wrong about that, given that the Order emanated in terms of drafting from Verry the contra proferentem rule would be activated to resolve the ambiguity in favour of CJP in this case. On any basis, Clause 38A was applicable to govern any adjudication between the Parties.

71. Although it is unnecessary for me to deal with questions of waiver and estoppel, I will briefly address the assertions made by the parties in this context. Essentially, CJP argue that by reason of what happened both in the appointment of the Adjudicator and what happened thereafter, Verry is estopped from asserting that the TeCSA Rules were applicable or otherwise any right to challenge the jurisdiction, alternatively has waived any objection to jurisdiction. Verry challenge this.

72. Various cases such as ***Thomas Frederic's (Construction) Limited v Keith Wilson*** [2004] BLR 23 and ***The Project Consultancy Group v The Trustees of the Grey Trust*** [1999] BLR 377 make it clear that if there is to be an objection

to jurisdiction of the arbitrator generally there should be a clear reservation of the objecting party's stance on jurisdiction. Such a reservation will usually be done effectively by clear words but it could also be done by unequivocal conduct.

73. I am satisfied here that there was no reservation of rights so far as jurisdiction was concerned. The history above reveals that to be the case, although belatedly during the adjudication process Verry raised the possible engagement of the TeCSA Rules. Such Rules were however put forward not on any basis that the Adjudicator lacked jurisdiction but on the basis that they gave the Adjudicator the right to disregard the arguably tighter timescale for the service of the Response laid down by Clause 38A. The argument was effectively that the TeCSA Rules permitted the Adjudicator a much wider or greater discretion to set the timetable. As far as I can ascertain from the documents before the Court, there never was anything which approached a reservation as to the jurisdiction in this or any context.

74. One needs to couple with the absence of any reservation of rights the positive encouragement by Verry in its letter dated 29 April 2008 to CJP's solicitors (and copied to the RICS) that the RICS should nominate the Adjudicator. The nomination by the RICS is inconsistent with the application of the TeCSA Rules which provide by Rule 5 for nomination of the Adjudicator by the chairman of the TeCSA. Thus in effect, and in law, by having encouraged CJP to secure a nomination from the RICS (and CJP doubtless having acted upon that encouragement in procuring a nomination from the RICS), Verry is estopped from asserting that an adjudication code which is inconsistent with a nomination by the RICS of the Adjudicator is applicable. Alternatively to that, it is on any count no longer open to Verry to assert that an adjudicator nominated by the RICS did not have jurisdiction.

75. Having raised the possible engagement of the TeCSA Rules, but not having reserved its position on jurisdiction, Verry is bound by the Adjudicator's decision that the TeCSA Rules were inapplicable. This became a part of the dispute which the Parties in effect invited the Adjudicator to resolve; the Adjudicator expressly addressed that issue in his decision. In those circumstances, the Adjudicator was given jurisdiction by the Parties who effectively concurred in his deciding whether the TeCSA Rules were applicable.

76. It follows from the above that the Adjudicator had jurisdiction to resolve the issues which were referred to him. The TeCSA Rules were not applicable as a matter of construction of the Sub-Contract and Clause 38A provided the framework for the adjudication.

Did the Adjudicator Decide the Right Dispute?

77. Verry sought to argue that the Adjudicator did not decide the dispute which was referred to him. I disagree. The Referral Note dated 1 May 2008 put the issue in Paragraphs 24 to 33 which summarised what the dispute was. It was essentially related to the non-payment of CJP's interim payment application for valuation No 15. That was said to be a failure to make payment in accordance with the contractual payment provisions. The Adjudicator decided that there had been a non-compliance with the payment provisions. It matters not that the Adjudicator answered the question wrongly or, indeed, for the wrong reasons. What he did do however was to answer the question which was put to him.

Breach of Natural Justice-Discussion

78. The first sub-issue under this head to determine is whether or not the Adjudicator was right as a matter of contractual construction in determining that he had no discretion to extend time for service of the Response. Verry argues that he did have such a discretion whilst CJP argues that he did not.

79. I have formed the clear view that the Adjudicator did have such a discretion for the following reasons:

(a) There is nothing in Clause 38A.2.5.1 which, in any express prescriptive language bars the Adjudicator from doing so.

(b) Clause 38A.2.5.5 makes it clear that the Adjudicator shall *"set his own procedure"*. It gives him an *"absolute discretion"* in taking the initiative in ascertaining the facts and the law as he considers necessary. One would have expected that, if he can set his own procedure and has an absolute discretion, he can grant appropriate extensions of time.

(c) Clause 38A.2.5.1 is not written in prescriptive terms: it identifies that Verry (in this case) may send within seven days of the date of a referral a Response. Whilst it is true that it is not stated elsewhere in Clause 38A that the Responding Party may serve its Response at a time later than that seven day period, there is nothing which says it cannot if the Adjudicator agrees.

(d) One needs to consider clauses such as those in Clause 38A with some common sense. Whilst one bears in mind that the timetable (in the absence of the referring party's agreement to a further 14 days or the parties' mutual agreement otherwise) is 28 days from the referral, one needs to consider what might sensibly happen as a matter of business common sense if there was some event beyond the control of the Responding Party which prevented the service of the Response on time. For instance, if all the fax and e-mail lines went down so that there was a delay in transmission by one minute or one hour in the service of the Response or a key member of the Responding Party's legal or clients team was struck down with illness, it would be surprising if the Adjudicator could not, within reason and the constraints of the timetable, extend time for the service of the Response.

(e) Clause 38A.2.5.5 gives the Adjudicator an absolute discretion of which the following eight sub-sub-sub-paragraphs are only examples. Obviously, given the 28 day (or other reliable) deadline, the discretion would have to be but can be exercised in a way so as to enable the timetable to be complied with.

(f) One of the entitlements of parties to an adjudication is a right to be heard, that being the rule of natural justice *"Audi Alterem Partes"*. There is thus a reasonable expectation of parties to an adjudication that, within reason and within the constraints of the overall requirement to secure the giving of a decision within the requisite time period, each party's submissions and evidence will be considered by the Adjudicator. It is a draconian arrangement (which the parties are of course free expressly to agree) that a party is denied its right to be heard unless it has been given a fair and clear opportunity to put its case. Very clear wording would be required to ensure that such a right was to be denied.

80. I do not consider that the wording of Clause 38A is such that the Adjudicator is prevented from giving appropriate extensions of time to either party for the service of documents, responses and evidence. It is of course open to any adjudicator in setting his or her procedure under Clause 38A to impose *"unless order"* type arrangements, provided that the parties are given the right first to argue whether that is appropriate. It is sometimes said by some commentators that adjudication is or can be *"rough justice"*. There is no need to make it even rougher by construing provisions such as those contained in Clause 38A as circumscribing a party's basic right to be heard.

81. There can be no dispute, given that he said it, that the Adjudicator would, if he believed that he had a discretion, have extended time to the service of the Response. It is accepted by both parties, properly, that the Adjudicator acted, characteristically, openly and honestly in all that he did. Thus, from time to time during the course of the adjudication case he made it clear to the parties what his initial views were, first of all about extending time and then about whether the TeCSA Rules were applicable. He sensibly encouraged the parties to come to the TCC on a quick reference to the TCC as to whether he had a discretion to extend time. With goodwill, that could have been accommodated within one to two weeks at the TCC. It was a sensible suggestion.

82. That said, the Adjudicator, for wholly honest but in my judgment ultimately wrong reasons, decided in effect to exclude from consideration the substantial response both in terms of argument and evidence from his consideration. It was inevitable that, once he did so exclude such material, he would come to the conclusion which he did. It was as if the adjudication was an uncontested claim. There is no hint or suggestion in his decision that he took into account any aspect of the Response which by then he had in his possession.

83. Reliance was placed upon my observations in ***Cantillon Ltd v Urvasco Ltd*** [2008] BLR 250 at Paragraph 57:

"From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:

(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 the 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 can be ***Balfour Beatty Construction Company Limited v The London 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 to thereto."*

The ***Cantillon*** case was concerned with an allegation that the adjudicator had made his decision upon the factual or legal basis not argued or put forward by either side without giving the parties opportunity to comment or address. That is not the case here.

84. I am satisfied that, unwittingly and honestly, the Adjudicator failed to apply the rule of natural justice that each party has a right to be heard and to have its evidence and arguments considered by the tribunal. The fact that the adjudicator acted honestly and in an open way does not mean however that there is no breach of the rules of natural justice. One must consider the end result of what the adjudicator actually did which is that Verry's Response, both in terms of argument and evidence, was expressly and consciously not considered by the adjudicator.

85. As to whether the breach was a material one, on analysis the only point put forward by CJP is that the Adjudicator's decision in the second adjudication demonstrates that the Adjudicator would probably have found against Verry even if he had considered the Response in the first adjudication. CJP argues that the onus of proof must be on Verry to show that the breach was a material one and that the adjudicator would have reached a different decision. I am satisfied that the breach here was a material breach:

(a) In itself, the failure to disregard the whole of Verry's response both as to argument and as to evidence was and must have been material. There comes a point when a breach of the rules of natural justice is so pervasive that the only proper conclusion to come to is that the breach is material.

(b) It is not necessary for the Court to go so far as having to investigate the facts to determine whether the adjudicator would have reached a different decision in substance if he had considered the Response. All one

need say (and I do) is that there was a real possibility that the adjudicator could have reached a different decision. I am satisfied that there is a real (as opposed to fanciful) possibility in this case.

(c) Because Verry decided to stop participating in the second adjudication part way through, there is no telling what the adjudicator would have decided if Verry had pressed its case with force and logic throughout the remainder of the adjudication.

86. It follows from the above that this decision of the adjudicator dated 6th June 2008 cannot and should not be enforced. CJP's claim for enforcement thus fails.

Verry's Claims for Declaration

87. In addressing matters above, I have effectively resolved the issue raised in Verry's proceedings as to the applicability of the TeCSA Rules: they are inapplicable. The remaining issue relates to the basis of payment under Clause 21 of the DOM/2 Conditions. The real issue is whether or not under Clause 21 as a matter of principle CJP is contractually entitled to be paid the amount of its applications as claimed by them in the event that no payment notice or no withholding notice is served.

88. It is therefore necessary to consider Clause 21 of the amended DOM/2 Conditions. The amendments in the Schedule of Amendments in relation to Clause 21 do not (unlike Clause 38.1) conflict with the DOM/2 Conditions. That is because they are framed in terms of deletions from the standard DOM/2 conditions together with insertions or substitutions.

89. The relevant Clauses as amended are as follows:

"21.1. The first and interim payments and the Final Payment shall subject to Clause 32 be made to the Sub-Contractor in accordance with the provisions of Clause 21. 21.2.1 The first payment shall be due on the date specified in the Pre-Order Meeting Minutes.

21.2.2 Interim payments shall be due at intervals not exceeding one month calculated from the date when the first payment was due.

21.2.3 The final date for payments for the first and interim payments shall be not later than 28 days after the date when they became due.

21.3.1 Subject to any agreement between the Sub-Contractor and the Contractor as to stage payments then subject to any decision of the Adjudicator under Clause 38A … the amount of the first and each interim payment of the Sub-Contractor shall be the Contractor's gross valuation as referred to in Clause 21.4 less ...

21.3.2 Not later than five days after the date on which any interim payment becomes due Contractor shall give a written notice to the Sub-Contractor which will specify:

1. The amount of the interim payment which is proposed to be made in respect for Sub-Contract Works and the basis on which such amount was calculated;

2. By way of deduction from such amount, the amount of any payment proposed to be made from the Sub-Contractor to the Contractor and the basis on which such amount was calculated.

3. Notwithstanding that the Contractor does not serve a written notice pursuant to this Clause 21.3.2 the Sub-Contractor shall only be entitled to payment of sums properly due in respect of the Sub-Contractor Works.

21.3.3 Not later than three days before the final date for payment of any interim payment, the Contractor may give a written notice to the Sub-Contractor which will specify any amount proposed to be withheld and/or deducted from the amount under Clause 21.3.1, the ground or grounds for such withholding and/or deduction and the amount of the withholding and/or deduction attributable to each ground. If no notice is given, the Contractors will pay the amount stated in his notice under Clause 21.3.1 by the final date for payment of it. Notwithstanding that the Contractor does not serve a written notice pursuant to this Clause 21.3.3 the Sub-Contractor shall only be entitled to payment of sums properly due in respect of the Sub-Contract Works".

90. What happened in this case is that there was no notice either under Clause 21.3.2 or 21.3.3. The issue thus arises as to whether or not in the absence of any such notice the valuation applied for in effect stands and is payable in the sum applied for.

91. I am satisfied that the value applied for by the Sub-Contractor does not automatically stand as the amount due in the absence of notices under Clause 21.3.2 or Clause 21.3.3. My reasons are as follows.

(a) There is nothing in the Sub-Contract which states that. There are some standard forms which do provide expressly that, if there is no equivalent to that referred to in Clause 21.3.2, the Sub-Contractor or Main Contractor's applied for value stands and is deemed to be the amount due. There would need to be clear wording to secure that state of affairs. There is not.

(b) By way of analogy the Scheme for Construction Contracts (England & Wales) Regulations Part 2, Paragraph 2 provides, by way of default mechanism, for interim payment on a basis equivalent to *"an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period..."* That basis is a value based basis. The Scheme recognises that this is an appropriate basis which one can properly presume complies with the parent Act.

(c) In effect Clause 21.3 provides for the Contractor to value each application as it comes in. However the default mechanism is agreed to be that the subcontractor "*shall only be entitled to payment of sums properly due in respect of the Sub-Contract Works".*

This expression is sufficiently clear and comprehensible. Clause 21.4 requires the gross valuation to be made by the Contractor to relate to *"the total value of the Sub-Contract Work on-site properly executed by the Sub-Contractor"*. Thus, the amount to which the Sub-Contractor is entitled and the maximum which it can expect on an interim valuation is the value of Sub-Contract Work properly executed (plus any further allowances for materials and goods on and offsite together with certain other sums referred to in Clause 21.4). Thus, whilst the amount due will represent the value of work executed in terms of quantities by reference to the Sub-Contract rates and prices, interim payment is only due in respect of work properly done. Therefore, if work has been improperly done then the Main Contractor (Verry in this case) is not obliged to pay to that extent. I will not at this stage seek to identify how the value of Sub-Contract Works improperly executed should be valued.

92. It follows from the above that Verry is entitled to a declaration that it is only entitled to be paid the amount properly due for work properly executed by CJP notwithstanding the absence of a payment notice or a withholding notice under Clause 21.3.2 or Clause 21.3.3 of the DOM/2 Conditions as amended.

Decision

93. CJP's claim is dismissed. Verry's claim for declarations is allowed, but only to the limited extent set out above.

MR. J. BOWLING (instructed by Fenwick Elliott LLP) for the Claimant
MR. A. HICKEY (instructed by Driver Consult Ltd.) for the Defendant