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

Introduction

1. The Claimant, VGC Construction Limited ("*VGC*") is and was a building and civil engineering sub-contractor. Jackson Civil Engineering Limited ("*Jackson*") is a main contractor. By a contract dated 13 November 2006, Jackson employed VGC to carry out various construction services relating to the provision of ducts and cabling on the M3 Motorway.

2. The sub-contract over-ran by some 26 or more weeks. Following the submission of two Applications for payment, 13 and 14, and the imposition of various set-offs by Jackson, adjudication was commenced on 2 May 2008 before an Adjudicator, Mr Stephen John. The parties signed an Adjudicator's Agreement. On 8 June 2008, the Adjudicator issued his decision which resolved that in effect there was a net sum due to VGC of £745,657.64. That decision was not honoured and VGC instituted the current proceedings on 11 July 2008 to seek enforcement of the Adjudicator's decision.

3. The case raises issues as to the jurisdiction of the Adjudicator, primarily in relation to whether or not it can be said that there was a sufficient dispute (if any) to be referred to adjudication, alternatively whether any claim giving rise to a possible dispute was withdrawn. There are also issues concerned with whether or not a new claim was raised in the adjudication which the Adjudicator had no jurisdiction to resolve and whether or not there has been some waiver of any right to challenge the jurisdiction of the Adjudicator. A major issue arises as to whether a claim for £300,000 for delay and disruption was so nebulous and ill-defined as to be unable to give rise to any dispute.

The History

4. The Sub-Contract between the parties was based on the ICE form of Sub-Contract (September 1991 with 1998 amendments), intended for use in conjunction with the ICE Conditions of Main Contract Sixth Edition. The Sub-Contract was a re-measurement one which none the less allowed for the ordering of variations and their valuation for payment purposes. Clause 6 of the Sub-Contract stated, materially, as follows:

   "(1) Within 10 days, or such other period as may be agreed in writing, of receipt of the Contractor's written instructions so to do, the Sub-Contractor shall enter upon the Site and commence the execution of the Sub-Contract Works and shall thereafter proceed with the same with due diligence and without any delay, except such as may be expressly sanctioned or ordered by the Contractor or be wholly beyond the control of the Sub-Contractor. Subject to the provisions of this clause, the Sub-Contractor shall complete the Sub-Contract Works within the Period for Completion specified in the Third Schedule hereto.

   (2) If the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works:

   (a) by any circumstances or occurrence (other than a breach of this Sub-Contract by the Sub-Contractor) entitling the Contractor to an extension of his time for completion of the Main Works under the Main Contract; or

   (b) by the ordering of any variation of the Sub-Contract Works to which paragraph (a) of this sub-clause does not apply; or

   (c) by any breach of this Sub-Contract by the Contractor;

   then in any such event the Sub-Contractor shall be entitled to such extension of the Period for Completion as may in all the circumstances be fair and reasonable. …"

5. The Third Schedule of the Sub-Contract identified the Period for Completion as 26 weeks whilst the Sub-Contractor Meeting Record dated 8 September 2006 identified that the Main Contract commencement date and Completion Period was 11 September 2006 and 26 weeks respectively whilst the Sub-Contract Provisional Start date and duration were 18 September 2006 and 26 weeks respectively. It appears that this minute was incorporated into the Sub-Contract.

6. There is no issue that the Sub-Contract was delayed. Mr Trevor Exton, the experienced Commercial Director of Jackson, says, in his first Witness Statement, that it was recognised by the parties that, because the design of various parts of the works was relatively incomplete in September 2006, variations would be necessary. Thus it was that by the time of Application 13 on 30 September 2007, the Sub-Contract was in delay by some 26 weeks plus. That Application, amongst numerous other items, contained a one-line item:
   "13.150 Delay and disruption … £300,000.00"

7. Jackson issued its Certificate 13 on 17 October 2007. In effect what the breakdown attached to this Certificate did was to take the overall amount claimed in Application 13, £4,354,168.67, and deduct from it those items which were rejected in whole or in part by Jackson; this included item 13.150 in its entirety. In addition, Jackson deducted some £768,594 for what were said to be *"Contra Charges"*: these were also one-line items which included for example items for "*JCE Staff Costs"* and *"JCE Compound Costs"* in the sums of £48,000 and £24,000 respectively.

8. On 25 October 2007 by a letter dated 25 October 2007 VGC wrote to Jackson:
   "Pursuant to Clause 6 of our Sub-Contract we request an extension of time of 26 weeks, to extend the Contract Completion Date to 14 September 2007. This date relates to when the additional, varied works that are instructed by [Jackson] were completed.
   The extension of time is justified by, but not limited to, the reasons listed on the attached Delay document."

   The Delay document attached was a four-page document which comprised simply a number of heads of reasons for delay. The two-line *"Overview"* paragraph states:

"The purpose of this document is to describe the delays to the Contract between VGC … and Jackson … on the M3 NRTS Project."

Thus, for instance there is reference to delays attributable to Traffic Management. The "Delays" are simply headings such as "Delayed Start … Traffic Management … Fragmented Working … Walk-out TM". There is no prose explanation of how or why any such delays occurred and how or why they justified an extension of time.

9. By letter dated 1 November 2007, VGC submitted their Application No 14 for payment in the total sum of £4,358,524.89. I infer that the Sub-Contract Works had been largely completed in September given that the increase in the value of work in October was only some £4,000. Again, the Application contained the one-line item for delay and disruption in the sum of £300,000. It also contained some four pages of re-measurement items and some 10 pages' worth of Variations. Thus Item 13.150 came under the rubric *"Variations"*. There were various individual items for delay and disruption. For instance Item 01.003 is for "Delay to Works – letter date 28/09/06 Allow on account … £12,500" and Item 02.015 is for *"Disruption due to moving sections 1 day per gang to move section (3 No. Gangs) also 1 day of pre-lims … £12,085.20"*. There were three items (11.129 – 11.131—for "*Traffic Management Delay"* at various dates in July 2007 and Items 11.139, 12.142 and 13.152 are said to be "*Site Pre-lims over-run"*.

10. Certificate 14, issued in November 2007 by Jackson, followed the same format as Certificate 13, deducting, amongst others, Item 13.150 for Delay and Disruption in the sum of £300,000.

11. On 7 November 2007, there was a short un-minuted meeting attended by Mr Exton for Jackson at which he explained to VGC representatives that, until supporting information was provided, he was not in a position to assess the claim for extension of time and to determine whether the contra charges ought to be reduced. It is thus clear that the issue that was arising between the parties as to whether or not an extension of time was due to the VGC would or at least might determine not only whether VGC was entitled to some compensation for such delay but also whether and to what extent Jackson was entitled to some of its contra charges relating to delay and disruption costs or losses suffered by Jackson.

12. Mr Exton in his first witness statement says that at this meeting VGC advised that it would take six months to produce the "*delay and disruption/extension of time*" claim and the requisite substantiating information. Mr Exton says in his statement that he "*proposed that we deal with the other items and leave assessment of this claim and our contra charges in abeyance for the time being"*. He does not suggest that some agreement was reached at that meeting with regard to the withdrawal of the assertion previously made by VGC in effect that it was, in broad terms, entitled to an extension of time or to the sum of £300,000.

13. On 7 December 2007 a minuted meeting was attended by Messrs Exton and Stobbs for Jackson and various senior managers of VGC (none of whom gave a statement in these proceedings). The purpose of the meeting was minuted in Paragraph 1 as being: *"… for [Jackson] and [VGC] to establish why the measurement items listed in [Jackson's] letter … date 10 October Notice of intention to withhold payment, were in dispute. [Jackson] were also to explain how their contra-charges listed in the above referenced letter were derived."*

The bulk of the minutes address the measurement items and the contra-charges. It is clear that all the contra-charges relating to delay or disruption were not accepted by VGC.

14. At Paragraph 6 of the minutes (which were prepared by VGC), the following "C*onclusion"* is set out:
"[Mr Exton] *stated that VGC's claim for an extension of time and [Jackson's] over-run would be left in abeyance. [VGC] would like to agree the measurement items prior to their inclusion in the Final Account. VGC are currently preparing the Final Account. The Final Account will be submitted mid-January 2008 when the agreement to the measurement items has been reached. VGC will attempt to finalise the extension of time claim by the end of January 2008. [Jackson] confirmed agreement to the Final Account being submitted in January 2008 …*"

15. It is asserted by Jackson that some effective or binding agreement was reached between the parties whereby VGC withdrew its delay and disruption claim for £300,000. What Mr Exton says in his statements, however, does not lead to that conclusion. At Paragraph 24 of his first statement he says:
"At the conclusion of the meeting on 7 December 2007 it was agreed and as is recorded at Item 6 on page 9 of the minutes that VGC would now submit its final account in mid-January 2008 and its 'delay and disruption/extension of time' claim by the end of January 2008. I understood this to mean that in the interim VGC was not pressing its 'delay and disruption/extension of time' claim because it was finalising it. In the meantime, that claim and JCE's contra charge claim would continue to be held in abeyance…It was not my decision to leave the claims in abeyance. VGC said they would be finalising the claims by the end of January …"

16. At Paragraph 9 of his second statement he says this:
"At paragraph 11 of his statement, Mr Brydon [of VGC] states that ***'Mr Exton suggests that he understood that the Claimant was not pressing its claim for disruption and extension of time because it had agreed that it would attempt to provide further details of the claim by the end of January 2008'.*** *I maintain that this was in fact the position as is clearly recorded in the minutes…Whilst the minutes record that I stated that the* ***'delay and disruption/extension of time'*** *claim and JCE's contra charges claim would be held in abeyance I wish to make it clear that this was the product of mutual agreement. This statement followed discussions wherein it was acknowledged that VGC was still not in a position to submit a formulated* ***'delay and disruption/extension of time'*** *claim. Previously and during the meeting of 7 November 2007 Mr Mauldon [of VGC] had advised that this would take six months to prepare. However, at the*

meeting of 7 December 2007 he advised that this would now be submitted by the end of January 2008. It follows as a matter of common sense that until the claim is properly formulated and submitted it would be held in ***'abeyance'****."*

17. I do not consider that on any construction of the minutes of the meeting of 7 December 2007 or indeed upon what Mr Exton says can it be said that there was some binding agreement that the claim, such as it was, for £300,000 for delay and disruption was to be withdrawn. The word "*withdraw*" or a comparable word is not used. There is certainly no hint or suggestion of any abandonment of the claims which had been put forward in Application 13 and 14. There would have to be a clear agreement or at least a clear representation made by VGC that their claim for £300,000 was being withdrawn or was not going to be acted upon or pursued.

18. Although there was a meeting on 10 January 2008 between the parties, there was no discussion about the delay and disruption claim. There then followed a period of relative inactivity between 11 January and 8 February 2008 during which VGC pursued another adjudication against Jackson.

19. On 22 February 2008, VGC wrote to Jackson primarily addressing issues between the parties relating to measurement. At Paragraph 19 of the letter, the following appears:

    "Delay, disruption and Prelims over-run: there are several items in relation to this. As these will be subject to a separate submission, we have removed them from our attached summary."

    There was a "*Schedule of disputed items in Measured Works*" attached which against Item 13.15 "Delay and Disruption" it was indicated that these items are "*elsewhere*". I do not read this letter as indicating that the delay and disruption claim for £300,000 was being abandoned. The item was simply being removed from the physical schedule that was attached to this letter.

20. Between February and early April 2008, the parties reached some agreement on disputed measured items.

21. There was a meeting on 4 April 2008 between amongst others Mr Exton [of Jackson] and Mr Brydon and Mr Butler [of VGC]. This was an un-minuted meeting. There is some issue on the evidence before the court as to what was said. There clearly was extensive discussion about the measured items as opposed to the delay claim. What is clear is that VGC indicated that they were seriously considering (at least) commencing adjudication against Jackson. It is also clear that Mr Exton understood that the adjudication could relate to the delay and disruption claim. He says in his first statement what happened when he had a private discussion with Mr Butler during the course of this meeting:

    "… Mr Butler advised that in his view adjudication was the only means of resolving the whole dispute particularly since the parties remained so far apart. I cautioned Mr Butler against taking this step because it was my view that most of the disputed items were capable of resolution without resort to adjudication. Adjudication would not have been appropriate in relation to the 'delay and disruption/extension of time' claim because it had still not been tabled and there was nothing to adjudicate on. I explained to Mr Butler that I could not undertake any assessment because the claim had yet to be formulated. I reminded him that the finalised claim was still outstanding. We could only consider the claim once it had been finalised."

22. Thus, taken at it highest, there was a discussion about adjudication at that meeting; there was no agreement at that meeting that the delay and disruption claim should or should be considered to be withdrawn. Mr Exton was essentially asserting that there was nothing, yet, to be adjudicated upon with regard to the delay and disruption/extension of time claim.

23. On 30 April 2008 VGC sent to Jackson by e-mail and by hard copy an "*As Built Programme which records the Actual periods taken to carry out these works and the effect of these variations*". It seems that the e-mail version was not readily legible albeit that it clearly purported to be a detailed programme which recorded against each activity what the programmed and actual periods of construction were. The hard copy which was sent to Jackson's Huntingdon office was clear, albeit that Mr Exton was not at the Huntingdon office (he was at the Ipswich office). This Programme does not purport to indicate cause and effect as such.

24. On 2 May 2008, VGC served a Notice of Adjudication on Jackson saying that *"as a result of the difference in value which currently exists in respect of the Final Account, a dispute exists between us"*. Although there was no formal Final Account, the Notice of Adjudication broadly described the nature of the dispute and the circumstances giving rise to it as being:

    "10. The parties have been, over a considerable period, negotiating the final account for the works. The basis of this has been application number 14 submitted by VGC.

    11. During negotiations, the parties held several meetings to attempt to agree the value of the Final Account. These were unsuccessful.

    12. VGC have prepared a Scott Schedule which they believe reflects the position of the parties at the date of the adjudication.

    13. The gross value of works valued by VGC is £4,287,302.08, against which Jackson have valued £3,623,796.94.

    14. Since Practical [Completion] has been reached, retention should be applied at 2.5% of the subcontract value.

    15. Jackson are applying set-off charges to the value of £656,400. VGC dispute these charges.

    16. To date Jackson have paid a net sum of £3,040,482.35."

The Adjudication

25. On 2 May 2008, VGC made application to the Institute of Civil Engineers for the appointment of an adjudicator. The ICE selected Mr John as Adjudicator and notified him and the parties thereof on 7 May 2008. The parties sensibly agreed mutually to sign an Adjudicator's Agreement with Mr John (or rather his company) on 8 May 2008. This recorded, in effect in a preamble, that:

"Disputes or differences have arisen between the Parties under a Contract dated: on or around 9 November 2006 …. These disputes or differences have been referred to adjudication in accordance with The Institution of Civil Engineers' Adjudication Procedure (1997) … and the Adjudicator has been requested to act."

It was agreed at Clause 1 that the rights and obligations of the Adjudicator and the Parties were to be as set out in that Procedure. By Clause 3 the parties jointly and severally undertook to pay for the provision of the Adjudicator's services. Rates were agreed in a Schedule.

26. It was agreed that the Referral Document should be considered to have been served on 12 May 2008. To a large extent it mirrored the Notice of Adjudication in that the same sums were claimed. Under the Clarification of Items in Dispute (Paragraph 17) VGC referred to the areas of dispute between the parties and to a substantial number of appendices attached which provide more detail. With regard to paragraph 17.23, the following was stated: *"Extension of time: Appendix 29."* It was agreed that this was a mis-reference which should have been to Appendix 30. A Scott Schedule (Appendix 3) was also attached.

27. Appendix 30 did not, as such, seek to explain the sum of £300,000. What it did do was to say, rightly or wrongly:

"*1. It is apparent from the attached analysis [the Programme sent on 30 April 2008] that, as a result of numerous delays and additional works during the currency of the Sub-Contract Period, as defined in the Sub-Contract, together with additional works instructed after the Sub-Contract Period passed, that VGC suffered delays and consequently loss due to no fault of their own.*"

There is then set out over the following eight paragraphs some explanation or at least assertion that there were delays attributable to various factors such as their variations and Jackson's alleged "*inability to organise the Traffic Management System*".

28. On 23 May 2008, Jackson served its Response to the Referral Notice. Although this Response appears to have been drafted by Jackson, I was told and accept that Jackson's solicitors were advising Jackson in the background, albeit not formally on record. The Response deals with the Referral on a paragraph by paragraph basis. Paragraph 10 refers to the meetings which took place in November and December, stating this:

"… a meeting was arranged for 4 April 2008, where again it was apparent that VGC, notwithstanding the comments made by Jackson Civil Engineering at previous meetings, had still not provided proper supporting details of their claim and there remained a substantial amount of work required before a meaningful assessment of VGC's account could be undertaken. Clearly, this still remains the case, yet VGC have now launched a further adjudication to try and resolve its account without the substantive information usually required to back up any application for payment. Given the length of time that Jackson Civil Engineering have been requesting proper backup of the sums claimed, the only conclusion must be that such information does not exist. Without the proper proof, there can be no entitlement."

29. With regard to the claim for £300,000, the following was stated:

"*15. It should be noted, that within Application No 13 VGC submitted a claim for delay and disruption in the sum of £300,000.00 … with no substantiation or prior notification. Formal notification of 'a claim' for an extension of time was issued under cover of VGC letter dated 25th October 2007 with only a 'table of contents'. There was no supportive information, justification or financial information appended … During the meeting held with VGC on 7 November 2007, Jackson Civil Engineering requested when the basis for and the justification of the claim for delay and disruption/extension of time would be submitted and were informed that it would take them approximately 6 months to complete. Six months have passed and to date the 1½ page statement in the Referral remains the sole basis of their submission with no financial information at all. Clearly, on any view, this is insufficient for Jackson … to assess its validity, and the Adjudicator should evaluate this claim as nil. The inclusion in Application No 13 by VGC of an, on paper, substantial claim for delay and disruption (and/or extension of time as requested under VGC letter dated 25 October 2007)…when it is not supported by any substantiation or justifiable reasoning as to its validity cannot and does not show that Jackson … were in breach of their rights under the sub-contract to dispute this item.*"

30. Later in the Response, Paragraph 17.23 addresses the extension of time claim. There is some repetition of the fact that it was a late notified claim and that there was no "*supportive information, justification or financial information*" for it. Jackson continued:

"For the reasons set out in paragraph 15 above, this claim lacks sufficient detail and substantiation for either Jackson Civil Engineering or the Adjudicator to assess its validity. Further, Jackson Civil Engineering will now demonstrate why VGC are not entitled to any time and/or money in respect of this claim and why VGC's submission, based on 1½ pages of unsupported statements, does not demonstrate entitlement as follows: …"

There then follows some three and a half pages of prose which asserts why VGC is not entitled either to extension of time or indeed to any money. So far as the quantification is concerned the main argument was that payment of variations to the extent that variations caused delay would compensate VGC for any delay or disrupted related expenditure. It concludes with this:

"It can be seen that the substantiation of any claim for an extension of time/delay and disruption by VGC has not been made, and only emanates from the deduction by Jackson … of its costs due to the extensive overrun on the Contract by VGC causing severe costs to be expended by Jackson ..."

31. Jackson sought redress that it would require the Adjudicator to find:

"(i) that Jackson Civil Engineering has valued the Application No 14 … correctly …

(ii) that the set-off charges are applicable in the sum of £637,131.60 as contained in Appendices R and S …

(iii) that VGC repay forthwith to Jackson … any monies Jackson … have overpaid VGC …"

32. On 29 May 2008, VGC served its Reply to the Response. VGC asserted that it had submitted *"substantiation of the amounts claimed throughout the period of both the interim applications and the subsequent negotiations (para 10.2)"*. At paragraph 17.22.10 it dealt with main elements of the Jackson set-off. In so doing, VGC indicated that it was entitled to an extension of time at least up until 8 August 2007 and challenged the details in Appendices R and S to the Response. With regard to the Extension of time claim VGC refuted the comments made by Jackson and stated that "*all information contained within the Referral has been in the possession of Jackson prior to the date of the Notice of Adjudication"*. However, at Paragraph 17.23.6 VGC said: *"VGC attach their calculation of the additional OHP [Overhead and Profit] costs required due to this overrun to their subcontract works."*

33. This attachment was a half-page calculation which identified a claim for time-related overheads and profits on the so-called "*Hudson Formula*" basis. This Formula is well known throughout the industry and involves a simple calculation in effect to work out what the time-related head office overhead and profit contribution is or should be related on a weekly basis to a period of over-run. The actual calculation produced a cost of over-run of 26 weeks times £13,857.75, a total of £360,301.50 with a deduction for an allowance for recovery of head office overheads and profits through the valuation of variations of £60,000. The net balance was said to be £300,301.50. It is not necessary for me to decide whether this was an appropriate calculation let alone an arithmetically correct one.

34. This Reply was served some 10 days before the time due for production of the Adjudicator's Decision. On 2 June 2008, Jackson wrote to the Adjudicator: *"We are in receipt of a letter from VGC … dated 29 May 2008 enclosing their Reply together with various attachments. Although most of these attachments are known and have been seen during the currency of the Contract, we would point out that the calculation of the VGC claim for extension of time is totally new. We therefore request the Adjudicator treat this as inadmissible in this Adjudication. We await your instructions."*

35. The Adjudicator gave the parties the opportunity to make what were called Closing Submissions or Remarks. The material parts of Jackson's Closing Submissions are as follows:

"… It is Jackson Civil Engineering's opinion that VGC did not allow sufficient time for any meaningful discussions before launching into this Adjudication. …

- *Delay and disruption claim: … Throughout the currency of the works on site, VGC never achieved their expected outputs. They only achieved them and slightly bettered them with substantially increased resources. … In addition, VGC have for the first time submitted a form of calculation of their extension of time costs within their Reply. Jackson … have already registered with the Adjudicator that this information is invalid and cannot be submitted at this late stage, and has no relevance to this Adjudication and should be ignored. Jackson … reserves their position on this matter, subject to the decision of the Adjudicator on this Adjudication. …*

Conclusion

As clearly stated previously, the launching of this adjudication is premature as not sufficient time was given by VGC to see how discussions proceeded. The introduction by VGC of a substantial claim for delay and disruption/extension of time with no substantiation of any sort or a programme which showed clearly the entitlement of an extension of time is a case in point. It should be based upon the accepted programme of the 16 October 2006 with links showing the effects of the each and every one of the instructed variations. This must be the only way this could have been justified, not based on the 'balance of probabilities'… It is for VGC to prove their case, not for Jackson … to show how it attempts to give reasonable assessments against items with little or no information from VGC. Jackson … clearly has given VGC every opportunity to provide additional information. VGC, equally, have failed in providing sufficient information, given within the period of negotiations from November 2007, to enable substantive discussions and agreements to proceed on their account.

Jackson … would reiterate its statement that, the submission of new information, for example, the basis of an extension of time claim in VGC's Reply is inadmissible, and all Jackson's … rights are accordingly reserved."

36. On 2 June 2008, the Adjudicator replied by e-mail to Mr Exton's letter of 2 June 2008 saying that he would *"consider and determine the matter raised when reaching my Decision"*.

The Adjudicator's Decision

37. This was sent out on 8 June 2008. The Adjudicator was not asked to give reasons for his decision and therefore was not required to do so. The Adjudicator described the dispute as being: *"The dispute between the Parties involves their failure to agree the value of the Final Account for work done by VGC under a sub contract to JCE in respect of duct laying, cable installation and associated works on the M3 Motorway during 2006 and 2007*."

He referred to his appointment, the date of referral and the time period for his decision and set out what submissions he had received; these included Jackson's letter dated 2 June 2008 and their Closing Submissions. He said also in relation to the dispute or difference:

"Having examined all of the documents provided by the Parties I am satisfied and therefore find that a crystallised dispute or difference exists between the Parties in respect of the valuation of the Final Account for the works, which includes the disputed application of Set Off Charges to the Final Account by [Jackson]."

38. He set out his view that the standard of proof involved the balance of probability and so far as the burden of proof was concerned he endorsed the principle of *"he who asserts must prove"*. He set out a list of the Disputed Items which included in summary: *"17.23 Extension of time."*

39. He said that he had "c*onsidered and decided on each of the above items"*. His Decision (with no reasoning and no breakdown) was that the value of Final Account was £3,883,220.50 exclusive of VAT and that the value of the Set-Off Charges levied by Jackson should be "nil". He then decided that Jackson should pay to VGC that total less all payments made to date by Jackson and the retention of 2.5%. He decided that Jackson should be responsible for paying the Adjudicator's Fees and that in effect Jackson should account for VAT.

These Proceedings

40. VGC applies for summary judgment with regard to the enforcement of the Adjudicator's Decision. That application is supported by two witness statements of James Brydon and one witness statement of Mr Butler. The application is opposed, that being supported by Mr Exton's two witness statements.

41. There was at one stage a challenge to the Adjudicator's Decision on the grounds that the Adjudicator had failed to apply the rules of natural justice. Mr Nissen QC for Jackson expressly withdrew any such challenge.

42. There are essentially three grounds of opposition by Jackson to the summary enforcement of the Adjudicator's Decision:

(a) It is argued that the only claim that had ever been made was in Applications 13 and 14 for a single lump sum of £300,000 with no breakdown or supporting information. That claim had been removed and separated, it is argued, from the remainder of the Final Account and was due to be the subject of a separate submission by VGC that never came. It is asserted that there can be no dispute in respect of the claim that was withdrawn. It is said that if there is a bona fide factual dispute between the parties as to whether or not it was withdrawn then that is a matter that cannot be resolved on a summary application.

(b) It is said that the claim for £300,000 was of such a nebulous nature that there could be no dispute in respect of it. It is said that it lacked contractual foundation in law, was unsupported by any form of detail or analysis and was nothing more than a single line demand for £300,000.

(c) The claim for £300,000 as it became during the course of the Adjudication was entirely or substantially new with the consequence that the Adjudicator had no jurisdiction to deal with it."

43. It is accepted by Mr Nissen QC that it would be open to the court to enforce the Adjudicator's Decision for the total allowed less £300,000 to reflect the fact, as he argues, the Adjudicator had no jurisdiction to address the £300,000 claim.

44. These grounds of challenge, all on a jurisdictional basis, are contested by VGC.

The Law

45. I was reminded by the parties of Chadwick LJ's observations in ***Carillion Construction Ltd v Devonport Royal Dockyard Ltd*** [2006] BLR 15 at Paragraphs 85 to 87 in which he, giving the judgment of the court, identified a broad policy to be adopted by the Courts when considering challenges to Adjudicators' decisions.

"85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. ….

86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels ***'excess of jurisdiction'*** *or* ***'breach of natural justice'****. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the* ***'right'*** *answer has been subordinated to the need to have an answer quickly. …*

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense …"

46. In the same case, Chadwick LJ endorsed the first instance judge's propositions, which are set out at Paragraph 52 of the Court of Appeal's judgment:

"1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).

2. *The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law …*
3. *Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision …*
4. *Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice."*

47. In ***Amec Civil Engineering Ltd v The Secretary of State for Transport*** [2005] BLR 227, the Court of Appeal was concerned with, amongst other things, the defining of a dispute which, in that case, was referable to arbitration. It is however equally applicable to the defining of a dispute for the purposes of adjudication. Subject to some amplification, May LJ in that case endorsed the propositions which the first instance judge, Jackson J (as he then was), put forward:

"From his review of the authorities, the judge derived the following propositions:

'1. The word 'dispute' which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference. …

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

48. Rix LJ endorsed at Paragraph 63 the propositions set out by Jackson J (see above). He added however at Paragraph 66:

*"Secondly, however, like most words, 'dispute' takes its flavour from its context. Where arbitration clauses are concerned, the word has on the whole caused little trouble. If arbitration has been claimed and it emerges that there is after all no dispute because the claim is admitted, there is unlikely to be any dispute about the question of whether there had been any dispute to take to arbitration. And if the claim is disputed, any argument that the arbitration had not been justified because at the time it was invoked there had not been any dispute is, it seems to me, unlikely to find a receptive audience (although it appears that it did in **Cruden Construction v Commission for the New Towns** [1995] 2 Lloyd's Rep 37). So it is that in this arbitration context the real challenge to the existence of a 'dispute' has arisen where a party seeking summary judgment in the courts has been met by a request for a stay to arbitration and the claimant has wanted to argue that an unanswerable claim cannot be a real dispute. …*

67. It follows that in the arbitration context it is possible and sensible to give to the word 'dispute' a broad meaning in the sense that a dispute may readily be found or inferred in the absence of an acceptance of liability, a fortiori because the arbitration process itself is the best place to determine whether or not the claim is admitted or not.

*68. Thirdly, and significantly, the problem over '**dispute**' has only really arisen in recent years in the context of adjudication for the purposes of Part II of the Housing Grants Construction and Regeneration Act 1996. Jackson J referred below to some of the burgeoning jurisprudence to which the need for a 'dispute' in order to trigger adjudication has given rise. In this new context, where adjudication is an additional provisional layer of dispute resolution, pending final litigation or arbitration, there is, as it seems to me, a legitimate concern to ensure that the point at which this additional complexity has been properly reached should not be too readily anticipated. Unlike the arbitration context, adjudication is likely to occur at an early stage, when in any event there is no limitation problem, but there is the different concern that parties may be plunged into an expensive contest, the timing provisions of which are tightly drawn, before they, and particularly the respondent, are ready for it. In this context there has been an understandable concern that the respondent should have a reasonable time in which to respond to any claim."*

49. There seems to be no authority (and certainly none was put before me) as to what happens when a claim or assertion is made by a potential claiming party which, although disputed, is then withdrawn by the claiming party. In the ordinary course of events, there can be nothing wrong with the proposition that a dispute may cease to be a dispute by reason, for instance, of an agreement between the parties or an unconditional withdrawal of the claim or assertion which gave rise to the dispute. It might be possible in certain circumstances to apply the principles of estoppel or waiver to a disputed claim which the claiming party indicates clearly and unequivocally to a responding party that it is withdrawing that claim or assertion; if the responding party acts on that representation about withdrawal to its detriment then the claiming party may find it difficult in practice to pursue the claim at all. However, it is necessary critically to examine whether a claiming party is in effect withdrawing or

abandoning the claim which it has made which has been disputed. The Court will need to consider whether the claiming party was effectively intending to abandon or merely temporarily to suspend or hold back any entitlement which it may have had to pursue dispute resolution processes laid down by the contract in question. There may, in context, be a difference between a party who indicates that it will hold its claim "*in abeyance*" because that may imply in the circumstances something less than a withdrawal. A withdrawal of a disputed claim may give rise to a substantive defence in any subsequent dispute resolution process.

50. There has been no authority since the ***Amec*** case about what may constitute a claim which is *"so nebulous and ill-defined that the respondent cannot sensibly respond to it"*. Reliance has been placed by Mr Nissen QC on the case of ***Cruden Construction Ltd v Commission for the New Towns*** [1995] 2 Lloyd's Law Rep 387, referred to by the Court of Appeal in ***Amec***. The facts of that case were briefly that Cruden was employed by the defendant to build 145 dwellings. The final certificate was issued in May 1986. In September 1993 the housing association who had bought the dwellings eight years before issued and served a writ against the defendant. Without any prior warning on 7 October 1993 the defendant's solicitors wrote to Cruden referring in general terms to the claim by the housing association and to the fact that there were schedules of defects running to 5,236 pages which were available for inspection; they indicated a need to protect their position by the commencement of arbitration proceedings against Cruden whose solicitors were asked to confirm whether they were authorised to accept services of notices of arbitration. On 11 October, Cruden's solicitors wrote saying that they were authorised to accept service but indicating their clients were "*currently unaware of any basis for an alleged claim*". Later that day, the defendant's solicitors served notices of arbitration saying a dispute had arisen. HHJ Gilliland QC formed the view that no dispute or difference existed between the plaintiff and the defendant. In his judgment:

"…it cannot properly be said as a matter of ordinary English that the plaintiff and defendant were in dispute or that a dispute had arisen between them when the notice of arbitration was served" (page 394).

51. Earlier the learned judge had said:

"The defendant did not identify which houses were alleged to be defective or what those defects were nor did it call upon the plaintiff to put the defects right or to pay compensation. …

The letter of Oct. 7 was the first suggestion there might be something wrong with the houses which the plaintiff had built but beyond that the plaintiff knew nothing more than that the defendant was about to start arbitration proceedings. It is of course right that the plaintiff's solicitors in their letter of Oct. 11, did say that they were not acknowledging or admitting that the defendant had any basis for a claim against the plaintiff but it would in my judgment be wrong to treat that statement as in effect a non-admission by the defendant of the claim thereby putting the plaintiff to proof. A fair reading of the letter of Oct. 11, 1993 is that neither the plaintiff nor its solicitors knew what was going to be alleged against them in the arbitration proceedings and that the acceptance of service was not to be taken as an admission or acknowledgement that there were any matters which would give rise to a claim against the plaintiff. No such matters had been asserted by the defendant."

52. It would be specious to seek to define when and in what circumstances a claim would be so nebulous and ill-defined as to be incapable of giving rise to a dispute. The circumstances will be many and various. However, to determine whether a claim falls into that category, one needs to look at all the surrounding circumstances. A one-line claim may be briefly described but may, given the surrounding circumstances, not be so nebulous or ill-defined. One can consider what both parties were doing and saying at the relevant time.

Discussion

53. It is necessary first to consider whether Applications 13 and 14 in general and in relation to the £300,000 claim for delay and disruption in particular gave rise, at least initially, to a dispute. The context of Applications 13 and 14 was that the Sub-Contract Works had been completed some 26 weeks or so later than, nominally, the Sub-Contract permitted. It was always mutually expected that there would be a substantial number of variations because, as Mr Exton candidly accepts in his first witness statement, the design of certain parts of the Works were relatively incomplete at the time that the Main and Sub-Contracts were let. As he says, it was mutually recognised that the Sub-Contract Works would almost certainly exceed the 26 weeks' Sub-Contract Period.

54. It is common or at the very least not uncommon in construction contracts for interim applications for payment to include (relatively) summary descriptions of items being claimed. This is reflected not only in the applications themselves in this case but also in the certificates which describe summarily what items are being cross-claimed and what items are being deducted or disallowed.

55. In practice, delay and disruption money claims in construction contracts fall, usually, into different categories of claim:

(a) Often, claims will include for expended preliminary costs on site, or *"site on-costs"*; thus the fact that the claiming contractor's foreman or site huttage has had to be on site for X weeks longer than anticipated will give rise to a claim for extended preliminaries.

(b) Disruption costs usually fall into the category of lost productivity or the diversion of personnel and resources away from productive work.

(c) Almost invariably, there will be claims for loss of head office overhead and profit usually calculated on a formula basis, the most common formula being the Hudson basis. There are other variants on the Hudson formula such as the Emden formula.

56. In my judgment, the claims made in Applications 13 and 14 in context were not so nebulous and ill-defined as to be incapable of giving rising to a dispute. My reasons for so saying are as follows:

(a) The claim for £300,000 was merely one of 150 sub-claims within the Applications.

(b) The claim for delay and disruption was within that substantial part of the Applications which related to variations. Thus it was or should have been clear to all concerned that the primary basis for any claim for delay and disruption related to variations.

(c) A number of the items within the Variations part of the Applications identify factors which purportedly give rise to delay or disruption. Such items include items 003 (the later Works), 008 (provision of labour and plant on other contract), 2.015 (disruption due to moving sections), 3.020 (loss of shift due to issues with Traffic Management), 3.022 (late setting up of Traffic Management and stoppages due to TM changes), 3.028 (delay awaiting instruction) and 11.129, 11.130 and 11.131 (Traffic Management delay).

(d) There were specific claims at Paras 11.139, 12.142, and 13.152 for "*Site Pre-lims Over-run*". This would in all probability have identified to the recipient of the application that the general claim in 13.150 for delay and disruption (for £300,000) did not include for the Site Pre-lims. The fact that elsewhere (for instance at 2.015) there is reference to disruption costs would again suggest to the recipient that specific loss of productivity disruption was being claimed in other items.

(e) Thus, to the recipient or to any reasonable recipient in the circumstances, the assumption would or should have been made that the general £300,000 was for other aspects of delay and disruption, the most obvious being a head office overhead and profit type claim.

(f) It is not uncommon for claims for delay in interim applications to be very much by way of *"on account"* applications. That does not mean to say that they cannot be addressed by the recipient.

(g) It must have been obvious to Jackson that this general and unparticularised claim must relate at least by way of a maximum to the 26 weeks' delay in completion which had occurred.

57. There can be no doubt that the claim for £300,000 was rejected by Certificates 13 and 14. It is unnecessary for this Court to decide whether the rejection was justified or not. However it was certainly not improper in any way for Jackson to reject it on the basis that no particularisation had been given. It is always legitimate at least to argue that a claim which has been put forward has not been properly substantiated. There was no doubt by the time of Application 14 and Certificate 14 that a claim for extension of time, albeit in brief and only headline terms had been submitted. Again it was not improper for that claim to be rejected on the grounds that it had apparently not been proved or established. However that is all part and parcel of the establishment of a dispute between the parties relating to the valuation of the whole account encompassed eventually by Application 14, some of whose constituent elements were more or less well described.

58. Thus by the issue of Certificate 14, there was an established dispute between the parties in relation to whether or not VGC was entitled to the whole of the amount which it had claimed in Application 14. This was essentially the dispute that was ultimately referred to adjudication, albeit that in the light of certain agreements and concessions the total claimed in Application 14 (£4,358,524.89) had by the time of the adjudication been reduced to £4,287,302.08.

59. I then turn to the question of whether or not the claim under Applications 13 and 14 was effectively withdrawn. I have formed the view that the claim under Applications 13 and 14 was not withdrawn and there certainly was not any agreement that VGC is in some way prevented from pursuing its disputed claims in adjudication. My reasons are as follows:

(a) I do not consider that the evidence proffered by Jackson establishes even on a prima facie basis that there was some binding agreement whereby VGC abandoned or withdrew its claim for £300,000 for delay and disruption (item 13.150 in it Applications). On Mr Exton's evidence this could only have occurred at the meeting of 7 December 2007. He does not say in his first witness statement that there was any agreement. In essence, he says there that, because VGC was going to submit its delay and disruption/extension of time claim by the end of January 2008, he understood that VGC was not pressing *"its delay and disruption/extension of time"* (claim) because it was finalising it. For a party to withdraw its claim, there must be a clear agreement or expression (by words, conduct or otherwise) that it will not pursue a particular claim. A wholly reasonable inference from everything that was said (apparently) at this meeting, was that VGC was going to provide substantiation to support the claim for extension of time. The extension of time claim was relevant not only to the £300,000 and other claims such as the "*site prelims claims*" but also to whether all or part of the set-offs or contra charges were justified. The fact that Mr Exton was treating VGC's claim for an extension of time as being left in abeyance does not mean, by inference or otherwise, that VGC were withdrawing or abandoning their claim for £300,000 which it had made in its Applications 13 and 14.

(b) Of course, if VGC did not provide any further substantiation, it might well prove to be the case that any adjudicator would reject such a claim as, in practice, lacking substantiation. But that was always going to be VGC's risk.

(c) There would have to be very clear wording, which is not suggested here by Mr Exton, that in relation to any established dispute, VGC was in effect agreeing that it could not pursue adjudication (or later arbitration) in relation to such dispute. No such clear wording exists or is even said by Mr Exton to have been uttered.

(d) Mr. Exton in his second statement substantively says that it is the minutes of the 7 December 2007 meeting which clearly records what was the position. The minutes do not go anywhere near far enough to establish that the claim for £300,000, for what it was worth, was being withdrawn.

60. I then turn to the adjudication itself. There can be no doubt or issue that the Adjudicator had jurisdiction at least to resolve some dispute. The parties expressly agreed upon his appointment as Adjudicator to resolve disputes or differences that had arisen between them. I have found that the disputes or differences which had arisen between the parties were effectively exactly those which the Adjudicator referred to in his decision, namely, those *"in respect of a valuation of the Final Account",* including the "*Set-Off Charges"*. There is no magic in the reference to the Final Account because that was at least shorthand for what the parties were talking about, namely the respective positions adopted by the parties on Application 14 and Certificate 14 as modified by discussions over the following few months. Strictly speaking, under the Sub-Contract, the exercise which had been undertaken was, in all probability, the Final Account exercise called for in the ICE form of Sub-Contract. However that difference is immaterial.

61. I am satisfied that there was no effective or indeed any challenge to the jurisdiction of the adjudicator. The Response essentially invited the Adjudicator to dismiss the claim in its entirety because it was not supported by sufficient backup supporting information or evidence. Thus at Paragraph 15, Jackson asserted that even with the 1½ page Appendix 30 the Adjudicator "*should evaluate this [£300,000] claim as 'nil'*". That is not a challenge to the jurisdiction. That is seeking a binding decision that by reason of the paucity of supporting information that claim should be valued at nil. In context, that is affirming the jurisdiction of the Adjudicator to adjudicate upon the £300,000 claim. That is further supported by the extensive paragraph 17.23 of the Response which seeks to explain why, not only there should be no extension of time but why, whether there is an extension of time due or not, no loss can have been incurred which is recoverable.

62. It was and must always have been open to VGC at the very least by way of defence to the contra charge claim to set up an assertion that the contra charges were not justified by reason of an entitlement on the part of VGC to an extension of time. Once the extension of time entitlement is or is necessarily part of the adjudication it must be open to a claiming party to rely on that to support its positive claim for compensation in relation to the delay.

63. One then turns to the belated introduction, in the Reply, by VGC of its calculation based on the Hudson formula supporting the £300,000. This was undoubtedly new in the sense that no such calculation had been produced before then. However it was in response to the assertion made in the Response that there was no calculation or support for the figure of £300,000. There is no assertion in this case that following the Reply there was insufficient time for Jackson to address in its Closing Submissions this calculation. Indeed Jackson had anticipated a quantum argument based on the assertion that overhead and profit was recoverable: it sought to argue in the Response that because the payment of variations allowed for overhead and profit the same could not be recovered again in relation to the delay. Without finding that it was a good argument, there can be no doubt that Jackson's argument in this context was at the very least respectable. There can be and is no complaint on the grounds of natural justice in relation to the introduction of this relatively well-known and simple type of calculation.

64. The question then arises as to whether or not the Closing Submissions effectively reserved Jackson's jurisdictional objection. I have formed the view that the Closing Submissions by Jackson do not do so. The substance of these Submissions is in effect that VGC has not established its entitlement to extension of time or indeed to additional cost or loss. The use of the expression that *"Jackson … reserves their position on this matter, subject to the decision of the Adjudicator on this Adjudication"* is at best ambiguous. That expression seems to call for the decision of the Adjudicator. One cannot approbate and reprobate, at least very easily. One cannot call for the decision of the Adjudicator whilst generally reserving one's position: the general reservation is unclear and certainly not sufficient to reserve any position on jurisdiction.

65. The references in Jackson's letter of 2 June 2008 and in its conclusion to its Closing Submissions that the extension of time claim in VGC's Reply and/or the overhead and profit calculation were *"inadmissible*" is not and is certainly not a sufficiently clear reservation on the question of jurisdiction. Inadmissibility can go to the admissibility of evidence. Indeed, that is the more likely, usual and more common meaning in the context of legal or legal type proceedings.

66. It was argued by Mr Nissen QC for Jackson that because Jackson was to a substantial extent drafting its own submissions and letters that one should construe the words in effect more favourably as supporting a reservation on jurisdiction. It seems to me, however, that Mr Exton was a highly experienced contractor with nearly 40 years' experience in the commercial administration of contracts in the civil engineering construction industry. Jackson is a substantial company which is involved clearly in a number of disputes which require resolution. Mr Exton has become involved with larger disputes either in supervising their resolution or by taking over the conduct of such disputes. Jackson also had Fenwick Elliott in the background from whom they could take advice on any material point. I do not consider that one can or should construe in those circumstances its submissions and letters in any more favourable way than would apply in any event.

67. Strictly speaking the question of whether there was a reservation by Jackson with regard to the jurisdiction of the Adjudicator is immaterial as I have found that the Adjudicator did have jurisdiction.

The Decision

68. It follows from the above that the claim by VGC to enforce the decision of the Adjudicator will be upheld. There will be judgment in the sums claimed by VGC in its favour.

MS SARAH HANNAFORD QC and MR SAMUEL TOWNEND (instructed by Messrs SLS Solicitors) for the Claimant
MR ALEXANDER NISSEN QC (instructed by Messrs Fenwick Elliott) for the Defendant