Neutral Citation Number: [2011] EWHC 1678 (TCC)

Case No: HT – 11- 158

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 July 2011

Before :

His Honour Judge Waksman QC sitting as a Judge of the High Court

Between :

FENICE INVESTMENTS INC	**Claimant**
- and -	
JERRAM FALKUS CONSTRUCTION LIMITED	**Defendant**

William Webb (instructed by Field Fisher Waterhouse, Solicitors) for the Claimant
Graeme Sampson (instructed by Davies & Davies, Solicitors) for the Defendant

Hearing date: 20 June 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. This is an application for summary judgment brought by Fenice Investments Inc. ("Fenice"), a company which had employed the Defendant contractor, Jerram Falkus Construction Limited ("JFC") to build five residential properties on its site at 150 Loudon Road, London NW8. On 9 September 2010 Fenice served a Notice of Adjudication. The adjudication was carried out by Dr Francesco Mastrandrea and by a decision dated 28 October 2010 ("the Decision") he resolved the issues in favour of Fenice. He stated therein that his fees were £19,775 plus VAT making a total of £23,235.63 and that JFC should pay them. Dr Mastandrea is employed or engaged by, or trades through a company called Hill International (UK) Limited ("HI"). An invoice for the fees was issued by HI to JFC.

2. JFC said that the fees were excessive. Initially it refused to pay anything but eventually paid £5,000 plus VAT saying that Dr Mastandrea was entitled to no more. It has maintained that position. Fenice accepted that the fees claimed were reasonable but said initially that, while both parties were jointly and severally liable, Dr Mastandrea should pursue JFC. HI threatened legal proceedings and Fenice subsequently paid the balance of the invoice, being £17,360 inclusive of VAT. It also paid £6,200 in respect of Dr Mastrandrea's own legal costs. In dealing with Dr Mastandrea/HI and their solicitors, Fenice also incurred £3,282.50 of its own legal costs.

3. Fenice now claims all of those sums from JFC on the following bases:

   (1) The claim is a simple enforcement of an adjudication because the principal sum claimed is what Dr Mastandrea determined that JFC should pay;

   (2) Alternatively, Dr Mastrandrea's determination of his reasonable fees can only be challenged if there was bad faith on his part and there is no such allegation here;

   (3) Alternatively, the fees are in any event manifestly reasonable so that there is no real prospect of having them reduced on any assessment. Or at the very least they clearly exceed more than the £5,000 plus VAT paid by JFC.

4. JFC denies that a claim can be mounted on the first or second basis set out above. It says that the whole question is one of reasonableness which cannot be determined summarily and there should be an assessment.

5. The adjudication in question was the third such adjudication between these parties and with this adjudicator on this project. The disputes between the parties were not resolved by the last adjudication and there is to be a trial in this Court starting on 11 July 2011 for 4 days.

The Basic Facts

6. The parties contracted on the basis of a JCT 2005 Design and Build Contract (Revision 1 2007) made on 1 February 2008 ("the Contract"). By Clause 9.2 thereof, if a dispute or

difference arose under the Contract and either party wished to refer to adjudication, the Scheme[1] would apply.

7. Following service of Fenice's Notice, Dr Mastrandrea was nominated as the adjudicator by RICS. He sent a letter dated 15 September 2010 to both sides' solicitors proposing that his fees would be calculated at £350 per hour plus expenses and VAT and payment should be within 7 days of the decision. Although his appointment was personal, invoices would be issued by and payment should be made to HI. He asked both parties to confirm this proposal. Fenice did but JFC did not. It is common ground, therefore, that JFC made no express agreement with Dr Mastandrea as to his hourly rate. Notwithstanding this, he proceeded with the adjudication.

8. The issue between the parties as originally stated was whether JFC had been right to assert that it was entitled to an extension of time (a) because of a claimed divergence between the levels of two of the units stipulated in the Employer's Requirements and the Site Boundary ("the Levels Issue") and (b) because of Fenice's instructions that JFC should proceed with utilities works to be undertaken on its behalf by British Gas, EDF and Thames Water ("the Utilities Issue"). No monetary award was sought. I will need to examine this dispute in a little more detail hereafter.

9. The Referral was served on 16 September. It was followed by various submissions and a meeting on 11 October. The Decision produced on 28 October was some 30 pages in length. In it, Dr Mastrandrea held that JFC was not entitled to the fixing of a later Completion Date than was otherwise applicable by reason of the Levels or the Utilities Issue. The final paragraph of the Decision, under the section headed "**<u>Decision</u>**" stated:

> "JFC shall within 7 days of the date of this Decision pay my charges in connection with this adjudication in the total sum of <u>£23,235.63</u> being £19,775 for the fees and £3,460.63 for the VAT."

10. The invoice rendered to JFC at the same time broke the fees down into 56.5 hours' work at £350 per hour ("the Invoice"). A time sheet produced by HI through its solicitors on 21 January 2011, after the fees dispute had arisen, shows that Dr Mastandrea spent 29.5 hours on the matter up to and including the meeting on 11 October, a further 11 hours up to and including 22 October, and a further 16 hours on 27 and 28 October.

11. As soon as the Decision and Invoice were issued JFC disputed the fees and lengthy correspondence ensued. By a letter dated 8 November from Davies & Davies, JFC's solicitors, it said that in the absence of time-sheets, its assessment was that Dr Mastandrea was entitled to no more than £5,000 and that it would be paying that sum. On 15 November it did so and HI banked the cheque. It is not suggested that this constituted a binding settlement of the fees dispute. By a letter dated 10 December Fenice's solicitors Field Fisher Waterhouse ("FFW") accepted that the fees were reasonable and that Fenice was jointly and severally liable to pay. But since JFC was refusing to pay not because of impecuniosity but because it disagreed with the fees, they invited HI to pursue JFC directly. On 21 January 2011 Glovers, the solicitors instructed by HI threatened legal proceedings against Fenice on the basis that there was no defence to the claim for fees and also sought from JFC the precise basis on which it was defending the claim. Further correspondence followed but the matter was not resolved.

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[1] IE The Scheme for Construction Contracts (England and Wales) Regulations 1998.

12. On 1 March Glovers made what was expressed to a Part 36 offer to Fenice and JFC. This was that they should pay the outstanding fees with no interest added, plus Glovers' costs to the date of acceptance. On 11 March Glovers provided in draft the documents which it intended to file at Court on 15 March. They included draft Particulars of Claim with HI as Claimant and both Fenice and JFC as Defendants. Paragraph 13 alleged that it was an express term of the contract between Fenice and HI that the hourly rate was to be £350 with payment to be made to HI within 7 days. Paragraph 14 alleged that it was an implied term of the contract between JFC and HI that JFC would pay the reasonable fees and expenses of HI with payment to be made to HI within a reasonable time. Paragraph 20 then alleged that the fees claimed were reasonable and that a reasonable time for payment was 7 days.

13. On 16 March Fenice accepted the Part 36 offer. Glovers then produced a draft bill of costs inclusive of counsel's fees and disbursements of £8,064. FFW offered to pay £6,200 which was accepted on 23 March. Fenice then intimated a claim to JFC, to recover the sums paid to HI. This was resisted by JFC which led to the current proceedings and the application now before me.

The Contractual Position

14. Against that background it is first necessary to establish the correct legal analysis of the parties' position and that of Dr Mastrandrea. (A point has been taken as to whether HI, as opposed to Dr Mastrandrea, could have made any claim for fees – I will deal with that issue below but for present purposes I treat them as one and the same.)

15. The following are the material paragraphs of the Scheme:

> "**Adjudicator's decision**
> **20.** The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute......
>
> **Effects of the decision**
> **23.** (1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.
> (2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties....
>
> **25.** The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
>
> **26.** The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability."

16. In *Linnett v Halliwells LLP* [2009] EWHC 319, Ramsey J considered a number of issues arising out of a claim brought by the adjudicator to recover his fees from the party he said should pay them.

17. First, so far as the parties themselves are concerned, there is an adjudication agreement between them which will contain expressly or impliedly the terms of the Scheme. See paragraphs 32 and 33 of the judgment. In this case, the parties have by reason of clause 9.2 of the Contract expressly agreed to contract on the basis of the Scheme in respect of any adjudication. One of the terms of their agreement is therefore that if the adjudicator states which of the parties should be liable to pay the fees, that party ("the paying party") agrees with the other that he will do so. This is independent of the fact that as against the adjudicator, they are both jointly and severally liable. It must follow that if the paying party refuses to pay the adjudicator, he is in breach of his agreement with the other party.

18. Second, so far as the parties and the adjudicator are concerned, there is a separate agreement or agreements. As to fees, a party may make an express agreement, as Fenice did here, in which case the adjudicator may claim pursuant to that express right. But in the absence of an express agreement, a party will nonetheless be taken to have made an agreement by conduct with the adjudicator if he participates in the adjudication, thereby requesting the adjudicator to act. It would be an implied term of that agreement that the party concerned would pay the adjudicator's reasonable fees. See paragraph 60 of the judgment. Such a position would obtain even where the relevant party made a jurisdictional challenge, provided that such party had participated in the adjudication. See paragraph 68 of the judgment.

19. It is therefore possible for one party to be bound to pay a particular fee or at a particular rate which was expressly agreed, while the other party must pay simply a reasonable fee as a matter of implication. In that case, the joint and several liability would apply only to the reasonable fee, whatever that was. See paragraph 62 of the judgment where Ramsey J also observed that in practice the agreed fee is likely to be the same as, or accepted to be, a reasonable fee.

20. The position enunciated above is precisely how HI put it against these parties in its draft Particulars of Claim referred to above.

21. Thus, although the Scheme is statutory in origin, the position of all parties in relation to the adjudicator's fees is contractual. s108 of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") confers no statutory right to payment on the adjudicator. See paragraph 34 of the judgment in *Linnett*. Moreover,

> "35. The adjudicator's contractual right to payment does not arise under and is not affected by the terms of the decision by which the adjudicator decides which party is to pay his fees and expenses. That decision determines who, as between the parties, is to bear those sums but it does not affect any contractual right to payment which the adjudicator may have or provide a right to payment if he has no contractual right. It may, in practice, lead to the relevant party making payment direct to the adjudicator but it gives the adjudicator no enforceable rights to payment."

Fenice's Primary claim against JFC

22. Fenice's primary contention is that its present action is no different from a claim to enforce the substantive decision of the adjudicator, for example, that one party pays the other an amount of money. There is therefore no need to enquire as to how the fees are arrived at, or were agreed, or whether they are reasonable. The determination of fees in the Decision is enough. I disagree for the following reasons:

(1) If the claim for fees was part of the decision in the same way as the substantive ruling, it would follow that the adjudicator's entitlement was only provisional and subject to paragraph 23 (2) of the Scheme. That makes no sense at all. The only further proceedings contemplated by paragraph 23 (2) are those to determine the substantive rights of the parties *inter se.* Mr Webb suggested that there could be some later claim made against the adjudicator by one or both parties to recover back any fees overpaid, but that is unrealistic;

(2) Fenice's contention ignores the fact that under paragraph 25 of the Scheme the adjudicator is entitled to his reasonable fees. Whatever may be the appropriate way of assessing them (see below) it cannot be the case that he (or any party who has paid him and now seeks to recover them from the other) is entitled to whatever he decides; otherwise the reference to reasonableness in paragraph 25 is entirely otiose. Moreover, that paragraph is not governed by paragraph 23 (2). The latter provision, unsurprisingly, governs paragraph 23 (1);

(3) This contention is also inconsistent with the contractual analysis described above;

(4) The fact that if this contention is wrong there may have to be some kind of assessment of the reasonableness of the fees (either in a direct claim by the adjudicator or in a claim by the other party) is not so repugnant or absurd that the framers of the Scheme could not have intended it.

Fenice's Second Claim – Bad Faith

23. This is to the effect that the only challenge that can be made to a claim for fees is on the basis of bad faith and none is alleged here.

24. Here I have been referred first to p239- 240 of Mustill & Boyd's *Commercial Arbitration*, Second Edition. This deals with how a challenge may be made to an arbitrator's fees if they are considered to be excessive in the context of what was then a commentary on the Arbitration Act 1950. Under that Act, the arbitrator had the power to tax his own costs under s18 (1) which he would usually exercise. If he then exercised a lien over the Award until he was paid, the complaining party could apply to the Court for a taxation under what was s19 (1). If the arbitrator issued the Award before being paid, the complaining party could simply refuse to pay, which would, again, trigger a taxation under s18 (2). It was only where the arbitrator had taken the fees in advance, and then taxed them, that it was suggested that it might only be possible to challenge the fees by arguing that the arbitrator has misconducted himself or exercised his power to tax his fees in bad faith. It is argued before me that the same should apply to the adjudicator's claim for fees. The only route to challenge would be via the bad faith provision in paragraph 26 of the Scheme. In my judgment that argument is incorrect for the reasons given below.

25. First, since 1996, the arbitrator's entitlement to fees has been governed by s28 of the Arbitration Act 1996. This provides as follows:

> "**Joint and several liability of parties to arbitrators for fees and expenses**
> (1) The parties are jointly and severally liable to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances.

> (2) Any party may apply to the court (upon notice to the other parties and to the arbitrators) which may order that the amount of the arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it may direct.
>
> (3) If the application is made after any amount has been paid to the arbitrators by way of fees or expenses, the court may order the repayment of such amount (if any) as is shown to be excessive, but shall not do so unless it is shown that it is reasonable in the circumstances to order repayment."

26. This provision makes it plain that the touchstone is reasonableness.

27. Section 29 of the 1996 Act provides as follows:

> "**Immunity of arbitrator**
>
> (1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.
>
> (2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.
>
> (3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25)..."

28. It will be noted at once that s29 (1) of the Arbitration Act 1996 is in almost identical terms to paragraph 26 of the Scheme which was issued after the enactment of that Act. Indeed s108 (6) of the Act provides that the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear appropriate. The immunity from liability save in the case of bad faith has nothing to do with the entitlement to reasonable fees either by an arbitrator or by an adjudicator. At p295 of the 2001 Companion to the Second Edition of *Commercial Arbitration* the learned editors pose the question whether if some <u>separate</u> breach of duty on the part of the arbitrator was shown, it could somehow go to reduce his fees on the basis that they had to be reasonable. They consider that it might, but (because of s29) only if that breach was committed in bad faith. But that postulation is irrelevant to the argument made by Fenice here which is that the adjudicator's fees could be attacked only of there was bad faith in actually setting or claiming them. Finally, any gloss in terms of bad faith is, as with the first argument, inconsistent with the requirement of reasonableness set out in paragraph 25 of the Scheme. Although not specifically argued before me, I have considered whether it might be possible to dilute the reasonableness requirement in paragraph 25 so that it is simply the standard by which the adjudicator should in effect tax his own costs with no effect beyond that, so that his own assessment of reasonableness is not challengeable except perhaps on grounds of bad faith. But if that was the intended effect of paragraph 25 it would have said so in clear terms (analogous to the old s18 (1) of the 1950 Act), and in my judgment the background to the system of adjudication and the Scheme is not such that it must obviously follow that there should be no challenge to an adjudicator's fees save on grounds of bad faith.

29. Reliance is also placed upon the decision of Mr Recorder Lane QC in *Stubbs Rich v Tolley*, in the Gloucester County Court on 8 August 2001. Here the Defendant contractor paid the fees of the Claimant adjudicator "under duress" and in the proceedings then sought to allege overpayment on the basis that they were unreasonably excessive. Schedule D5 of the signed adjudication agreement was in the same terms as paragraph 26 of the Scheme. The Recorder rejected the overpayment claim on the basis of the argument referred to above, referring to the passage in Mustill & Boyd at pages 239-240. But since the argument referred to above is wrong, so, with respect, is the Recorder's decision.

30. In paragraph 10.21 of *Coulson on Construction Arbitration,* 2nd Edition, reference is made to opening up or reviewing an adjudicator's claim to fees. But in fact, since the adjudicator has no power of lien (see *Coulson* paragraphs 10.25-10.29) the forum in which the fees is likely to arise is one where, simply, they have not been paid and the adjudicator claims them, or they have been paid by the "wrong" party, and he claims to be indemnified. Or the paying party takes the initiative and seeks a declaration as to their reasonableness. In any of those cases, the Court will in some way have to address the question of reasonableness.

31. That should not be a surprising conclusion since a claim based on a contractual right to a reasonable sum is one which the Courts are well used to deciding. The fact that there is no statutory right to a taxation (cf s28 (2) of the 1996 Act) does not alter that. And while adjudication is intended to be a speedy process, and adjudicators should not be kept out of their proper fees, that is no reason why the express words of paragraph 25 of the Scheme should not be given their ordinary meaning. Where the nature of and background to the Scheme can have an impact, however, is in relation to the correct approach to be taken to the actual assessment of reasonableness, with which I deal below.

Fenice's Third Argument – the reasonableness of the fees

32. Given my findings above it follows that the question of the reasonableness or otherwise of Dr Mastrandrea's fees is engaged. Before dealing with that directly it is necessary to consider what the approach of the Court would be to the usual case where fees are unpaid, namely a claim for them made by the adjudicator himself – as in *Linnett*. Unless the party sued has expressly agreed any part of them (for example hourly rates) the claim will be that the fees charged were reasonably incurred and reasonable in amount.

33. The overall burden of proving reasonableness must rest upon the adjudicator – there is no basis in paragraph 25 for reversing it. But assuming that when the fees dispute first arose, the adjudicator explained how the fees were made up by reference to rate, hours worked and (at least in summary) on what, there will be an evidential burden on the Defendant to make out at least a *prima facie* case to say that they are unreasonable. In my judgment, simply putting the adjudicator to proof is not enough.

34. If the Defendant does properly raise the issue of reasonableness the Court's approach on any assessment should be a robust one, with a considerable "margin of appreciation" given to the adjudicator, for the following reasons:

    (1) The work has to be undertaken at considerable speed, and sometimes with moving targets in the sense of what the core issues underlying the adjudication are, or become; by analogy, where work is done by solicitors on an urgent basis, this is frequently advanced as a reason why the Court should award more than the guideline rate of costs;

    (2) Routine satellite litigation about an adjudicator's costs could not have been intended by the framers of s108 or the Scheme and would be a discouragement to potential adjudicators to act in this important process.

35. Accordingly, in relation to hourly rates, provided that the rate claimed is not clearly outside an overall band of reasonableness, there will be no basis to interfere, even if it could be

shown that a different adjudicator, especially an adjudicator with different qualifications, may have charged less or even significantly less. In this area, as with solicitors' costs, it is a fact that rates can vary considerably. The seniority and experience of the adjudicator concerned is also a factor. The reasonableness of an hourly rate is not to be determined in a vacuum, in absolute terms, by reference to some notional adjudicator. It is to be considered in the context of the adjudicator agreed in advance by the parties (if such be the case) or the adjudicator in fact appointed. In this context it makes sense for the adjudicator, when appointed, to indicate his hourly rate and invite express agreement, as here. If a party simply fails to acknowledge the invitation at all (as JFC did here) any later complaint that the rate was excessive is unlikely to provoke much sympathy.

36. As for time spent, challenges in other areas of professional fees are usually not on the basis that the hours claimed were not worked but that the particular task took too long or that unnecessary work was done. But again, leeway needs to be afforded here because on a tight schedule different adjudicators may approach their task in different way, or order their work differently. And as for allegedly unnecessary work, it is important to bear in mind paragraph 20 of the Scheme. The adjudicator is entitled to take into account "....matters under the contract which he considers are necessarily connected with the dispute."

37. Given the principles set out above, the party to an adjudication which is considering a fees challenge will need to give careful consideration as to whether there is any realistic basis for disputing the fees claimed. It is to be expected that that in the usual run of cases there will not. But if a party, and in particular the paying party, intends to challenge them, it should take the initiative where necessary. If the adjudicator brings proceedings first, the party sued will then defend in the usual way. But if the adjudicator does not, or threatens proceedings against the other party (who may take a different view on fees) the paying party should progress the resolution of the dispute by seeking a declaration from the Court as to the reasonableness of the fees. In any such proceedings the adjudicator will no doubt counterclaim for the fees. If the adjudicator has by then claimed against the non-paying party or now seeks to bring him in, that party would be able, properly, not to admit liability on the basis of the dispute raised by the paying party. It is hard to see how the adjudicator would be able to obtain an immediate judgment against the non-paying party in such circumstances. The latter will be bound by the eventual result. In this way the non-paying party's exposure to costs will be kept to a minimum.

38. Any disputes which arise hereafter should not involve any significant points of principle. A party will be entitled to make an application for summary judgment if it takes the view that they clearly are (or are not) reasonable and in any event they can seek an immediate assessment – it is hard to see how any disclosure is involved other than the papers sent to the adjudicator and his own timesheets. Nor is oral evidence likely to be necessary. So the hearing is likely to be short and the Court might in an appropriate case direct that the issue be dealt with on paper.

Assessment in this case

Two preliminary points

39. JFC has taken the point that it never expressly agreed to pay HI as against Dr Mastrandrea. Since he was the appointed adjudicator, it has no obligation to pay anyone else. I reject that argument. I can see no difficulty with an individual adjudicator who carries on business through a firm or company seeking payment to that entity. Dr Mastrandrea made it known to JFC at the outset that he traded through HI. And when JFC paid the £5,000 plus VAT on 15 November 2010 it sent the cheque to Dr Mastrandrea's "London office" ie the offices of HI and presumably the cheque was made payable to HI. Moreover this is a claim made by Fenice to recover the fees it paid in respect of the adjudication. It cannot possibly be said to have acted unreasonably by paying the entity to which Dr Mastrandrea directed payment should be made.

40. Second, JFC argues that Fenice should not have paid VAT on the fees because it (Fenice) is a non-UK company being registered in Jersey. But it is common ground that Fenice is in fact registered for VAT here and the work done by Dr Mastrandrea constituted services in respect of land in the UK. In any event, there is no reason why JFC cannot reclaim in the usual way the VAT element of any payment it is ordered to make to Fenice, especially as the Invoice is addressed to JFC. Presumably, JFC reclaimed the VAT on the £5,000 already paid. So there is nothing in this point either.

The sums claimed by Fenice

41. The actual position before me is different from what can be expected in the future. The adjudicator has made no claim in, and is not a party to these proceedings. The question of reasonableness therefore arises in the context of Fenice's claim against JFC. On analysis that claim can be put in two ways:

    (1) First, as with any jointly and severally liable party, Fenice has a right at common-law to recoup wholly or in part its payment of the underlying debt, the debt here being the reasonable fee owed to Dr Mastrandrea; alternatively the claim made be seen as arising under the Civil Liability (Contribution) Act 1978 on the basis that both parties are liable for "the same damage". The practical outcome will be the same. The Court will assess the appropriate contributions *inter se* (here following the adjudicator's decision that JFC should pay) and order payment;

    (2) But in addition, as there is in any event a contract between the parties with regard to the adjudication which includes the obligation to pay the fees if the adjudicator determines that one party should do so, JFC here was contractually obliged to pay Dr Mastrandrea and did not. So Fenice brings a claim for breach of contract.

42. Mr Webb contends that under the second characterisation of the claim JFC was clearly in breach of its obligation to pay because on any view the reasonable fees exceeded £5,000. The consequence was HI's pursuit of Fenice and in order to forestall litigation which could not be defended Fenice acted reasonably by paying the fee and Glovers' costs. Mr Webb contends that even if hereafter it could be shown that a reasonable fee was less than £19,775 this matters not, provided that Fenice acted reasonably in considering that it was. In other words not only is there a band of reasonableness for the fees but also a band of

reasonableness in terms of Fenice's actions. In short, its position should be considered as analogous to the Claimant buyer in *Biggin v Permanite* [1951] 1 KB 422 who was able to recover as against the seller of the defective goods, the cost of the settlement reasonably made with the sub-buyer. Moreover, on the reasonableness of Fenice's action, JFC would bear the burden of disproving it. That raises at least the theoretical possibility that as against JFC, Fenice can recover a sum which is more than was in fact due to Dr Mastrandrea on the basis of a reasonable fee. As a matter of law that proposition appears to be sound. In fact, for the reasons set out below, the outcome in relation to Dr Mastrandrea's fees will be the same, however Fenice's claim is to be characterised. But a paying party can in any event avoid a *Biggin v Permanite* type claim by the other party by swiftly taking the initiative as described above.

43. Given that this is an application for summary judgment, the appropriate course at this stage is for me to assess what Fenice is clearly entitled to as against JFC by considering on the facts of the case:

(1) What level of the fees charged by HI can clearly be found to be reasonable, and

(2) Whether and to what extent Fenice acted reasonably in paying £6,200 to HI and incurring £3,282.50 of its own costs.

The fees themselves

44. JFC has objected in these proceedings, and objected in correspondence to Dr Mastrandrea's hourly rate of £350. In my judgment there is no real prospect of this being held unreasonable on any assessment, for the following reasons:

(1) In the two previous adjudications, Dr Mastrandrea charged a similar fee. Admittedly, JFC did not expressly agree it but nor did it raise a specific objection including when it was the paying party. So it cannot be said that a fee of this order is unusual;

(2) Nor did JFC specifically object to the fee proposed for this adjudication. If a paying party wishes to object to a fee of which it was aware at the outset, it surely behoves it to make that known at the time. This at least gives the adjudicator the chance to reconsider or adjust on the basis that he knows that there might be a challenge later. This is well illustrated by the suggestion in Davies & Davies' letter of 8 November, after the dispute arose, that this adjudication did not require a barrister (which Dr Mastrandrea is) and that a construction professional could have done the job just as well and more cheaply. The time to make that point was at the beginning, not the end, and in any event both parties agreed to be bound by the adjudication nomination process undertaken here by RICS which led to Dr Mastrandrea's appointment;

(3) Dr Mastrandrea is also a senior chartered surveyor and chartered arbitrator. He is an experienced adjudicator. If one compares the fee to the hourly rate of senior barristers or solicitors it cannot possibly be said to be out of the norm;

(4) JFC has set much store by what Dr Mastrandrea said in his e-mail of 10 November referring to the letter of 8 November and another letter from Davies & Davies of 10 November, namely:

> "Save to say that, in any event, my time records are now rendered entirely irrelevant as – depending on the view taken of the appropriate rate that a *"construction professional qualified to act as an adjudicator"* might have charged (being the basis of JFC's offer in relation to the work which it says, wrongly, that I should have carried out) – that would represent between 25 and 33 hours' work for such a person (which I am happy to estimate for such work) ...."

so that he appeared impliedly to accept a rate for such a person of £150-£200 per hour. There is nothing in this point. Perhaps such a person would have charged that amount but that does not mean that Dr Mastrandrea's hourly rate was, for a person in his position, unreasonable. There might have been more to JFC's point had it adduced evidence to show that a fee in the region of £350 was clearly and significantly more than the general level of fees charged or the fees charged in adjudications known to JFC, or its advisers.

45. Of course, as between Fenice and the adjudicator, Fenice had expressly agreed a rate of £350 and so could not challenge it. But given that I have found that it was clearly reasonable, nothing turns on this.

46. The other issue is the number of hours claimed namely 56.5. I first deal with the written submissions made. The Referral comprised 28 pages and 19 Appendices. The Response, served by JFC on 27 September, had 55 pages, 12 Exhibits and some sub-exhibits. A 9-page Reply with 24 attachments was served on 4 October pursuant to permission granted on 29 September and JFC served a Rejoinder of 11 pages on 6 October. A meeting with Dr Mastandrea lasting about 1½ hours took place on 11 October. At the meeting JFC made a concession in relation to the Levels Issue which I consider further, below. JFC had also made written objections to Dr Mastrandrea's jurisdiction to adjudicate but these were withdrawn on 13 October. On 22 October Dr Mastrandrea made further enquiries of JFC and received further information. As noted in paragraph 10 above, 11 of those hours came after the meeting on 11 October and a further 16 came after 22 October making 27 in all.

47. JFC maintained repeatedly in correspondence that Dr Mastrandrea's fees could not be justified particularly because (a) the two jurisdiction objections were withdrawn on 13 October and (b) there were major concessions in Fenice's favour at the meeting on 11 October which meant that on any view there was little or no further work to be done afterwards. In order to address this it is necessary to say a little more about the issues.

48. The contractual date for completion was 15 June 2009. Practical Completion was certified on 9 September 2009. So, in the absence of any justification, JFC was 58 days' late in completing.

49. The Levels Issue involved the fact that in respect of two of the houses, if they were built (as they were) according to the floor levels specified by Fenice they would end up being slightly lower than the pavement outside. This discrepancy emerged in June 2009, remedial works were discussed and ultimately implemented, but obviously after the completion

date. The Utilities Issue arose from the fact that JFC had been instructed to apply Provisional Sums allocated to work by the utility companies, British Gas, EDF and Thames Water and the work done by those companies was not finished until after completion so again there was a delay. The adjudication was initiated by Fenice who said that JFC had incorrectly asserted as follows:

(1) that the instructions given to it to remedy the defect in terms of levels amounted to "divergence between the Employer's Requirements and the definition of Site Boundary" within the meaning of clause 2.10 of the Contract. If correct it would have been a Relevant Event entitling JFC to an extension of time;

(2) that the instructions to proceed with the utilities works concurrently or otherwise delayed the completion of the works even though (delay in) performance of statutory undertakers was not a Relevant Event and it was JFC's own failings which then delayed and disrupted performance by the utility companies.

50. Unsurprisingly all of the submissions went into considerable detail as to where responsibility lay for these delays. In the Referral the point was made that the Site Boundary did not in fact identify levels at all, only the physical limits of the site. Fenice then alleged that in seeking to argue that the site boundary somehow did or should be seen as relating to levels, JFC was trying to bring in how and why the design defect arose and wrongly took no responsibility for it, or its late notification. Section 6 of the Referral dealt with the underlying surveys and drawings, then the contract terms and then the contractual allocation of responsibility. It dealt with a lengthy witness statement that had been prepared by Mr Davies of Davies & Davies in this regard. Section 7 then dealt with the Employers' Requirements. It contended in paragraph 7.6.4 that JFC was plainly responsible for designing the works so as to achieve a proper interface between the house thresholds and the existing pavement and had not done so. Having failed to do so JFC was not entitled to a Relevant Event. On the Utilities Issue, Fenice said that it was not the issue of its instructions in the middle of 2008 that caused the delays in 2009. It was either that JFC had delayed its own performance so that the site was not ready for the utilities, or they had delayed themselves and as JFC's sub-contractors, it was responsible for their delays. The facts and the relevant contractual provisions were gone into in some detail. Fenice also rebutted a suggestion that the deletion of standard clause 2.26.6 (which said that the carrying out of work by a statutory undertaker, or its failure to do so, constituted a Relevant Event) meant that where there was delay in this respect, time was at large.

51. In its Response JFC took issue with all of this. It maintained under the Levels Issue not only that the claim under Clause 2.10 was justified but that Fenice had impeded the work so that time became at large – an entirely separate point. It also said that time had become at large under the Utilities Issue and went into considerable detail as to how and why the delay occurred, arguing that under the Contract none of this was its responsibility. It noted in paragraph 208 that on any view it was not (and it was not asserting) that the very issue of the instructions the previous year had caused the delay now said to justify an extension of time but rather the utilities' own failings for which it had no liability. And it resisted the claim that it had delayed in the works coming before. The summary of conclusions at paragraph 222 of the Response shows that the issues as perceived by JFC went significantly beyond clause 2.10 on the Levels Issue and the mere issue of instructions on the Utilities Issue. Fenice's Reply challenged many points in the Response and in particular addressed the argument that there had been prevention by Fenice causing time to

become at large. On the Utilities Issue, it is correct that the issue of the original instructions by Fenice was not the cause of the delay a year later. But in truth both sides were arguing as to whether in any way JFC could not be held responsible for the delay, Fenice contending that either JFC was already late with the works or that it was contractually responsible for the utilities' defaults. In the Rejoinder JFC came back on these points and in particular, on levels, who was responsible for the design defects, and it focussed on the point that time had been made at large. It alleged that Fenice had known what it should do about remedying the defect but sat on the matter until after June thereby causing an act of prevention. On the Utilities various points were made including that the utilities themselves delayed for an unreasonable period before coming on site.

52. Prior to the meeting on 11 October Dr Mastrandrea produced a detailed and sensible agenda setting out 6 groups of points where he needed clarification. At the meeting it was ultimately conceded that it could not be said that there was a divergence between the Employer's Requirements and the Site Boundary under clause 2.10 but that left the more general issues dealt with in the submissions and JFC's separate argument that time was at large in respect of the Levels Issue as well as the Utilities Issue. Then, by a letter dated 13 October from Davies & Davies, JFC came back on some points. It also said that under the Utilities Issue the allegation made by Fenice that JFC had delayed the start of the utilities was outside his jurisdiction (though it was covered in the submissions) but at the end of the letter JFC agreed to withdraw its objections to jurisdiction so that Dr Mastrandrea could decide such matters.

53. The Decision itself is a very comprehensive document and dealt with all the issues being debated between the parties. This was not a case of "creep" on Dr Mastrandrea's part: in every relevant section he describes what each side contended on a factual or contractual issue and then said what his view was. He observed correctly that the source of the Levels Issue controversy was who should be responsible for the delay due the amendment to the design. He noted the concession on the Clause 2.10 point and thereafter dealt with the other matters raised on this issue. It would have been artificial for him to do otherwise. There were various contractual points to be dealt with - six pages of analysis concluded that JFC should have identified that the correct relationship between the floor levels and the pavement would not be achieved on the existing design and should have notified that to Fenice at an early stage which it did not. Dr Mastrandrea then dealt with issues as to the timing and nature of the remedial work. He then dealt with the origin of the levels discrepancy also being argued between the parties. In paragraph 4.70 he reiterated in conclusion that the checking that the levels worked and if not the reporting of such to Fenice at an early stage was JFC's responsibility. He ended thus:

> "Whilst, given the narrow parameters upon which my jurisdiction is based, it is not necessary for me so to decide, I am satisfied that in this JFC failed."

54. The point here (as Dr Mastrandrea later explained in his e-mail of 4 November) was that although the clause 2.10 point had gone, the parties were seriously contesting the other aspects of the Levels Issue and JFC in particular was coming back on every point and so it was appropriate for him to give his conclusions. From paragraph 6.4 onwards in his Decision he had to return to the Levels Issue because JFC was still maintaining that time was at large here.

55. On the Utilities Issue he covered the disputed points including a contention from JFC that the original instructions did not contain enough information. He referred to the fact that on one issue – whether the utilities were acting as statutory undertakers – he obtained further information from JFC. He also dealt with a *force majeure* point which had been raised by JFC at the meeting. He agreed that the issue of the instructions did not cause the delay but then concluded that it must have been due either to delay by JFC or by the utilities for whom he found (against JFC's submissions) they were responsible. He then dealt with the "time at large" claim in respect of the Utilities Issue.

56. In their letter dated 3 November Davies & Davies suggested that the Decision could and should have been very much shorter (along with the hours spent on it) since one matter had been conceded at the meeting (clause 2.10) and the other issue (instructions to engage the utilities) was not as it had been framed. Dr Mastrandrea set out a very detailed rebuttal in his e-mail dated 4 November. In short he said that while the matter could have been dealt with more shortly, the fact was that JFC took issue with all the positive allegations made by Fenice about JFC's obligations and performance and as a result Dr Mastrandrea was obliged to deal with them. He set out the numerous points of challenge taken up by JFC. I found that rebuttal to be highly persuasive. Davies & Davies retorted that Dr Mastrandrea should nonetheless have confined himself to the areas strictly requiring a decision and that he had allowed "creep" in relation to other matters, which such allegations he rejected. He subsequently said in his detailed e-mail of 8 November that even if his original analysis of his brief had been wrong, JFC had conferred an *ad hoc* jurisdiction upon him to decide the ancillary matters, for reasons again persuasively given. And of course, on 13 October, at a time after the meeting when it was clear what were being regarded as the issues to be decided, JFC specifically abandoned its jurisdiction points.

57. All this time, Davies & Davies were also asking for Dr Mastrandrea's timesheets so that they could see what each of his hours was spent on. Once they had offered £5,000 plus VAT Davies & Davies said that they might review the position on sight of the timesheets. On 21 January 2011 Glovers provided "a copy of the time record held..that was used for generation of the invoice..." This shows when the hours were worked and in brief terms, in respect of what, for example, "Considering Submissions", "Interlocutories" "Interlocutories and adjudication decision writing" and "Decision". Prior to the meeting 25.5 hours were spent on the Decision with an element also on interlocutories.

58. There was no very strong challenge before me to the time spent by Dr Mastrandrea prior to and at the meeting. The length of the four submissions, plus attachments, and the many points and issues raised meant that he could quite reasonably have spent the hours that he did in considering them, formulating his views at the stage, preparing for the meeting, drafting up a careful and detailed agenda and then holding the meeting.

59. As for the hours spent subsequently, in my judgment the notion advanced by JFC, that somehow there was almost nothing for Dr Mastrandrea to do after the meeting on 11 October is absurd. If, by that stage, the truth was that JFC was bound to lose the adjudication it could and should have conceded it there and then. The reason it did not is because in reality there were other points in issue which had not been disposed of.

60. Consistent with the approach set out above, I cannot see any serious basis for arguing about the hours spent by Dr Mastrandrea on his Decision. Given how the parties – and

especially JFC – were conducting the dispute, there is no ground to suppose that he had gone off on a frolic of his own. It is not suggested that he did not in fact spend the hours on this job. Therefore the question of whether there is a real prospect of showing that any part of the fee was unreasonable is a matter of assessment and analysis of the written materials before me. Mr Sampson for JFC suggested that there should be an assessment in any event so that Dr Mastrandrea could be cross-examined. I cannot see why – he has given his explanation of working the hours that he did which I have assessed above.

61. In considering all of the above, I have taken account of the coloured schedule of documents produced to me showing which documents relating to the adjudication were routine correspondence, copies, part of the submissions and so on.

62. It follows that Fenice is entitled to recover all the fees which it paid to HI, in the total sum of £17,360. inclusive of VAT.

Glover's Fees

63. As at 10 December 2010, there was in truth no issue between Fenice and HI, as Fenice saw it. But by the time it decided to pay, on 16 March 2011, Glovers had been instructed and were considering in detail Dr Mastrandrea's position and formulating the claim. Fenice delayed paying, in one sense understandably, because it hoped to persuade HI to sue JFC alone. But that did not happen. I think there is force in JFC's submission that it is at least arguable that if Fenice was going to "bite the bullet" and pay, it should have done so at the time when it effectively admitted liability or that at the very least, having tried to engage with Glovers as to who should be sued, it should not have waited as long as it did. I can see that some of Glovers's fees would have accrued even in this reduced time frame and for present purposes I would allow Fenice £1,500 in this regard.

Fenice's own legal fees

64. Clearly Fenice was entitled to take some legal advice on its position especially since at the time this was not entirely clear legal territory. Nonetheless it is arguable that it should have spent less time and money on dealing with Glovers since at the end of the day on its assessment of the fees, it had no defence. I would award Fenice £1,500 here also as being the minimum to which it should be entitled, as opposed to the £3,280.50 claimed.

Further Assessment

65. This means that Fenice is entitled to judgment in the total sum of £20,360 inclusive of VAT. The proceedings, however, continue in respect of the sums claimed by Fenice for which I have not awarded it summary judgment. The total involved here is £6,480.50. Having had further submissions from the parties, I intend to determine that issue finally, after giving the parties the opportunity to adduce further written evidence and argument.

66. In normal circumstances any dispute over adjudicator's fees, if to be litigated at all, will not be as protracted as this one for the reasons set out above. The non-paying party should not find itself in the position of having to start proceedings without the involvement of the adjudicator, or having to expose itself to significant costs. Any such dispute should be

capable of resolution at a single hearing or on paper. The spectre of frequent challenges to fees leading to lengthy satellite litigation, posed by Fenice, is not a realistic one in my view.

Fenice's financial position

67. Had this been the enforcement of a monetary award by the adjudicator a question may have arisen as to whether the court should order a stay of execution on payment, given that Fenice is a Jersey company, with bank accounts in Monaco but no tangible assets here, the properties in question having now been constructed and sold. See the principles set out in *Wimbledon Construction v Vago* [2005] EWHC 1086. In the event, because I have given summary judgment in the manner set out above, this does not arise.

Costs and interest

68. Since providing a draft of this judgment, I have had written submissions on costs and interest. It is common ground that in principle JFC should pay Fenice its costs. I reject the argument that it should be limited to fixed costs under CPR 45.1. This is a case where the Court should clearly exercise its discretion not to award costs on such a basis. See the decision of Akenhead J in *Amber Construction v London Interspace* [2007] EWHC 3042 (TCC). This was a claim started in the TCC, and therefore on the multi-track, without any application to transfer it. Although the amount was modest, the nature of the issues made it a substantial application which took over half a day with Counsel on both sides. There is no reason for me not to assess costs summarily. Having read both side's submissions, I think there is force in the point that the costs of two solicitors attending Court is disproportionate and that the hours spent on physical preparation of exhibits and other documents is somewhat excessive. Of the costs claimed, I will award £15,750. Those costs will be payable by JFC within the usual period of 14 days. I append to this judgment the relevant order. Having read the parties' submissions, I award interest of £240 making a total judgment figure of £20,600.

69. I am extremely grateful to Counsel for their helpful and comprehensive oral and written submissions.