Neutral Citation Number: [2019] EWHC 1591 (TCC)

Case Nos: HT-2018-000395
& HT-2019-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 25 June 2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

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Between :

WILLOW CORP S.À.R.L.

Claimant

- and -

MTD CONTRACTORS LIMITED

Defendant

- - - - - - - - - - - - - - - - - - - -

Paul Cowan (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimant**
Abdul Jinadu (instructed by **BDB Pitmans LLP**) for the **Defendant**

Hearing dates: 21 February & 25 March 2019
Further written submissions: 15 April 2019

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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.

MR JUSTICE PEPPERALL:

1. By an adjudication decision dated 19 December 2018, Matthew Molloy ordered that Willow Corp. S.À.R.L. should pay MTD Contractors Limited the sum of £1,174,854.92 plus VAT and interest of £36,294.84. No payment was made. Instead, on 28 December 2018, Willow issued a Part 8 claim seeking declarations as to the proper construction of a supplementary agreement reached in June 2017 and that the adjudicator's decision was unenforceable. MTD defends the Part 8 proceedings and, on 7 January 2019, issued separate Part 7 proceedings seeking to enforce the adjudication.

2. Both matters are now before me. Willow seeks judgment upon its Part 8 claim. MTD resists the claim for declaratory relief and seeks summary judgment in order to enforce the adjudication.

PROCEDURAL BACKGROUND

3. Willow's Part 8 claim was issued on 28 December 2018. The claim was supported by a witness statement made by Willow's solicitor, Daniel Gilberthorpe, on the same day.

4. On 7 January 2019, MTD issued its Part 7 claim and made an immediate application for summary judgment. The application was supported by a witness statement made by MTD's solicitor, David Gwillim, dated 4 January 2019. Further, on 17 January 2019, Mr Gwillim made a second statement both supplementing his original statement in the Part 7 claim and responding to Mr Gilberthorpe's evidence in the Part 8 claim. Such statement was late, but the parties sensibly agreed that MTD should have permission to rely on Mr Gwillim's statements.

5. The parties then agreed directions for the orderly listing of both the Part 8 claim and MTD's summary judgment application. Such directions were approved by the court and allowed for Willow to file its evidence in response in the Part 8 claim and in answer to the summary judgment application by 6 February 2019. The directions did not envisage any further round of evidence.

6. On Friday 15 February 2019, MTD filed two further statements, being statements made by Marius Deaconescu in earlier adjudication proceedings in January and February 2018. Further, after business hours on the evening before the case came on for hearing, MTD served a further 302 pages of documents dated between February 2017 and November 2018. They were not exhibited to any further witness statement.

7. At the start of the hearing on 21 February 2019, I heard argument upon MTD's oral application to rely on Mr Deaconescu's statements and the further 302 pages. I refused permission to make such application orally and indicated that I would not have admitted the evidence in any event. I did not then give my reasons for these rulings in what turned out to

be a vain attempt to complete submissions that day. I therefore start this judgment by giving my reasons.

LATE EVIDENCE IN THE PART 8 PROCEEDINGS

8. Rule 8.6(1) of the Civil Procedure Rules 1998 provides:

> "No written evidence may be relied on at the hearing of the claim unless–
>
> (a) it has been served in accordance with rule 8.5; or
>
> (b) the court gives permission."

9. Rule 8.5 requires the defendant's evidence to be filed with its acknowledgment of service. While the rule then allows a further 14 days for the claimant's responsive evidence, it does not envisage a second round of defence evidence. Accordingly, such further evidence can only be relied upon with the permission of the court. Equally, the agreed directions did not allow for further evidence from MTD. Still less did they allow parties to put documents in evidence other than by way of exhibit to their witness statements.

10. By analogy with the case law under rule 32.10, any application to rely on late evidence is therefore in substance an application for relief from the sanction imposed by rule 8.6(1). Rule 23.3 states the general rule that applicants must file an application notice. Further, rule 3.9(2) requires that any application for relief from sanctions must be supported by evidence. Here, MTD has neither filed an application notice nor any evidence in support of its application.

11. Rule 23.3(2) provides:

> "An applicant may make an application without filing an application notice if–
>
> (a) this is permitted by a rule or practice direction; or
>
> (b) the court dispenses with the requirement for an application notice."

12. Paragraph 3 of Practice Direction 23A provides:

> "An application may be made without serving an application notice only:
>
> (1) where there is exceptional urgency;
>
> (2) where the overriding objective is best furthered by doing do;
>
> (3) by consent of all parties;
>
> (4) with the permission of the court;
>
> (5) where paragraph 2.10 above applies; or
>
> (6) where a court order, rule or practice direction permits."

13. Paragraph 2.10 adds:

> "Where a date for a hearing has been fixed and a party wishes to make an application at that hearing but he does not have sufficient time to serve an application notice he should inform the other party and the court (if possible in writing) as soon as he can of the nature of the application and the reason for it. He should then make the application orally at the hearing."

14. While there are many circumstances in which the court will entertain an application made orally at a hearing that has already been fixed, I refused to allow MTD permission to make this application orally and unsupported by any evidence. I should, in any event, have dismissed this application had it been necessary for me to engage with the principles in Denton v. TH White Ltd [2014] EWCA Civ 906; [2014] 1. W.L.R. 3296:

    14.1 The failure to file evidence in good time was serious. The default was not de minimis. Further, such failure is especially significant where hundreds of pages of material are dumped on a litigant the night before a hearing. There was no merit in Mr Jinadu's submission that Willow had previously seen this material. In preparing for this hearing, Willow and its lawyers were entitled to focus on the actual evidence filed in these proceedings. Neither could be expected to assimilate and deal with this evidence overnight.

    14.2 The lack of evidence in support of the application for relief from sanctions made it difficult to assess the reasons for default. It appeared from Mr Jinadu's submissions that the reason for the late evidence was simply his decision as counsel that he wished to rely on this material. This is not a proper reason for the default in circumstances where the evidence was available to Willow since 2018.

    14.3 If admitted, the late evidence would have subverted the order of evidence, both contained in rule 8.5 and the agreed directions, and allowed MTD the last word. Alternatively, the late evidence would have put the hearing at risk in order to allow Willow a fair opportunity to consider and respond to the late evidence. In all the circumstances of this case, and having regard to the matters highlighted at rules 3.9(1)(a) and (b), the interests of justice plainly favoured dismissing any application for relief.

LATE EVIDENCE IN THE SUMMARY JUDGMENT APPLICATION

15. Rule 24.5(2) provides:

> "If the applicant wishes to rely on written evidence in reply, he must–
>
> (a) file the written evidence; and
>
> (b) serve a copy on the respondent,
>
> at least 3 days before the summary judgment hearing."

16. The fresh evidence was not both filed and served at least three clear days before the summary judgment hearing. Indeed, the bulk of the new material was provided after hours the night before the hearing and was not exhibited to a statement. It is, in my judgment, important that applicants seeking summary judgment should not be permitted to ambush respondents. There are therefore sound reasons both for the requirement that the applicant should give at least 14 days' notice of the application for summary judgment and of the evidence in support. Equally, the court should be reluctant to allow late evidence in reply.

17. Taking into account the seriousness and significance of seeking to rely on late evidence in support of a summary judgment application, the lack of any proper explanation for the late evidence and the potential risk of an adjournment in order to allow Willow a proper opportunity to assimilate and respond to this evidence, I refused MTD permission to rely on the late evidence.

THE FACTS

18. Willow is a limited liability company incorporated in Luxembourg. MTD is an English building contractor. On 22 September 2015, MTD entered into a contract with Willow to design and build the 150-bed, 7-storey Nobu Hotel in Shoreditch. The contract price was £33,500,000.

19. The project was delayed. On 16 February 2017, the parties agreed a plan for the phased handover of the hotel in order to allow staff training and planned pre-opening activities to commence. MTD asserted claims for loss and expense and unexpected cost overruns. The parties discussed these claims and entered into a written agreement on 21 June 2017. They agreed a revised date for Practical Completion of 28 July 2017.

20. By his decision in the first adjudication, Jonathan Cope decided that the June agreement did not deem Practical Completion to have been achieved on 21 July 2017, but rather imposed an amended obligation on MTD to complete the works in order to achieve Practical Completion by that date. Mr Molloy was bound by such finding but in any event indicated that he agreed with Mr Cope.

21. In fact, the works were not completed by 28 July 2017. The minutes of a meeting that day recorded the views of GVA Second London Wall Project Management Limited, the Employer's Agent, that Practical Completion had not been achieved:

> "3.1 [GVA] could not issue Practical Completion on a number of grounds. These included:
>
> - There is a significant quantum of outstanding items. The external works, roof, party wall works, stairwells, 500 series rooms have not yet been completed, snagged and offered for inspection. Lift 6 is not yet complete, and neither is the CCTV.
> - Life Safety Strategy has not been confirmed by MTD.
> - Health and safety concerns relating to the outstanding, defective and snagging items need to be addressed.
> - BAA and other consultants have not yet issued a statement signing off the works as compliant to either ER's or CP's. BAA's note also stated that areas had not been inspected by them.
> - CHP works not complete; this affects the submissions of the BREEAM information. The current number of BREEAM credits achieved is significantly lower than the required number."

22. Indeed, Mr Molloy expressly found at paragraph 37 of his decision, that:

> "… absent the June agreement, the extent of work recorded as outstanding at the meeting convened on 28th July 2017 would have justified GVA's refusal to certify Practical Completion by reference to the requirements of the Contract and the pre-conditions included at Section 4 of the Employer's Requirements …"

23. Mr Molloy decided, however, that on the true construction of the June agreement, GVA was required to certify Practical Completion provided that there was an agreed list of outstanding work. Since there was such a list, he concluded that Willow was not entitled to claim liquidated damages of £715,000 for the further delay in completing the hotel between 28 July and 13 October 2017.

24. Having rejected the claim for liquidated damages, Mr Molloy ordered that Willow, should pay £1,174,854.92 plus VAT comprising the balance payable under the building contract less MTD's liability to Willow of £841,245.08 in respect of defects, professional fees and loss of profits.

THE ISSUES

25. By its Part 8 claim, Willow seeks declaratory relief:

    25.1 First, declarations as to the true construction of the June agreement: Particulars of Claim, paragraphs 58.1, 58.2 and 58.3.

    25.2 Secondly, a declaration that Practical Completion had not been achieved by 28 July 2017: paragraph 58.4.

    25.3 Thirdly, a declaration that Mr Molloy's rejection of Willow's claim for liquidated damages is "legally unenforceable": paragraph 58.5.

    25.4 Fourthly, declarations that the Molloy adjudication is in any event unenforceable because of various alleged breaches of natural justice: paragraphs 58.6, 58.7 and 58.8.

26. By its Part 7 claim, MTD seeks to enforce the adjudication. Willow defends the enforcement claim on the basis of both its construction argument and on the grounds of alleged breaches of natural justice. In the event that Willow succeeds on its construction argument, there is also an issue as to whether severance is permissible such that the court might allow MTD to enforce the balance of the adjudication decision.

THE PROPER APPROACH TO THIS CASE

27. Rule 24.2 of the Civil Procedure Rules 1998 provides that, on a claimant's application for summary judgment, the court may give judgment if it considers that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial. The onus is upon the claimant to establish the absence of a triable issue.

28. Summary judgment is of course the usual means by which parties enforce adjudication decisions in their favour made pursuant to the statutory scheme in the Housing Grants, Construction & Regeneration Act 1996. By section 108(3) of the Act and regulation 23(2)

of The Scheme for Construction Contracts (England & Wales) Regulations 1998, the decision of the adjudicator is binding upon the parties and must be complied with unless or until their underlying dispute is finally determined whether by litigation, arbitration or agreement. Adjudication is founded on the "pay now, argue later" principle: per Dyson J (as he then was) in Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] B.L.R. 93 and Coulson J (as he then was) in Mead General Building Ltd v. Dartmoor Properties Ltd [2009] EWHC 200 (TCC), at [5]. As Chadwick LJ put it in Carillion Construction Ltd v, Devonport Royal Dockyard Ltd [2006] B.L.R. 15 at [86], the need to have the "right" answer has been subordinated to the need to have an answer quickly.

29. In Caledonian Modular Ltd v. Mar City Developments Ltd [2015] EWHC 1855 (TCC), Coulson J reiterated the general principle, but added, at [12]:

> "That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration."

30. In Hutton Construction Ltd v. Wilson Properties (London) Ltd [2017] EWHC 517 (TCC), Coulson J indicated that where a defendant seeks to argue such a short and self-contained point, it should issue a Part 8 claim seeking declaratory relief. He added:

> "17. … there is a dispute between the parties as to whether or not the defendant is entitled to resist summary judgment on the basis of its Part 8 claim. In those circumstances, the defendant must be able to demonstrate that:
>
> (a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;
>
> (b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement;
>
> (c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.
>
> 18. What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document. In a disputed case, anything less than that would be contrary to the principles in Macob, Bouygues and Carillion.
>
> 19. It is axiomatic that such an issue could still only be considered by the court on enforcement if the consequences of the issue raised by the defendant were clear-cut. In Caledonian Modular, it was agreed that, if the document was not a payment notice – and it plainly was not – then the claimant's case failed. If the effect of the issue that the defendant wishes to raise is disputed, it will be most unlikely for the court to take it into account on enforcement. Any arguable inter-leafing of issues would almost certainly be fatal to a suggestion by the defendant that their challenge falls within this limited exception."

31. Here, Willow took the proactive step of issuing its Part 8 claim without waiting for MTD to launch enforcement proceedings. Such Part 8 claim was listed for hearing before me together with the summary judgment application. Accordingly, this is not a case in which Willow simply seeks to resist the summary judgment on the basis of the Part 8 claim, but rather it now seeks final declaratory relief. The construction issue is, in my judgment, short, self-contained and well-suited to being determined in Part 8 proceedings. I am therefore content to determine that issue. The remaining claims for declaratory relief are not, however, similarly appropriate for summary determination in Part 8 proceedings:

    31.1 In so far as the declaration sought at paragraph 58.4 seeks a declaration as to what was decided in the adjudications, it is otiose. If, in substance, what is really sought is a declaration that, as a matter of fact, Practical Completion had not been achieved at 28 July 2017 then it is not appropriate for summary determination in the Part 8 claim but rather a ground on which Willow might resist the application for summary judgment.

    31.2 The declaration sought at paragraph 58.5 is unnecessary. The purpose of the Part 8 claim is as a vehicle for the final determination of the short point of contractual construction. Questions as to enforcement are best dealt with in the Part 7 proceedings.

    31.3 The declarations sought as to alleged breaches of natural justice are not appropriate for resolution in Part 8 proceedings but are arguments that need to be considered in the enforcement proceedings.

THE CONSTRUCTION POINT

THE AGREEMENT

32. The parties contracted on the basis of the 2011 edition of the JCT Design and Build contract. Such terms do not define Practical Completion, but clause 2.27 provides:

> "When practical completion of the Works or a Section is achieved and the Contractor has complied sufficiently with clauses 2.37 and 3.16.5, and (where applicable) any pre-conditions to practical completion set out in the Employer's Requirements have been satisfied, then:
>
> 1. In the case of the Works, the Employer shall forthwith issue a statement to that effect ('the Practical Completion Statement');
> 2. In the case of a Section, he shall forthwith issue a statement of practical completion of that Section (a 'Section Completion Statement');
>
> and practical completion of the Works or the Section shall be deemed for all the purposes of this Contract to have taken place on the date stated in that statement."

33. Clauses 2.37 and 3.16.5 are concerned with the contractor's obligation to provide as-built drawings and the health and safety file.

34. Such position was varied by the June agreement. Its key clauses provided:

> "1) An additional extension of time of 21 weeks is awarded, taking the practical completion date of the project to 28th July 2017.

"2) The award is subject to the following:

a) No Liquidated Damages will be levied against MTD Contractors by Willow Corp;

b) No additional preliminaries or direct loss and/or expense will be claimed by the Contractor or paid by Willow Corp to MTD Contractors;

c) The parties have agreed that the following spaces to accommodate Nobu training and pre-opening activities have been achieved by 6th June 2017:
- 82 Restaurant & Bar, including terrace area
- Main Kitchen
- B1 Event Space
- Ground Floor Reception, Conference Space and Bedroom
- 1st Floor Bedrooms and Suites
- 2nd Floor Suite
- Areas associated with access and toilet facilities

4) Remaining areas to be practically completed by 28th July 2017 save for the areas detailed on MTD attached schedule ref. MTD210617PCS.

7) This agreement includes and is in full and final settlement of any delays and all extensions of time and includes all known variations and Contract Instructions issued to date; up to and inclusive of EAI 23 dated 13 April 2017.

8) This agreement includes for all measures required by the Contractor to complete the Works by the revised completion date.

10) £34,300,000.00 … is agreed in full and final settlement of the Contract Final Account. This includes the commercial settlement between both parties and is inclusive of all claims, counterclaims and damages incurred by ether (sic) party save for the agreed additional payment in paragraph 11 below. The aforementioned agreed Final Account does not remove or affect MTD Contractors' continuing contractual responsibility to complete snagging and defects in accordance with the Contract Documents. Payment of the balance of the Final Account shall be made on the date of practical completion of the Works. The Retention shall be released in line with the contract.

11) Subject to MTD Contractors' acceptance of the above Willow Corp SARL will be responsible for the agreed additional payment of £1,700,000.00 … exclusive of VAT, as previously agreed in the letter of 15th September 2015, for unexpected costs overrun; as demonstrated and agreed with MTD Contractors' letter dated 13th June 2017."

35. The attached schedule was entitled "Schedule of Dates for the Completion of the Hotel leading to PC." It provided:

"1.0 SNAGGING and INCOMPLETE WORKS

MTD propose that three main areas inside of the building will be undertaken as follows:

1.1) Reception; by 30.06.17

1.2) Restaurant, toilets and main kitchen: 7.07.17

1.3) Conference area: 14.07.17

1.4) 3rd floor (MTD numbering): 14.07.17

1.5) 4th floor (MTD numbering): 28.07.17

2.0 FITTING OUT OF GYM AND SPA

2.1) fitting out, commissioning, gym, treatment rooms, steam plant and steam room: 22.09.17

To complete the works, MTD need space for offices and site messing and therefore the future space area on B1 must be clear of Nobu storage by the 10.08.17 as a lay down area for MTD materials. There will not be enough space in the gym and treatment rooms for MTD storage and to carry out the works at the same time.

3.0 SITE OFFICES TO COMPLETION

In addition to complete the fitting out, the MTD site offices will need to be removed from the 4th floor and be relocated in the landscaped area which is currently enclosed in heras fencing panels adjacent to Ravey Street.

4.0 TESTING AND COMMISSIONING

A period of four weeks will be necessary to carry out the final testing and commission (sic) once the whole hotel has been fitted out. This will include the black building test, collation of test certificates to insert into the manuals and BREEAM and EPC certificates. It is proposed that this duration should be carried out once the gym and spa is nearing completion from the 25.08.17 to the 22.09.17.

5.0 PRACTICAL COMPLETION

The proposal is for PC to be achieved by the 28.07.17 with an agreed lest (sic) of outstanding work and any final snagging testing and commissioning to be completed by the 22.09.17."

THE ADJUDICATOR'S CONSTRUCTION

36. As indicated above, Mr Molloy concluded that, on the true construction of the June agreement, Willow's agent was required to certify Practical Completion regardless of the extent of any outstanding works provided that there was an agreed list of such work. Such decision turned on Mr Molloy's construction of clause 4 of the agreement read together with paragraph 5.0 of the schedule.

37. Mr Molloy explained his reasoning at paragraphs 33, 34 and 39 of his decision:

> "33. Objectively viewed, I accept that the intention of the June Agreement was to redefine the requirements for Practical Completion, such that the fitting out, commissioning, gym, treatment rooms, steam plant and steam rooms were not required and that MTD would be afforded space for offices and site messing post Practical Completion. Although I accept that there is no restriction regarding the words set out in paragraph 2a), as a matter of construction I also accept that the words need to be construed in the overall context of the June Agreement. In that regard, it is evident that the circumstances surrounding the June Agreement included the overall Final Account, the associated requests for extension of time and the handing over of the hotel. In this latter regard, it is evident that certain areas had already been handed over to Nobu on 6th June 2017 for training and pre-opening activities and that there was to be phased

handover of certain other areas between 30th June 2017 and continuing up to 22nd September 2017. Notwithstanding the date for completion of the fitting out, commissioning, gym, treatment rooms, steam plant and steam rooms, it was agreed that the work associated with those areas and activities would not prevent Practical Completion being achieved, subject to an agreed list of outstanding work being prepared. However, it is clear that question of whether, as a matter of fact, the redefined requirements for Practical Completion had being (sic) satisfied was not resolved by the June Agreement. That being the case, the question of whether Practical Completion had been achieved is still a live issue.

34. Another important aspect of the June Agreement was the fact that it defined the events upon which it was based, i.e. 'any delays and all extensions of time and … all known variations issued to date; up to and inclusive of EAI 23 dated 13th April 2017.' What I derive from this is that the agreed revised Completion Date of 28th July 2017, the agreed Final Account and the additional payment did not encompass events beyond 13th April 2017. It would therefore follow that, if there were further variations or delay events issued after 13th April 2017, the Completion Date may be revised and the Final Account may be adjusted in accordance with the contractual mechanism which was still in place. Objectively viewed, it appears to me that, in such circumstances, the intention would be that the terms of [the] June Agreement drew a line in the sand in relation to events up to and including EAI 23 dated 13th April 2017, but did not seek to resolve all issues associated with achieving the revised Completion Date. Therefore, if the revised Completion Date was not achieved, the parties' rights and obligations were still preserved. In that context, I do not accept that the agreement that no liquidated damages would be levied was all encompassing and/or intended to operate in the event that MTD failed to achieve the revised Completion Date. In a similar vein, I do not accept that the agreement that no additional preliminaries or direct loss and/or expense would be claimed was intended to encompass Relevant Events or Relevant Matters which occurred after 13th April 2017….

39. Although Mr Brannigan is of the opinion that the extent of outstanding work and actions were such that Practical Completion had not been achieved, my view is that this does not account for the effect of the June Agreement. Whilst I accept that the extent of outstanding works, including in the region of 1,000 snagging items, was such that the criteria set out in Section 4 of the Employer's Requirements had not been satisfied, it is clear from the schedule attached to and incorporated within the June Agreement that the proposal was that practical completion would be achieved on 28th July 2018 (sic) with an agreed list of outstanding work. Although the date by which the outstanding work was to be completed was noted as being 22nd September 2017, this does not alter the terms of the agreement regarding the criteria required for Practical Completion to be achieved notwithstanding there being outstanding work. The conclusion I therefore reach is that MTD's submission that the stance taken by GVA was contrary to the June Agreement is sound. In my view, in the context of the June Agreement, a statement of Practical Completion should have been issued certifying completion on 28th July 2017 with a list of outstanding works which MTD would be afforded space and access in order to undertake. That being the case it follows that Willow Corp is not entitled to levy liquidated damages between 28th July 2017 to 13th October 2017."

ARGUMENT

38. Mr Cowan argues that the purpose of the June agreement was to agree the steps necessary to get the hotel completed. The parties agreed a 21-week extension and further agreed a modification of the obligation to achieve Practical Completion:

    38.1 Paragraph 1.0 of the schedule detailed the path to Practical Completion.

    38.2 Paragraphs 2.0, 3.0 and 4.0 expressly allowed the works there defined to be carried out after Practical Completion.

39. Mr Cowan argues that, properly construed, paragraph 5.0 allowed Practical Completion to be certified even though the excepted works had not been completed. Such outstanding works were to be listed in an attached list. He argues that Mr Molloy's construction would allow MTD to pocket £1.7 million, do no further work whatever to advance the building project and then insist on the certification of Practical Completion on 28 July 2017 provided only that it provided a list of the outstanding works. Such construction, he contends, allows the tip of the tail (paragraph 5.0 of the schedule) to wag the dog (the June agreement).

40. Mr Jinadu accepts that, on its true construction, the June agreement did not deem Practical Completion to be achieved on 28 July 2017. He argues that the schedule was integral to the June agreement and that Mr Molloy applied criteria in determining that Practical Completion had been achieved. Asked to identify such criteria, Mr Jinadu said that Mr Molloy had not enumerated the criteria applied but that it was "clear that in Mr Molloy's own mind there were criteria to be satisfied." Mr Jinadu accepts that the central purpose of the revised contractual obligation to achieve Practical Completion was that MTD should deliver a functioning hotel. Pressed as to why Mr Molloy's construction was right, Mr Jinadu simply submitted that it was not so obviously or demonstrably wrong that the court would be justified in overturning Mr Molloy.

DISCUSSION

41. Practical Completion can be an elusive concept. In Mears Ltd v. Costplan Services (South East) Ltd [2019] EWCA Civ 502; [2019] 4 W.L.R. 55, Coulson LJ said at [74]:

> "I consider that the law on practical completion can therefore be summarised as follows:
>
> a) Practical completion is easier to recognise than define: see Keating on Construction Contracts, 10th Edition, paragraph 20-169. There are no hard and fast rules: see Bailey's Construction Law, 2nd Edition, paragraph 5.117, footnote 349.
>
> b) The existence of latent defects cannot prevent practical completion (J Jarvis & Sons Ltd v. Westminster Corpn [1969] 1 W.L.R. 1448; [1970] 1 W.L.R. 637). In many ways that is self-evident: if the defect is latent, nobody knows about it and it cannot therefore prevent the certifier from concluding that practical completion has been achieved.
>
> c) In relation to patent defects, the cases show that there is no difference between an item of work that has yet to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.

d) Although one interpretation of Viscount Dilhorne in Jarvis and Lord Diplock in Holser & Dickinson Ltd v. P & M Kaye Ltd [1972] 1 W.L.R. 146 suggests that the very existence of [a] patent defect prevents practical completion, that was emphatically not the view of Salmon LJ in Jarvis, and the practical approach developed by Judge Newey in HLJ Nevill (Sunblest) Ltd v. William Press & Son Ltd (1982) 20 B.L.R. 78 and Emson Eastern Ltd v. EME Developments Ltd (1992) 55 B.L.R. 114 has been adopted in all the subsequent cases. As noted in Mariner International Hotels Ltd v. Atlas Ltd [2007] 10 HKCFAR 1, that can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling.

e) Whether or not an item is trifling is a matter of fact and degree, to be measured against 'the purpose of allowing the employers to take possession of the works and to use them as intended' (see Salmon LJ in Jarvis). However, this should not be elevated into the proposition that if, say, a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied. Mariner is a good example of why such an approach is wrong. In consequence, I do not consider that paragraph [187] of the judgment in Bovis Lend Lease Ltd v. Saillard Fuller & Partners (2001) 77 Con. L,R, 134, with its emphasis on the employer's ability to take possession, should be regarded (without more) as an accurate statement of the law on practical completion.

f) Other than Ruxley Electronics & Construction Ltd v. Forsyth [1996] A.C. 344, there is no authority which addresses the interplay between the concept of completion and the irremediable nature of any outstanding item of work. And even Ruxley is of limited use because that issue did not go beyond the first instance decision. But on any view, Ruxley does not support the proposition that the mere fact that the defect was irremediable meant that the works were not practically complete."

42. A number of matters are rightly common ground:

42.1 First, upon the true construction of the June agreement, MTD was granted an extension until 28 July 2017 to achieve Practical Completion. The agreement imposed an obligation to achieve Practical Completion by that date and it was not simply a matter of the parties agreeing that completion should be deemed to take place on that date.

42.2 Secondly, the agreement specifically envisaged that Practical Completion would be achieved notwithstanding that certain works (the gym, spa, testing and commissioning) remained outstanding.

42.3 Thirdly, while the agreement compromised any claim that Willow might have had for liquidated damages in the event that Practical Completion was achieved by 28 July 2017 and the excepted works were completed as specified in the schedule, Willow remained entitled to liquidated damages in default of completion of such amended obligations.

43. The building contract as varied by the June agreement falls to be construed in accordance with the well-known principles identified by the House of Lords and the Supreme Court in

a series of recent cases. Such principles were authoritatively restated by Lord Neuberger in Arnold v. Britton [2015] UKSC 36; [2015] A.C. 1619, at [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v. Persimmon Homes Ltd [2009] A.C. 1101, para. 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

Natural and ordinary meaning

44. I consider that the natural and ordinary meaning of clause 4 of the June agreement read together with paragraph 5.0 of the schedule is that MTD was to achieve Practical Completion save for the "areas detailed" in the schedule by 28 July 2017. The detailed areas were those listed at paragraphs 2.0, 3.0 and 4.0 of the schedule. Upon Practical Completion, the parties were also to agree a list of any such outstanding works. Such requirement was not, however, a wholesale exclusion from the obligation to achieve Practical Completion by 28 July 2017.

45. Such conclusion is plainly a very significant factor in the exercise of construing the clause. As Lord Neuberger observed, at [18]:

> "… the clearer the natural meaning the more difficult it is to justify departing from it."

Other relevant provisions

46. In my judgment, such construction is fortified by considering other provisions:

46.1 First, clauses 1 and 8 confirm that MTD was to achieve Practical Completion by 28 July 2017.

46.2 Secondly, the schedule expressly differentiated between:

a) further works that were required to be practically complete by 28 July 2017 (some of which were specifically listed at paragraph 1.0 with proposed dates leading to the target Practical Completion date); and

b) those works that could be completed after such date (the gym, spa, testing, commissioning and the eventual removal of the relocated site office).

The overall purpose of the clause and the agreement

47. There were three essential purposes of the June agreement:

47.1 First, it was an agreement to extend the date by which MTD was required to achieve Practical Completion to 28 July 2017. Such obligation arose from clauses 1, 4 and 8 of the agreement and paragraph 5.0 of the schedule to the agreement.

47.2 Secondly, it was an agreement to acknowledge the work that had been completed and agree a timetable for the outstanding work:

a) By clause 2(c), the parties agreed the work that had been completed by 6 June 2017.

b) Paragraph 1.0 of the schedule to the agreement provided an agreed timetable for the completion of certain work in the 5 weeks to 28 July 2017.

c) Although no specific date was set, it appears that the removal of the fourth-floor site office was also to be achieved by 28 July 2017. That said, paragraph 3.0 of the schedule envisaged that a relocated site office could remain within the grounds beyond that date.

d) Further, the schedule set subsequent dates for the completion of other works, specifically the gym and spa (paragraph 2.0) and testing and commissioning (paragraph 4.0).

47.3 Thirdly, it was an agreement to settle the parties' financial liabilities. [Clauses 2(a)-(b), 7, 10 and 11.]

48. Such purposes support a construction that required MTD to achieve Practical Completion save where expressly excused by paragraphs 2.0, 3.0 and 4.0 of the schedule. Any construction that allowed MTD to undertake no further work provided that the parties agreed a list of the outstanding works would undermine each of the three purposes identified above.

The factual matrix

49. The contractual completion date had originally been 3 February 2017. In view of the delay, the parties agreed a plan in February 2017 for the phased handover of the hotel. Meanwhile, MTD asserted claims for loss, expense and cost overruns while Willow had potential claims for liquidated damages.

Commercial common sense

50. Commercial common sense can be an unreliable tool where it is invoked to gainsay the natural and ordinary meaning of a clause properly construed against the contract as a whole and taking into account the purpose of both the clause and the agreement and against the factual matrix. See, for example, Lord Neuberger's observations in Arnold at [17] and the many exhortations in the caselaw for caution before a judge purports to second-guess businessmen's views of commercial common sense. Here, however, commercial common sense supports the construction that I reach without resort to such test since, in my judgment, it would make no sense to construe the June agreement as providing that Practical Completion might be achieved even if MTD undertook no further work before the target date provided that it followed the simple expedient of agreeing a list of the works then outstanding.

CONCLUSIONS

51. Accordingly, upon its true construction, the June agreement did not require Willow to accept that Practical Completion had been achieved simply upon agreement of a list of outstanding works. Rather, MTD was required in fact to achieve Practical Completion by 28 July 2017 save only in respect of the works identified in sections 2.0 to 4.0 of the schedule to the agreement.

NATURAL JUSTICE

52. In addition, Willow resists enforcement on the basis of a number of alleged breaches of natural justice. Six principal points were argued by Mr Cowan:

    52.1 First, Willow says that, notwithstanding the pressure of time inherent in statutory adjudication, time was simply too tight and that it was not afforded a reasonable opportunity to review and meet the case against it.

    52.2 Secondly, Willow argues that Mr Molloy did not himself have sufficient time to conduct a fair review of the case. In consequence, it is said that Mr Molloy failed to address material issues and evidence.

    52.3 Thirdly, Willow complains that Mr Molloy was wrong to allow MTD to adduce substantial evidence at the reply stage. Specifically, complaint is made that expert evidence was then served which, it is said, should have been adduced in the referral if it was to be relied upon in the adjudication.

    52.4 Fourthly, Willow says that Mr Molloy was wrong to allow MTD to serve a surrejoinder and to fail to limit the further evidence introduced at that stage.

    52.5 Fifthly, having allowed the surrejoinder, Willow complains that Mr Molloy limited its further response to certain matters. Despite doing so, Mr Molloy made findings against Willow on aspects of the surrejoinder evidence upon which he had not invited a response.

    52.6 Sixthly, Willow argues that, no doubt by reason of the pressures of time, Mr Molloy failed properly to address a number of issues and evidence. In his oral submissions, Mr Cowan focused on one example, namely Willow's allegation that Mr Molloy commented that Willow's case on loss of profits during the necessary re-wiring works was based on an "unrealistic" assumption of 100% occupancy whereas in fact there was evidence before him of 100% occupancy as a matter of recorded fact.

53. In response, Mr Jinadu submits that the court should take a robust approach to enforcement of the adjudication and be astute not to undermine the policy behind the statutory scheme. He argues that Willow had served a Pay-Less Notice and that it was therefore presumably aware of the grounds on which it sought to deduct sums from the final account even before the adjudication. As to the complaint about the reply, Mr Jinadu points out that Willow was able to lodge both a rejoinder and a further response after the surrejoinder.

54. Mr Jinadu accepts that it at first sight looked odd that the adjudicator had limited the response to the surrejoinder and then made findings on other issues dealt with in MTD's surrejoinder against Willow. He explains that this was because Mr Molloy already had an exchange of evidence and submissions on these points.

55. As to the loss of profits claim, Mr Jinadu argues that Willow's claim was based on an assumed level of occupancy and that it was reasonable for the adjudicator to calculate the loss on the basis that 100% occupancy would not otherwise be achieved during the re-wiring works. Even if he was wrong, that was not a ground for refusing enforcement.

LAW

56. Adjudication is not intended to provide all of the refinements of a High Court trial. It requires an impartial and reasoned provisional decision within a very compressed timetable. It is not intended to replicate what Dyson J referred to in Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] B.L.R. 93, at page 97, as "the grinding detail of the traditional approach to the resolution of construction disputes." It provides a quick and interim solution that the courts will ordinarily enforce pending final resolution of the parties' dispute through litigation or arbitration.

57. In Carillion Construction Ltd v. Devonport Royal Dockyard Ltd [2006] B.L.R. 15, Chadwick LJ said, in giving the judgment of the Court of Appeal:

> "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. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions...) may, indeed aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'.
>
> 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 recognise 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 sub-contractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

> 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 expenses – as, we suspect, the costs incurred in the present case will demonstrate only too clearly."

58. In Pilon Ltd v. Breyer Group plc [2010] EWHC 837 (TCC), Coulson J observed, at [20]:

> "In my judgment, it is wholly illegitimate for a defendant … to comb through the decision to try and find some aspect of the dispute which the adjudicator did not expressly address, and then argue on jurisdictional or natural justice grounds that it should not be enforced."

59. In CG Group Ltd v. Breyer Group plc [2013] EWHC 2722 (TCC), Akenhead J added, at [31(e)]:

> "It behoves courts who are considering challenges on the grounds of breach of the rules of natural justice to have regard to the constraints under which adjudicators operate when faced with what are often complex legal arguments."

60. Summarising the jurisprudence, Fraser J said in Beumer Group UK Ltd v. Vinci Construction UK Ltd [2016] EWHC 2283 (TCC), at [16]:

> "It is therefore clear that for breaches of natural justice to be sufficient to justify the court declining to order summary judgment enforcing an adjudicator's decision, they must be the plainest of cases; the adjudication proceedings must have been obviously unfair. Combing through what has occurred or concentrating on the fine detail of the material before the adjudicator, to allege a breach of natural justice, will neither be encouraged nor permitted by the court. Adjudications are conducted very quickly, and this speed is part of the process imposed by Parliament on those who enter into construction contracts. The framework within which adjudicators have to reach decisions has to be taken into account when complaints are made by losing parties."

DISCUSSION

61. The timetable in this adjudication was as follows:

61.1 Referral: MTD made the referral on 12 November 2018. It provided three files of supporting materials.

61.2 Response: Willow's request for an extension to 28 November was refused, and accordingly it provided its response on 21 November 2018.

61.3 Reply: MTD provided a further five witness statements and three expert reports with its reply on 28 November 2018.

61.4 Site inspection: 4 December 2018.

61.5 Rejoinder: Willow served its rejoinder on 6 December 2018.

61.6 Surrejoinder: MTD provided a surrejoinder on 10 December 2018 with two expert reports and four witness statements.

61.7 Response: Mr Molloy invited Willow's response to a limited number of points by 12 December 2018.

61.8 Decision: Mr Molloy issued his decision seven days later on 19 December 2018.

62. Mr Cowan relies on the observations of His Honour Judge Lloyd QC in Balfour Beatty Construction Ltd v. The Mayor & Burgesses of the London Borough of Lambeth [2002] EWHC 597 (TCC), at [36]:

> "An adjudicator does not act impartially or fairly if he arrives at a decision without having given a party a reasonable opportunity of commenting upon the case that it has to meet (whether presented by the other party or thought to be important by the adjudicator) simply because there is not enough time available. An adjudicator, acting impartially and in accordance with the principles of natural justice, ought in such circumstances to inform the parties that a decision could not properly reasonably and fairly be arrived at within the time and invite the parties to agree further time. If the parties were not able to agree more time then an adjudicator ought not to make a decision at all and should resign."

63. It will, however, be a rare case where the court will decline to enforce an adjudication on the basis of the adequacy of the time allowed. I fully accept that time was very tight in this adjudication and that both the parties and the adjudicator will have been under pressure throughout the compressed timetable. That is, however, the nature of adjudication. I am not satisfied that time was so tight that Willow was not given a reasonable opportunity to comment upon the case against it or that Mr Molloy was not able properly to consider the parties' submissions and the evidence.

64. Equally, I do not consider that there was any significant breach of natural justice in either Mr Molloy's admission of evidence at the reply stage or in his allowance of the surrejoinder. Indeed, Willow was able to have the final word by responding to the surrejoinder. These are, in my judgment, no more than complaints about the rough and tumble inherent in the statutory scheme.

65. There is no merit in Willow's sixth point:

65.1 While there was evidence of actual occupancy rates for a different period, Mr Molloy was right to say that Willow's case necessarily depended upon an assumption as to the likely occupancy rates during the re-wiring works.

65.2 In advancing this issue, Willow's solicitor, Daniel Gilberthorpe, referred to a spreadsheet that had been relied upon in the adjudication compiling the occupancy data and which he said demonstrated that the hotel was "very often at 100% occupancy." If indeed the spreadsheet showed that then Mr Molloy was plainly right to make at least some allowance for the likelihood that 100% occupancy would not be achieved all of the time.

65.3 The occupancy spreadsheet was not shown to me and was, in any event, not the actual underlying evidence of occupancy but a compilation presumably drawn from such primary evidence.

65.4 Mr Molloy dealt with this head of claim at paragraphs 133-137. Willow has not, in my judgment, established a clear and significant breach of natural justice in Mr Molloy's handling of the issue. Of course, Willow might subsequently establish that its true loss was greater than that assessed by Mr Molloy, but that is not a ground for refusing enforcement.

66. One matter did initially cause me greater concern, namely the argument that Mr Molloy made findings against Willow on the basis of accepting MTD's surrejoinder evidence on issues 6A and 6B without allowing Willow to respond. On closer analysis, however, I accept Mr Jinadu's submission that these were issues that Willow had dealt with in the evidence filed with its response but which had not been dealt with by MTD in its reply. Accordingly, these were not new issues but rather matters on which, following the surrejoinder, Mr Molloy already had the benefit of both parties' submissions and evidence. Further, Willow does not explain in either its evidence or Mr Cowan's submissions what its answer to MTD's position would have been on these two issues and how, if at all, it was prejudiced by its inability to lodge further submissions or evidence. By definition, if Willow's approach would have been to repeat the evidence and arguments filed with the response, then such further submissions would have taken the case no further. Alternatively, if it was thereby shut out from lodging evidence and submissions taking a new point, one would have expected that case to be articulated before me. I infer from Willow's failure to do so that it is likely that there was nothing new to be said.

SEVERANCE

67. Since:

67.1 Willow fails in its challenge on the basis of natural justice; but

67.2 the adjudicator erred, in his construction of the June agreement,

the question arises whether the court can order severance of the adjudicator's decision.

68. In Cantillon Ltd v. Urvasco Ltd [2008] EWHC 282 (TCC), Akenhead J reviewed the question of severability. As he expressly recognised, his remarks were strictly obiter. He said, at [63]:

> "(a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.
>
> (b) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.
>
> (c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with

one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).

(d) The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.

(e) There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all-pervading that the remainder of the decision is tainted, the decision will not be enforced.

(f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the Court."

69. In Pilon Ltd v. Breyer Group plc [2010] EWHC 837 (TCC), Coulson J remarked, at [40]:

> "… it may soon be time for the TCC to review whether, where there is a single dispute, if it can be shown that a jurisdiction/natural justice point is worth a fixed amount which is significantly less than the overall sum awarded by the adjudicator, severance could properly be considered. That was, after all, the basis on which summary judgment applications were routinely decided before the Housing Grants, Construction & Regeneration Act 1996."

70. As Sir Peter remarked in the Fourth Edition of his work, Coulson on Construction Adjudication at para. 15.32, that challenge has subsequently been taken up, principally by Akenhead J in Working Environments Ltd v. Greencoat Construction Ltd [2012] EWHC 1039 (TCC); [2012] B.L.R. 309 and Beck Interiors Ltd v. UK Flooring Contractors Ltd [2012] EWHC 1808 (TCC) and by Edwards-Stuart J in Lidl UK GmbH v. RG Carter Colchester Ltd [2012] EWHC 3138 (TCC).

71. In Greencoat, Akenhead J held that the adjudicator did not have jurisdiction to decide two heads of claim worth some £21,149 plus VAT. Nevertheless, he enforced the adjudicator's decision as to the balance of the other ten heads of claim totalling circa £230,000 plus VAT.

72. In Lidl, Edwards-Stuart J severed two claims for liquidated damages worth £125,000. He said, at [61]:

> "At first sight it may appear that the decision in Greencoat conflicts with the general principle that a decision cannot be severed where only one dispute or difference has been referred. The rationale underlying this principle is, I think, that where a single dispute or difference has been referred it will generally be difficult to show that the reasoning in relation to the part of the decision that it is being sought to sever had no impact on the reasoning leading to the decision actually reached, or that the actual outcome would still have been the same. If this is the case, the part cannot safely be severed from the whole. However, where, in the case of the referral of a single dispute additional questions are brought in and adjudicated upon, whether by oversight or error, there should be no reason in principle why any decision on those additional questions should not be severed provided that the reasoning giving rise to it does not

> form an integral part of the decision as a whole. However, failing this, the entire decision will be unenforceable."

73. Commenting on these recent developments, Sir Peter observed at para. 15-32 of his book:

> "Accordingly, even where there is a single dispute, it appears that the court may, in the right circumstances, be prepared to enforce a part of the decision of the adjudicator, if that part is clearly and obviously untainted by the jurisdictional or natural justice problem, and can be readily identifiable."

74. I agree with Edwards-Stuart J that in the context of a single dispute or difference it can often be difficult to divorce any significant flaw in the adjudication from the balance of the decision. Indeed, significant breaches of natural justice are particularly prone to infect and therefore undermine the entire decision. In my judgment, the proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis need not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced.

75. In this case, I am satisfied that the effect of the error of law on the issue of contractual construction was limited to Mr Molloy's dismissal of the claim for liquidated damages and that such error did not infect the balance of the decision. I therefore consider that the good can and should be severed from the bad. The value of the claim for liquidated damages was £715,000. Accordingly, I enforce the balance of the decision.