Case No: HT-2021-000129
HT-2021-000130

Neutral Citation Number: [2021] EWHC 2502 (TCC)

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

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 15th September 2021

Before:

HH JUDGE EYRE QC

- -

Between:

CC CONSTRUCTION LIMITED	**Claimant/Pt 8 Defendant**
- and -	
RAFFAELE MINCIONE	**Defendant/Pt 8 Claimant**

- -
- -

Nicholas Collings (instructed by **Ashfords LLP**) for **CC Construction Limited**
Gideon Shirazi (instructed by **Charles Russell Speechlys LLP**) for **Raffaele Mincione**

Hearing date: 13th July 2021

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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.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.00am on 15th September 2021.

HH Judge Eyre QC:

Introduction.

1. Mr. Raffaele Mincione ("the Employer") owns 57 – 59 Clabon Mews, London SW1 ("the Property"). In 2016 the Employer engaged CC Construction Ltd ("the Contractor") to design and build the shell and core of a new house at the Property. The new house was to be of three storeys with three basement levels and the works included the demolition of the two existing mews houses. The written agreement of 21st April 2016 ("the Contract") adopted the JCT Design and Build Contract (2011 Edition) albeit with a number of amendments and the works were to be performed for the sum of £2,587,250. The Contract was varied in September 2017 when the Contract Sum was increased to £3,130,602 and the completion date postponed.

2. The Employer has declined to pay the sum of £483,512.12 (net of VAT but inclusive of interest) which the Contractor says is due following the service of a Final Statement and pursuant to an adjudication decision ("the Decision") determining that this sum is payable. The Employer's case is that the operation of the terms of the Contract in the circumstances of this case and in the light of the parties' actions means that the Final Statement served by the Contractor was not conclusive; that in fact a balance is owing to the Employer; and that the Decision is not enforceable. The Contractor disputes the Employer's interpretation of the Contract and contends that it is entitled to enforce the Decision.

3. The matter came before me on 13th July 2021 for a remote hearing by way of MS Teams of the Employer's Part 8 Claim seeking declarations as to the effect of the Contract in the circumstances which had arisen and of the Contractor's claim for summary judgment in respect of its Part 7 Claim to enforce the Decision.

The Factual Background.

4. The Contract was dated 21st April 2016 but the Contractor had in fact taken possession of the site about a fortnight earlier.

5. The Works were defined as:

> "The design and construction of a new three storey single dwelling including three basement levels at the property shown edged red on the site plan annexed at Annex B."

6. The Contract did not utilise the provision in the standard form of contract for the division of the Works into Sections.

7. Clause 1.7.1 provided that:

> "Any notice or other communication between the Employer … and the Contractor that is expressly referred to in the Agreement for these Conditions (including without limitation, each application, approval, consent, confirmation counter-notice, decision, instruction or other notification) shall be in writing."

8. The Contract defined "Final Statement" as having the meaning provided in clauses 1.8 and 4.12. Clause 1.8.1.1 of the standard form of contract had been deleted and as a consequence clause 1.8 provided for the effect of the Final Statement as follows:

> ".1 As from the due date for the final payment specified in clause 4.12.5 and in addition to the effect referred to in clause 4.12.6, the Final Statement or, as the case may be, the Employers Final Statement (`the relevant statement') shall, except as provided in clauses 1.8.2, 1.8.3 and 1.8.4 (and save in respect of fraud), have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration or legal proceedings) as:
>
> …
>
> .2 conclusive evidence that all and only such extensions of time, if any, as are due under clause 2.25 have been given: and
>
> .3 conclusive evidence that the reimbursement of direct loss and/or expense, if any, to the Contractor pursuant to clause 4.20 is in final settlement of all and any claims which the Contractor has or may have arising out of the occurrence of any of the Relevant Matters whether such claim be for breach of contract, duty of care, statutory duty or otherwise.
>
> .2 If adjudication, arbitration or other proceedings have been commenced by either Party before the due date for the final payment the relevant statement shall have effect as provided in clause 1.8.1 upon and from the earlier of either:
>
> .1 the conclusion of such proceedings in which case the statement shall be subject to the terms of any decision, award or judgement in or any settlement of such proceedings; or
>
> .2 the expiry of any period of 12 months from or after the submission of the statement, during which neither Party takes any further step in such proceedings…
>
> .3 Subject to clause 4.12.6, if adjudication, arbitration or other proceedings are commenced by either Party on or after the due date for the final payment and not later than 28 days after the due date, the relevant statement shall have effect as conclusive evidence as provided in clause 1.8.1 save only in respect of the matters to which those proceedings relate.
>
> .4 …"

9. Clause 2.28 provided for the issue of a Non-Completion Notice if the Contractor failed to complete the Works by the Completion Date. Clause 2.29 then provided for the Employer to withhold or to deduct or to require the payment of liquidated damages by a notice given no later than 5 days before the final date for payment provided that a

Non-Completion Notice had been served and the Employer had given notice before the due date that he may so withhold, deduct, or require.

10. Clause 2.30 provided thus for the Employer to take possession of a part or parts of the Works:

> "If at any time or times before the Practical Completion Statement or relevant Section Completion Statement the Employer wishes to take possession of any part or parts of the Works or a Section and the Contractor's consent has been obtained (which consent shall not be unreasonably delayed or withheld), then, notwithstanding anything expressed or implied elsewhere in this Contract, the Employer may take possession of such part or parts. The Contractor shall thereupon give the Employer notice identifying the part or parts taken into possession and giving the date when the Employer took possession ('the Relevant Part' and 'the Relevant Date' respectively)."

11. Clause 2.32 (incorporating the amendment of the standard form) provided as follows for a notice to be issued when defects in a Relevant Part had been made good:

> "When any defects, shrinkages or other faults in the Relevant Part which the Employer has required to be made good under clause 2.35 have been made good, he shall issue a notice to that effect provided that the Employer shall not be required to issue that notice earlier than the expiry of the Rectification Period for the Relevant Part."

12. Clause 2.35 provided that:

> "If any defects, shrinkages or other faults in the Works or a Section appear within the relevant Rectification Period due to any failure of the Contractor to comply with his obligations under this Contract:
>
> .1 such defects, shrinkages and other faults shall be specified by the Employer in a schedule of defects which he shall deliver to the Contractor as an instruction not later than 14 days after the expiry of that Rectification Period; and
>
> .2 notwithstanding clause 2.35.1, the Employer may whenever he considers it necessary issue instructions requiring any such defect, shrinkage or other fault to be made good, provided no instructions under this clause 2.35.2 shall be issued after delivery of a schedule of defects or more than 14 days after the expiry of the relevant Rectification Period.
>
> Within a reasonable time after receipt of such schedule or instructions, the defects, shrinkages and other faults shall at no cost to the Employer made good by the Contractor unless the Employer shall otherwise instruct…."

13. At 2.36 the Contract (again incorporating the amendment of the standard form) dealt as follows with the issuing of a Notice of Completion of Making Good:

> "When the defects, shrinkages or other faults in the Works or a Section which the Employer has required to be made good under clause 2.35 have been made good, he shall issue a notice to that effect (a "Notice of Completion of Making Good") provided that the Employer shall not be required to issue any Notice of Completion of Making Good earlier than the expiry of the Rectification Period. That notice shall not be unreasonably delayed or withheld, and completion of that making good shall for the purposes of this Contract be deemed to have taken place on the date stated that notice."

14. Clauses 4.1 – 4.3 dealt with adjustments to the Contract Sum. For present purposes it is to be noted that those clauses did not make provision for the Contract Sum to be adjusted to take account of liquidated damages under clause 2.29.

15. Clause 4.12.1 provided for the Contractor to submit the Final Statement together with such supporting documents as the Employer may reasonably require following practical completion.

16. The calculation of the Final Statement was addressed thus at clause 4.12.2:

> "The Final Statement shall set out the adjustments to the Contract Sum to be made in accordance with clause 4.2 and shall state:
>
> .1 the Contract Sum. as so adjusted; and
>
> .2 the sum of amounts already paid by the Employer to the Contractor,
>
> and the final payment shall be the difference (if any) between the two sums, which shall be shown as a balance due to the Contractor from the Employer or to the Employer from the Contractor, as the case may be. The Final Statement shall state the basis on which that amount has been calculated, including details of all such adjustments."

17. Clause 4.12.5 provided thus for the due date for payment:

> "The due date for the final payment shall be the date one month after whichever of the following occurs last:
>
> .1 the end of the Rectification Period in respect of the Works or (where there are Sections) the last such period to expire;
>
> .2 the date stated in the Notice of Completion of Making Good under clause 2.36 or (where there are Sections) in the last such notice to be issued; or

> .3 the date of submission to the other Party of the Final Statement or, if issued first, the Employers Final Statement ("the relevant statement")."

18. The conclusivity of the Final Statement was addressed in clause 4.12.6 stating:

> "Except to the extent that prior to the due date for the final payment the Employer gives notice to the Contractor disputing anything in the Final Statement or the Contractor gives notice to the Employer disputing anything in the Employer's Final Statement, and subject to clause 1.8.2, the relevant statement shall upon the due date become conclusive as to the sum due under clause 4.12.2 and have the further effects stated in clause 1.8."

19. Clause 4.12.7 - 9 provided that:

> ".7 The final date for payment shall be 28 days from the due date. Not later than 5 days after the due date, and notwithstanding any dispute regarding the relevant statement, the Party by whom the statement shows the final payment as payable ('the payer") shall give a Payment Notice to the other Party with the details specified in clause 4.10.1. Subject to any Pay Less Notice under clause 4.12.8 the payment to be made on or before the final date for payment shall be the sum stated in the Payment Notice or, if such notice is not given, the balance stated in the relevant statement.
>
> .8 if the payer intends to pay less than the sum stated in the Payment Notice or, in default of such notice, less than the amount stated in the relevant statement, he shall not later than 5 days before the final date for payment give the other Party a Pay Less Notice in accordance with clause 4.10.2
>
> .9 Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice."

20. The effect of the Contract Particulars, the definitions in clause 1.1, and clause 2.35 was that the Rectification Period was the period of 12 months from Practical Completion.

21. On 2nd October 2018 the Employer issued a non-completion notice. This was followed, on 19th October 2018, by the Employer's notification of his intention to require the payment of and/or to withhold liquidated damages by reason of the delay in completion.

22. On 7th December 2018 the Employer took partial possession of the Property. He took possession of the entirety of the Property apart from the external face of the boundary wall of 57 Clabon Mews. The Contractor has contended that this amounted to 99.86% by value of the Works. Even without regard to precise percentages it is clear that the Employer was then in possession of the substantial bulk of the Property. On the same date the Contractor gave notice pursuant to clause 2.30 of the Contract that the Employer had taken partial possession of the Property to that extent.

23. Practical Completion was on 15th November 2019.

24. On 14th February 2020 the agents then acting for the Employer issued a document entitled "Notice of Completion of Making Good" using the standard JCT form for such a notice. This document stated that it referred "solely to the Relevant Part" identified in the Contractor's notice of 7th December 2018 and in a subsequent letter of the Employer's Agents. It then said:

> "Under the terms of the above Contract, I/We certify that in accordance with Clause 2.32 of the Contract, all defects, shrinkage is and/or other faults in the Works due to materials, goods or workmanship not in accordance with this Contract, which the Employer has required the Contractor to rectify, have been made good as of 7 February 2020."

25. On 5th March 2020 the Contractor sent by email a Final Account and invited the Employer's Agents to engage in negotiations with a view to settling the account and closing out the Contract.

26. In April 2020 the Employer dispensed with the services of his agents. There was a subsequent re-engagement but nothing turns on whether at the relevant times the Employer was or was not acting through agents.

27. On 5th October 2020 the Contractor sent the Employer a letter attaching a Final Statement. This was said to be based on the Final Account which had been sent in March 2020. The Final Statement showed a balance of £479,957.80 owing to the Contractor.

28. As already noted, Practical Completion had been on 15th November 2019 and so the Rectification Period expired on 15th November 2020.

29. There is some suggestion that the letter of 5th October 2020 was not received and certainly the Employer made no response to it. In any event the Contractor sent a further letter on 1st December 2020 which was received by the Employer on 4th December 2020. This letter attached the 5th October 2020 letter and the material which had accompanied that letter. In the letter of 1st December 2020 the Contractor stated:

> "We are nearing the end of the Making Good Defects Period for the rear wall of Nr 57 Clabon Mews and it would be appreciated if the Final Statement could be agreed as soon as possible to tie in with the end of this period."

30. The Employer replied on 18th December 2020. That letter was headed "57 – 59 Clabon Mews – Final Statement" and in it the Employer stated:

> "I also refer to the Final Statement enclosed with your letter dated 5 October 2020.
>
> In accordance with clause 4.12.6 I give notice that I dispute the content of the Final Statement in its entirety. In particular, and without limitation:…"

31. The letter then said the Employer took issue with the inclusion in the Final Statement of the Contractor's cost of obtaining access to complete the works to the rear wall and with the failure to take account of delay in completing the works which, the Employer contended, meant that liquidated damages in excess of £340,000 were due. He concluded by saying:

> "On this basis alone (and, for the avoidance of doubt, I dispute all items in your Final Statement), the final payment would be a sum due from CC Construction to me.
>
> In accordance with clause 4.12.7, I will provide a Payment Notice in due course."

32. The Employer had not delivered any schedule of defects pursuant to clause 2.35.1 nor issued instructions for rectification under clause 2.35.2 after the service of the Notice of Completion of Making Good of 14th February 2020. However, on 13th January 2021 he issued a Notice of Completion of Making Good, again in the standard JCT form. This stated:

> "This Notice refers to the whole of the Works.
>
> Under the terms of the above Contract, I/We certify that in accordance with Clause 2.36 of the Contract, all defects, shrinkages and or other faults in the Works due to materials, goods or workmanship not in accordance with this Contract, which the Employer has required the Contractor to rectify, have been made good as at 13 January 2021."

33. On 19th January 2021 the Contractor sent an invoice for £479,957.80. The covering email stated that this sum was "payable pursuant to clauses 4.12.6 and 4.12.7 of the JCT contract" and that "the contractual final date for payment of the Final Statement balance was Saturday 15th January 2021".

34. On 20th January 2021 Miss. Forsyth replied on behalf of the Employer saying:

> "The final date for payment is not 15 January 2021. As you are aware, clause 4.12.5 of the building contract provides that the due date for final payment is 28 days after the last of the following:
>
> - The end of the Rectification Period
>
> - The date stated in the Notice of Completion of Making good
>
> - The date of submission of the final Statement.
>
> The date stated in the Notice of Completion of Making Good was 13 January 2021. Therefore, neither the due date for the final date for payment has occurred."

35. There then followed correspondence in which the parties set out their differing contentions as to the due date.

36. On 9th February 2021 the Contractor gave notice of intention to make a referral to adjudication and on 16th February 2021 the referral was made.

37. In the meantime, on 10th February 2021, the Employer had served a payment notice asserting that there had been an overpayment of £254,656.58 to the Contractor.

38. The Employer contends that the effect of these dealings was that the due date for the purposes of the Contract was 13th February 2021 being one month after the service of the Notice of Completion of Making Good on 13th January 2021. He says that the Payment Notice of 10th February 2021 was, accordingly, served before the due date. In addition the Employer contends that the letter of 18th December 2020 was effective to prevent the Final Statement being conclusive for the purposes of clause 4.12.6. The Contractor says that the letter was not effective for that purpose and that at the latest the due date was 4th January 2021 being one month after the Employer's receipt of the Contractor's letter of 1st December 2020 with the consequence that the Payment Notice was not served until more than five days after the due date.

39. The adjudicator was Mr. Siamak Soudagar and he gave his decision on 26th March 2021.

40. Mr. Soudagar explained that the Contractor had argued that the relevant date in a Notice of Completion of Making Good was 7th February 2020 that having been the date stated in the notice of 14th February 2020. As no defects had been notified after that no further Notice of Completion of Making Good could have been issued. That conclusion was said to follow as a matter of construction of the Contract or by way of implication with the words "unless no defects are issued" being added to clause 4.12.5.2 in order to ensure business efficacy. Alternatively, the Contractor said that any such notice should have been issued by 30th November 2020 that being the end of the Rectification Period and the notice was to be treated as having been so issued. It followed, the Contractor said, that the due date was 4th January 2021 being one month from receipt of the Final Statement on 4th December 2020. The Contractor also contended that the letter of 18th December 2020 had not been effective to prevent the Final Statement becoming conclusive because that letter had not been directed at the 1st December 2020 Final Statement and also because the Employer had not commenced proceedings, whether for arbitration, adjudication, or otherwise, in the period before the due date. It was in those circumstances that the Contractor sought payment of £479,957.80.

41. The Employer contended that the due date was 13th February 2021 being one month after the Notice of Completion of Making Good of 13th January 2021 and that as his Payment Notice had been issued before the due date the Contractor was not entitled to rely on the Final Statement. The Employer disputed the Contractor's construction of the provisions as to the Notice of Completion of Making Good and said that the preconditions for the implication of a further term had not been satisfied. The Final Statement was not conclusive for the purposes of clause 4.12.6 because of the effective challenge in the letter of 18th December 2020. Alternatively, account should have been taken of the Employer's liquidated damages claim in the sum of £343,237.74 in calculating the sum due. Moreover, the Employer was, in any event, entitled to set off the liquidated damages claim by way of a legal set off. The Employer also contended that the adjudicator had no jurisdiction to reach a decision as to the conclusivity of the Final Statement because no dispute in relation to that issue had crystallised before the reference to adjudication.

42. The Contractor's response to the liquidated damages claim was threefold. First, it said that the Employer's failure to serve a Pay Less Notice precluded any reduction of the final payment to take account of such damages. Second, it contended that as a matter of fact no such damages were payable and provided witness evidence in support of that assertion. Finally, it said that in any event the issue of liquidated damages was not part of the dispute which the adjudicator had been asked to determine and so could not be raised in the adjudication.

43. The adjudicator concluded that a Notice of Completion of Making Good was only to be issued when defects had been specified under clause 2.35. In the circumstances of this case no further defects had been notified under that clause after the 14th February 2020 notice. Accordingly, the notice of 13th January 2021 was not necessary and was not to be seen as the last Notice of Completion of Making Good. There had only been one such notice which had been that of 14th February 2020. The adjudicator accepted the Contractor's argument that the proposed words were to be added to clause 4.12.5.2 by way of implication. He also accepted the alternative contention that the Notice of Completion of Making Good was to be treated as having been issued on the date when it should have been issued which was no later than 30th November 2020. In the light of those conclusions the adjudicator found that the due date was 4th January 2021.

44. The adjudicator also decided that he had jurisdiction to determine the question of the conclusivity of the Final Statement. The adjudicator dealt with that matter in short terms. He had noted that the Employer had said that the dispute as to the conclusivity of that statement had not crystallised before the start of the adjudication. He concluded, at [218], that the answer to the issue of jurisdiction was to be found in the Notice of Intention to refer a Dispute to Adjudication. The adjudicator noted that the Contractor had there sought a declaration as to the conclusivity of the Final Statement and he took the view that this demonstrated that there was a crystallised dispute between the parties as to conclusivity such as to give him jurisdiction.

45. On the issue of conclusivity the adjudicator found that the letter of 18th December 2020 was ineffective to prevent the Final Statement attaining conclusivity. The adjudicator gave two reasons for that conclusion. The first was that the letter was, he found, to be read as a challenge to the Final Statement of 5th October 2020 and not to that received on 4th December 2020. The second was that he interpreted clause 4.12.6 as providing for a two-stage process of challenge. In his view the giving of notice and the commencement of adjudication or other proceedings were not alternative means of challenge but were separate stages in a two-stage process both of which had to occur before the due date.

46. In the light of those findings the adjudicator found that the Final Statement was conclusive and that no Payment Notice or Pay Less Notice had been issued before or in the requisite period after the due date. It followed, the adjudicator found, that the sum in the Final Statement of £479,957.80 net of VAT was payable.

47. The adjudicator then dealt very briefly with the Employer's liquidated damages argument saying, at [238], that:

> "It is established law that an Adjudicator cannot open up a certificate considered to be conclusive, as such, once the due date has been determined, the Adjudicator will have no further power

> to open up the Final Statement. In respect of liquidated damages, I conclude that it is not a part of the dispute I have been asked to decide and therefore cannot be raised in set off in these circumstances."

48. The Contractor says that the Decision is enforceable. The Employer for his part says that the adjudicator did not have jurisdiction to consider the question of the conclusivity of the Final Statement and that there was a material breach of the requirements of natural justice in that he contends that the adjudicator failed to address his case as to the deduction of liquidated damages.

The Procedural History.

49. On 9th April 2021 both the Employer and the Contractor commenced proceedings.

50. The Employer filed a Part 8 Claim seeking declarations as to the due date and the consequences said to flow from the conclusion reached in that regard; as to the conclusivity of the Final Statement in respect of the value of the account between the parties; as to the conclusivity of the Final Statement in respect of extensions of time and any loss and expense claims by the Contractor; and as to the enforceability of the Decision. The Employer's contention that the Final Statement was not conclusive as to value depended on his contention that the letter of 18th December 2020 was an effective notice for the purposes of clause 4.12.6. In the Part 8 Claim the Employer asserted an alternative claim contending that if the letter of 18th December 2020 was ineffective as a notice for the purposes of clause 4.12.6 then that clause was unfair within the meaning of section 62 of the Consumer Rights Act 2015 and as such was not binding on the Employer.

51. The Contractor's Part 7 Claim was filed on the same day. In that the Contractor sought orders for the payment of the sums awarded in its favour by the adjudicator. The Contractor applied concurrently for summary judgment.

52. On 19th April 2021 O'Farrell J ordered that both matters be heard together on 9th June 2021 (that date was later varied by consent). That order was made without a hearing and O'Farrell J provided for either party to have permission to apply to vary the directions contained in the order.

53. On 28th April 2021 the Contractor acknowledged service of the Part 8 Claim. In the Acknowledgement of Service the Contractor objected to the Employer's use of the Part 8 procedure. However, despite that objection the Contractor did not seek to exercise the permission given to apply to vary O'Farrell J's order.

54. On the day of the hearing before me the Contractor, through Mr. Collings, contended that the matters raised in the Part 8 Claim were not apt for determination in Part 8 proceedings. He said that either the Employer's claim should be dismissed or that directions should be given for it to continue by way of Part 7 proceedings while the court proceeded to determine the Contractor's summary judgment application.

55. For the reasons I gave orally on 13th July 2021 I concluded that the allegation of unfairness under the 2015 Act was not suitable for determination by way of the Part 8 procedure but that the other elements of the Part 8 claim were so suitable. In the light

of that ruling the Employer abandoned his argument that clause 4.12.6 was not binding on him by reason of unfairness and the hearing continued before me.

The Issues.

56. The first issue arose in relation to the Employer's claim for a declaration that the due date was 13th February 2021. The Contractor said that the due date was 4th January 2021 at the latest (being one month from the Employer's receipt of the Final Statement on 4th December 2020) but submitted that no declaration should be made and that I should confine myself to declining to make the declaration sought by the Employer.

57. Next there was dispute as to whether the Employer's letter had been effective to prevent the Final Statement becoming conclusive by virtue of clause 4.12.6. This involved two sub-issues. First, whether the Employer's letter of 18th December 2020 was properly to be read as disputing the Final Statement received on 4th December 2020. Second, whether clause 4.12.6 required not just a notice of dispute but also the commencement of adjudication, arbitration, or other proceedings in order to prevent the Final Statement becoming conclusive. The Employer submitted that the letter was indeed disputing the Final Statement received on 4th December 2020 and that it sufficed to prevent conclusivity without the need for proceedings to be commenced. The Contractor said that the letter was not properly to be read as disputing that Final Statement and that in any event it was ineffective to prevent conclusivity in the absence of proceedings having been commenced before the due date.

58. The Employer sought a declaration as to the effect of clause 1.8.1. The Contractor contended that such a declaration was neither necessary nor appropriate and that it could have the effect of precluding fact-specific arguments which it would seek to advance in response to the Employer's potential liquidated damages claim.

59. There was also dispute as to the enforceability of the Decision. This resolved into two sub-issues namely whether the adjudicator had had jurisdiction to address the question of the conclusivity of the Final Statement and whether there had been a material breach of the rules of natural justice in his treatment of the Employer's claim to be entitled to set off liquidated damages.

The Due Date.

60. The nature of the court's task in interpreting a contract can in general terms be stated shortly. As was enunciated in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and explained in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 the court is to seek to ascertain the intention of the parties by reference to the language used when seen in context.

61. Mr. Shirazi placed considerable emphasis on the fact that the parties here had used a standard form JCT contract albeit with modifications. He said that this had the consequence that the Contract was to be interpreted in such a way as to promote certainty. This was important in order to enable others who made agreements using the same standard form to be confident of the consequences which would follow from the use of the terms of the standard form. To the extent that Mr. Shirazi contended that there is a special rule of interpretation applying to such contracts or that the principles laid down by the Supreme Court in *Arnold v Britton* and *Wood v Capita Insurance Services Ltd* are in some way modified in the case of such contracts I do not accept that

to be the law. The principles set out by the Supreme Court are of general application. Mr. Shirazi supported his contention by reference to the speech of Lord Bridge in *The Chikuma* [1981] 1 WLR 314 at 322 A – B. However, the words of Lord Bridge are to be seen in the light of his lordship's preceding analysis of instances where problems had arisen from attempts to place artificial or strained interpretations on clauses in standard form contracts so as to meet the perceived needs of justice in particular cases. Lord Bridge cautioned against the exercise of "judicial ingenuity" in that way because of the impact which such strained interpretations can have on other users of the standard form in question. Lord Bridge was not saying that a different approach was to be taken in construing standard form contracts but was instead emphasising the particular importance when dealing with such contracts of not departing from the normal rules of construction.

62. Similarly, Mr. Shirazi's invocation of section 69 (1) of the Consumer Rights Act 2015 does not advance matters here. That section provides that:

> "If a term in a consumer contract … could have different meanings the meaning that is most favourable to the consumer is to prevail."

63. Here both sides contend that the meaning of the Contract is clear and as will be seen below I have concluded that the meaning is, indeed, clear. In my judgement section 69 (1) can only come into effect when there is genuine ambiguity after the proper application of the normal principles of contractual interpretation. The section does not come into play simply because it is possible to argue for differing interpretations at the start of the exercise of interpreting a contractual term. Instead for the provision to operate there must be genuine ambiguity after the normal process of analysing the language used in its context to determine the intention of the parties has been undertaken. In reaching that conclusion I have adopted the approach taken by HH Judge Keyser QC in *AJ Building and Plastering Ltd v Turner* [2013] EWHC 484 (QB), [2013] Lloyds LR 629 and by HH Judge Stephen Davies in *Khurana v Webster Construction Ltd* [2015] EWHC 758 (TCC). Those judges were considering the effect of regulation 7 (2) of the Unfair Terms in Consumer Contracts Regulations 1999 which addressed the situation where there was "doubt about the meaning of a written term". Although the language of the provisions is different the effect is the same and a term can only have different meanings if there is doubt about its true meaning. Judge Keyser's analysis as adopted by Judge Stephen Davies is equally applicable to section 69 (1) and has the effect that the section only avails a consumer if genuine ambiguity remains after the rigorous application of the generally applicable rules of interpretation. That is not the position here and so I am not assisted by section 69 (1).

64. Finally, by way of setting out the approach which he said was applicable Mr. Shirazi invoked the "Clear Words Principle" as set out at section 18 of *Lewison's The Interpretation of Contracts* (7th Ed) namely that "where a construction would produce an unfair result, the court will often require clear words to support the construction in question". The principle in those terms echoes the language used by Coulson J in *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2008] EWHC 2379 (TCC). The effect of the principle is that in the absence of clear language the court is unlikely to conclude that the parties to a contract intended their contract to operate so as to create an unfair result. I do not, however, find that principle of assistance when interpreting the provisions in the Contract as to the due date. If when

properly construed the provisions of the Contract have the effect that in the circumstances of this case the due date is to be determined without reference to the issue of the Notice of Completion of Making Good on 13th January 2021 that would be an outcome adverse to the Employer's interests but it would not be an unfair result of a kind which would bring the Clear Words Principle into play.

65. Accordingly, the due date is to be determined by the application of the normal principles of construction to the terms of the Contract.

66. Applying that approach I am satisfied that the correct interpretation of clause 4.12.5.2 is that where in the operation the Contract the circumstances are such that there is scope for a Notice of Completion of Making Good to be issued under clause 2.36 then the due date will be one month from the issue of that Notice of Completion of Making Good (or the last such notice in a case where there are Sections which is not the position here) provided that date is or could be later than one month from either the expiry of the Rectification Period or the date of submission of the Final Statement. However, where there is no scope for the issue of a Notice of Completion of Making Good under clause 2.36 or is no longer any possibility of such a notice then clause 4.12.5.2 cannot come into operation and no account is to be taken of that sub-clause in calculating the due date. That will be the position in a case where the Employer has not issued an instruction in the form of a schedule of defects for the purpose of clause 2.35.1 or has not issued instructions under clause 2.35.2 and where the time for doing so has passed (as will be the position with the passage of 14 days from the expiry of the Rectification Period).

67. The crucial question in considering how clause 4.12.5.2 is to be interpreted is that of whether the effect of the Contract is that there needs to be a Notice of Completion of Making Good regardless of the other circumstances. If there does then there is considerable force in Mr Shirazi's analysis and it would then be necessary for there to be such a notice in every circumstance with the effect that the due date can never arise until there has been a Notice of Completion of Making Good. However, I am satisfied that when the Contract is properly interpreted the correct analysis is that it will only be possible for there to be a Notice of Completion of Making Good for the purposes of clause 4.12.5.2 in particular circumstances. If there comes a time when not only have those circumstances not arisen but there is also no possibility of them arising then there is no scope for a Notice of Completion of Making Good for the purposes of that sub-clause. In such a case the sub-clause simply does not come into operation.

68. That assessment follows from the wording of clause 4.12.5.2 which identifies two scenarios. The first is where there has been a single Notice of Completion of Making Good under clause 2.36 and the second is where provision has been made for Sections and where there have been more than one such notice under clause 2.36. It follows that for clause 4.12.5.2 to come into operation there must either have been a notice under clause 2.36 or scope for such a notice still to be served. If there has been no such notice and no possibility of one being served then clause 4.12.5.2 cannot assist in determining the due date. This is a consequence of the fact that the notice in which the date is to be stated for the purposes of clause 4.12.5.2 is one "under clause 2.36".

69. It becomes necessary to consider the circumstances in which a Notice of Completion of Making Good can be issued under clause 2.36. As noted above that provides for the notice to be issued:

> "When the defects, shrinkages or other faults in the Works or a Section which the Employer has required to be made good under clause 2.35 have been made good".

70. It follows that a notice under clause 2.36 can only be issued where defects and so forth have been required to be made good under clause 2.35. Clause 2.35 in turn provides that such a requirement can only arise through an instruction in the form of a schedule of defects delivered not later than 14 days after the expiry of the Rectification Period (clause 2.35.1) or by instructions issued either before delivery of the schedule of defects or again no more than 14 days after the expiry of the Rectification Period (clause 2.35.2).

71. The effect is that it will be possible to determine at the latest by 14 days after the expiry of the Rectification Period whether there is any scope for the issuing of a Notice of Completion of Making Good under clause 2.36 and hence whether there is any scope for clause 4.12.5.2 to have any relevance. If by that date no schedule of defects has been delivered under clause 2.35.1 and no instructions under clause 2.35.2 issued then the time for the delivery of such a schedule or the issuing of such instructions will have passed and as a consequence there will be no possibility of a Notice of Completion of Making Good ever being issued under clause 2.36.

72. It is to be noted that clause 2.32 provides for the Employer to "issue a notice to that effect" when defects in a Relevant Part which the Employer required to be made good under clause 2.35 have been made good. However, such a notice will be a notice under clause 2.32 and not under clause 2.36 and so cannot be relevant for the purposes of clause 4.12.5.2. The Contract draws a distinction between (a) instructions for the making good of defects in the Works as a whole or in a Section or Sections thereof the completion of which making good will lead to the issuing of a Notice of Completion of Making Good under clause 2.36 and (b) instructions for the making good of defects in a Relevant Part the completion of which will lead to the issuing of a notice under clause 2.32. It is only the former which is potentially relevant for the purposes of clause 4.12.5.2.

73. It is also to be noted that clause 2.32 although dealing with a notice in respect of a Relevant Part makes reference to the requirement to make good having been made under clause 2.35. It could be said that this means that a notice under clause 2.32 is also a Notice of Completion of Making Good or that a notice under clause 2.32 can also be a Notice of Completion of Making Good within the meaning of clause 2.36. On that view such a notice could also be relevant for the purposes of clause 4.12.5.2. In my judgement the better view is that such a notice is not within the scope of clause 4.12.5.2. That is, first, because such a notice will avowedly have been issued under clause 2.32 and not clause 2.36. Second, clause 4.12.5.2 makes reference to "the" Notice of Completion of Making Good and only contemplates there having been more than one such notice where there are Sections. It does not contemplate notices relating to the completion of making good in respect of a Relevant Part being relevant for the purpose of determining the due date. However, the question is not relevant for current purposes. That is because a notice under clause 2.32 can only be in respect of defects which the Employer has required to be made good under clause 2.35 and as explained above it will be possible to know by 14 days after the expiry of the Rectification Period whether there has been any such requirement and so any possibility of such a notice. Moreover, on the facts of this case the only notice under clause 2.32 which was or could have been

issued was that of 14th February 2020 which being more than one month before both the expiry of the Rectification Period and the date of the submission of the Final Statement can have no impact on the due date on the facts of this case.

74. Mr. Shirazi made reference to the use of the word "shall" in the phrase "he shall issue a notice to that effect" in clause 2.36. He contended that this means that there must inevitably be the issue of a Notice of Completion of Making Good with the consequence that there must always be a date in such a notice which will need to be taken into account by reason of clause 4.12.5.2. That argument overlooks the preceding part of the clause which makes it clear that the Employer's obligation to issue such a notice only arises if the Employer has required making good under clause 2.35.

75. It is right that the language of clause 2.36 suggests that the Employer will almost inevitably have required making good under clause 2.35. That may very well be likely in most cases but it is not inevitable.

76. Mr. Shirazi referred me to clause 4.18.3. Clause 4.18 addressed the amount and periods of retention in respect of interim payments and clause 4.18.3 provided that:

> "half the Retention Percentage may be deducted from so much of the total amount as relates to work where the Works or relevant Section(s) have reached practical completion but in respect of which a Notice of Completion of Making Good under clause 2.36 has not been issued or relates to work in a Relevant Part where a notice under clause 2.32 has not been issued."

77. That provision is addressing retention from interim payments and so is not directly relevant here but it is right to note that the language used there suggests that in all cases there will have to be a Notice of Completion of Making Good when there has been Practical Completion of the Works as a whole or of a Section. However, such an interpretation cannot prevail against the fact that the notices to which reference is made are to be under either clause 2.36 or clause 2.32 and for such a notice to be issued there has first to have been a requirement under clause 2.35. It is, moreover, of note that clause 4.18.3 makes separate reference to notices under clause 2.36 and those under clause 2.32. That provides some, albeit limited, support for the conclusion set out above that a notice under clause 2.32 is not also a notice under clause 2.36. It also suggests that the omission of any reference to a clause 2.32 notice from clause 4.12.5.2 was deliberate with the consequence that such a notice has no relevance for the purposes of that clause.

78. The Contractor's letter of 1st December 2020 which I have quoted at [29] above made reference to the parties "nearing the end of the Making Good Defects Period" for the rear wall. The letter is a somewhat puzzling one because the expression "Making Good Defects Period" is not a defined term for the purposes of the Contract and the Rectification Period had expired shortly before the date of the letter. The similarity of language might suggest that a Notice of Completion of Making Good was expected and potentially being sought. However, I have concluded that is not an appropriate reading of the letter which did not ask for such a notice but instead sought agreement of the Final Statement. In any event the letter cannot affect the proper interpretation of the Contract which must be determined as at the date of the Contract.

79. The Employer said that the effect of his action in taking partial possession on 7th December 2018 was that the Works were thereafter divided into Sections. This argument was advanced on the footing that it had the consequence, the Employer said, that as there were Sections regard was to be had only to the last Notice of Completion of Making Good and that until 13th January 2021 there had not been a Notice of Completion of Making Good in respect of the Works as a whole and that there was a Section in respect of which there had been no such notice. In the light of the conclusion which I have reached as to the proper interpretation of clause 4.12.5.2 this argument has no impact on the ultimate outcome. However, it is right that I explain why this argument is misconceived. The provisions in the standard JCT Design and Build Contract form for division of the Works into Sections were left blank in the Contract. Clauses 2.30 – 2.34 of the Contract dealt with partial possession and it is apparent from those provisions that the taking of partial possession did not create a division into Sections. Not only is there no express provision to the effect that a partial possession creates a Section but the contrary is apparent from the provision that partial possession creates a Relevant Part. By virtue of clause 1.1 that is a defined term the meaning of which is to be found in clause 2.30. The Contract is clear that partial possession creates a Relevant Part and not a Section. That is, moreover, apparent from the fact that clause 2.30 envisages partial possession of either a part of the Works as a whole or of a part of a Section. Partial Possession of a Section creates a Relevant Part of the Section but does not convert a Section into separate Sections. Similarly partial possession of the Works as a whole does not divide the Works into Sections.

80. In support of his contention that the Contract was to be interpreted as necessarily requiring a Notice of Completion of Making Good before the due date could arise Mr. Shirazi referred me to the decision of the House of Lords in *Reinwood Ltd v L Brown & Sons Ltd* [2008] UKHL 18, [2008] 1 WLR 696. He said that in that case the House of Lords had been influenced by the need for the parties to construction contracts readily to know where they stand (see per Lord Walker at [19] and per Lord Neuberger at [40] and [45]). Mr. Shirazi said that his interpretation was consistent with that requirement because it meant that both parties would know in advance that a Notice of Completion of Making Good was required for calculation of the due date and also that when such a notice came after the end of the Rectification Period and the submission of the Final Statement then the due date was one month from the date of the notice. It would also be conducive of certainty because it would enable both parties to know that the Employer had accepted that the making good work had been completed. It is right that in *Reinwood* the importance of enabling the parties to know in advance where they stood was emphasised but that principle does not assist the Employer here and in my judgement it rather favours the contrary interpretation. In *Reinwood* the House of Lords held that the effect of a valid certificate could not be altered retrospectively. However, that does not assist with the question here of how the due date is to be calculated and Mr. Shirazi's approach begs the question of the validity or effectiveness of the purported Notice of Completion of Making Good of 13th January 2021. The interpretation of the Contract which I have set out above does enable the parties to know where they stand because it means that by 14 days after the end of the Rectification Period they will be able to see whether a schedule of defects has been delivered under clause 2.35.1 or instructions issued under clause 2.35.2 and if that has not occurred to know, first, that the Employer's opportunity for seeking making good has passed and, second, that clause 4.12.5.2 cannot come into play and that the due date is to be calculated by reference to the later of the expiry of the Rectification Period or the

submission of the Final Statement. As Mr. Collings pointed out Mr. Shirazi's interpretation would create uncertainty because it would lie in the discretion of the Employer (subject perhaps to the requirement in clause 2.36 that the notice not be "unreasonably delayed") to decide when the Notice of Completion of Making Good was to be served with the consequence that until the Employer chose to do that the due date could not be determined.

81. In the adjudication the Contractor had argued that if a final Notice of Completion of Making Good was necessary then the notice of January 2021 should have been served earlier. It said that such a notice should have been served on the date by when the Employer could no longer instruct the rectification of defects under clause 2.35. That was 30th November 2020 which was 14 days after the expiry of the Rectification Period. The Contractor contended that the notice should be regarded as having been served when it should have been on 30th November 2020. That argument invoked the approach in *DR Jones Yeovil Ltd v Stepping Stone Group Ltd* [2020] EWHC 2308 where, at [89], HH Judge Russen QC had based such an approach on the decision in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, [2005] 1 WLR 3850. Mr. Shirazi countered that argument by saying that it was not open to the court retrospectively to rewrite notices or certificates to give them a different date thereby giving one party a retrospective right to "smash and grab". Instead in Mr. Shirazi's submission the parties' rights were to be determined by reference to the actual date on which the Notice of Completion of Making Good was given even if the court was of the view that it should have been issued at a different time. There would be force in the Employer's argument if I were to accept the interpretation of the Contract as necessarily requiring a Notice of Completion of Making Good before the due date could occur. The question does not, however, arise on the view I have set out above. The difficulty for the Employer's argument is not the proposition that the purported Notice of Completion of Making Good of January 2021 should have been issued at a different date. Instead, the difficulty is that in the absence of a schedule of defects or instructions pursuant to clause 2.35 there was no scope for issuing the notice at all or rather that the notice could not operate as a Notice of Completion of Making Good under clause 2.36 and so was ineffective and irrelevant for the purposes of clause 4.12.5.2.

82. Although he expressed it in different language the adjudicator reached a conclusion to the same effect as that which I have set out above. At [194] – [196] Mr. Soudagar noted that a Notice of Completion of Making Good is only required when defects in respect of which the Employer had required rectification had been made good. He said that in the absence of such defects such a notice is not necessary. The adjudicator found that the only Notice of Completion of Making Good which had been required under the Contract was that which had been issued on 14th February 2020. After that there was no need for any further such notice and he said that the notice of 13th January 2021 did not "change the date when all defects had been made good which was 7th February 2020".

83. At [196] the adjudicator expressed his finding in terms very similar to the construction I have set out above saying:

> "It is my finding that a NMG is only issued under clause 2.36, where there are defects specified under clause 2.35, and if there are no defects, clause 4.12.5 cannot require the issue of a NMG

> for the purposes of calculating the due date for the final payment."

84. The adjudicator also considered and accepted the Contractor's alternative argument. First, he found that if necessary words to the effect of "unless no defects are issued" should be added to clause 4.12.5.2 by way of implication. Second, he found that if a further Notice of Completion of Making Good was needed to trigger the due date then it should have been issued by 30th November 2020 and that applying the approach in *DR Jones Yeovil Ltd v Stepping Stone Group Ltd* he found it was to be regarded as having been issued on that date. Neither of those arguments becomes relevant in the light of the conclusion which I have reached as to the proper interpretation of clause 4.12.5.2.

85. The result of my interpretation of the Contract is that the notice of February 2020 was not a notice for the purposes of clause 4.12.5.2 because it was not issued pursuant to clause 2.36. However, even if that view is wrong and the notice is to be regarded as having been a notice under clause 2.36 and as such relevant by reason of clause 4.12.5.2 that notice can have no impact on the due date having been issued in February 2020.

86. In summary the core of Mr. Shirazi's argument was the contention that there must always be a Notice of Completion of Making Good the date of which will always need to be taken into account in determining the due date by virtue of clause 4.12.5.2. In my judgement the fundamental flaw in that approach is that it overlooks the provision in clause 4.12.5.2 that the relevant Notice of Completion of Making Good be one "under clause 2.36" and the facts that a notice under that clause can only be issued in particular circumstances and that it is possible to identify a date by when all will know there will be no scope for such a notice (because the time for a schedule of defects or instructions under clause 2.35 will have passed). If there are circumstances in which it is clear that a notice under clause 2.36 is an impossibility then it must follow that there are circumstances in which clause 4.12.5.2 cannot come into operation and when that clause will be irrelevant for the purposes of determining the due date.

87. The Employer sought a declaration that the due date was 13th February 2021 being one month from the Notice of Completion of Making Good of 13th January 2021. The effect of my conclusion as to the proper construction of the Contract is that the January 2021 notice was not a notice for the purposes of clause 4.12.5.2. This is because there had not been the delivery of any schedule of defects or the issuing of instructions under either clause 2.35.1 or 2.35.2 with the consequence that the January 2021 notice was not a notice pursuant to clause 2.36. The January 2021 notice was, accordingly, irrelevant for the purposes of determining the due date.

88. It follows that the due date was not 13th February 2021 and the Employer is not entitled to a declaration to that effect.

89. In the circumstances here clause 4.12.5.2 does not come into play at all because by 14 days after the end of the Rectification Period the Employer had not delivered either a schedule of defects under clause 2.35.1 or issued instructions under clause 2.35.2 and this meant that there was no scope for a subsequent Notice of Completion of Making Good under clause 2.36. It follows that by virtue of clause 4.12.5.3 the due date would appear to be 4th January 2021 being one month from the Final Statement (that being later than the end of the Rectification Period on the facts here). That was the approach

which the Contractor advocated in the adjudication. However, before me the Contractor did not seek the making of a declaration and Mr. Collings urged me not to make any declaration as to the due date. That was because the Contractor wanted to leave open the possibility of a subsequent argument that the sundry notices should have been served earlier and should be treated as having been served earlier. I need not comment on that argument in the light of the conclusions I have reached. It is sufficient to note that the Employer has not established that the due date was the sole date in respect of which it sought a declaration and that the Contractor does not seek any declaration in respect of the due date. In those circumstances I am minded simply to decline to grant the declaration as to the due date sought by the Employer. However, I will hear submissions as to whether it would be appropriate for a declaration to be granted that the due date was no later than 4th January 2021. That is the consequence of the analysis set out above and would have the benefit of making it clear that the Employer's Payment Notice of 10th February 2021 came more than five days after the due date while avoiding prejudging any future argument from the Contractor that the due date should be taken to have been earlier.

Was the Letter of 18th December 2020 effective to prevent the Final Statement becoming conclusive pursuant to Clause 4.12.6?

90. The Contractor says that the Employer's letter of 18th December 2020 was not effective as a notice disputing the Final Statement for the purposes of clause 4.12.6. It says that this is so for two reasons. First, the letter refers to "the Final Statement enclosed with your letter dated 5th October 2020" and so was not effective to challenge the Final Statement which was sent under cover of the letter of 1st December 2020 and received by the Employer on 4th December 2020. Second, the Contractor says that the effect of the inclusion of the words "subject to clause 1.8.2" in clause 4.12.6 is that in order to prevent a Final Statement becoming conclusive the Employer had not only to give notice of dispute but also had to commence proceedings whether by adjudication, arbitration, or otherwise before the due date and that was not done here. For the reasons set out below I reject both those contentions. The letter of 18th December 2020 was effective and operated for the purposes of clause 4.12.6 to prevent the Final Statement from becoming conclusive and did so without the need for the commencement of adjudication or other proceedings.

91. Both parties are agreed that the test for interpretation of the letter of 18th December 2020 is how it would have been understood in the particular circumstances by a reasonable recipient aware of the surrounding facts.

92. Here the Contractor's letter of 1st December 2020 began by saying that it had received no response to the 5th October 2020 letter or the attachments thereto; it attached that letter and the attachments again; and said that "it would be appreciated if the Final Statement could be agreed as soon as possible…". The Final Statement sent on 1st December 2020 had not been altered from that sent on 5th October 2020 and the 1st December letter was adopting that statement and the earlier covering letter.

93. The Employer's letter of 18th December 2020 referred to "the Final Statement enclosed with your letter dated 5th October 2020". That was an accurate description of the Final Statement sent on 1st December 2020 because the letter of that date had enclosed the earlier letter and that letter's attachment.

94. In those circumstances a reasonable recipient of the Employer's letter of 18th December 2020 would be in no doubt that the Employer was disputing the Final Statement which had been re-sent on 1st December 2020 after having been originally sent on 5th October 2020. Accordingly, the letter operated as an effective notice of dispute for the purposes of clause 4.12.6.

95. The validity or otherwise of the Contractor's second argument, namely that as well as sending a notice disputing the Final Statement the Employer had to commence adjudication or other proceedings before the due date, depends on the proper interpretation of the words "subject to clause 1.8.2" in clause 4.12.6. The Contractor says that those words govern the entirety of the preceding words from the very opening words of the clause, namely "Except to the extent that prior to the due date the Employer gives notice to the Contractor disputing anything in the Final Statement…", and in particular that they govern the words which immediately precede them. It says that they thereby require a two-stage process if the Final Statement is not to become conclusive. The Contractor says that there must be both a notice and the commencement of proceedings before the due date to prevent the conclusivity of the Final Statement.

96. In my judgement the proper construction of clause 4.12.6 is that the words "and subject to clause 1.8.2" govern the words which follow them rather than those which precede them. This is the result of the use of the word "and" and the incorporation of the phrase including that word within commas. It is also important to remember that clause 4.12.6 is primarily providing for the conclusivity of the Final Statement while also setting out the circumstances in which that conclusivity will not come into operation. The first part of the clause sets out an exception to the conclusivity but the effect of the phrase in commas "and subject to clause 1.8.2" is to provide that the following words, namely "the relevant statement shall upon the due date become conclusive as to the sum due and have the further effects stated in clause 1.8", are in addition subject to clause 1.8.2.

97. So as a matter of language clause 4.12.6 provides for different rather than cumulative means of preventing a Final Statement becoming conclusive. That consequence also follows when regard is had to the nature of the Contract and the purpose of the provisions. Clause 1.8.2 is addressing the position where adjudication or other proceedings are already in train before the due date. It provides that in those circumstances the Final Statement does not take effect until the conclusion of those proceedings or until the proceedings have been dormant for 12 months. It also provides that in those circumstances the Final Statement shall be subject to the terms of any decision in the proceedings or any terms of settlement. The purpose of clause 1.8.2 is to prevent the outcome of such proceedings being forestalled by the issue of a Final Statement. Clause 1.8.2 does not require that there should have been any notice disputing a Final Statement for its provisions to come into play. The purpose of the reference to "and subject to clause 1.8.2" in clause 4.12.6 is to make it clear that the operation of clause 1.8.2 is not affected by clause 4.12.6 and in particular that even if there has been no notice of dispute for the purposes of clause 4.12.6 before the due date proceedings which are already in train by the due date are not superseded by the conclusivity attaching to the Final Statement.

98. It follows that the words "and subject to clause 1.8.2" in clause 4.12.6 have the opposite effect to that contended for by the Contractor. They do not provide for two steps each of which must be taken in order to prevent the Final Statement becoming conclusive. Instead, they provide alternative routes to the same result and make it clear that if

proceedings have been started before the due date then the Final Statement does not become conclusive even if no notice of dispute has been given.

99. It is to be noted that clause 1.8.3 deals with the situation where adjudication or other proceedings have been commenced on or after the due date and not later than 28 days after the due date. That provides that in those circumstances "the [Final Statement] shall have effect as conclusive evidence as provided in clause 1.8.1 save only in respect of the matters to which those proceedings relate." This potentially provides a further route of challenge and at the lowest it supports the view that the reference in clause 4.12.6 to clause 1.8.2 does not require there to have been both a notice disputing the Final Statement and the commencement of proceedings before the due date in order to prevent the statement becoming conclusive.

100. The consequence is that the letter of 18th December 2020 was effective to prevent the Final Statement from becoming conclusive by reason of clause 4.12.6.

Should there be a Declaration as to the Effect of Clause 1.8.1?

101. The Employer sought a declaration that:

> "The Final Statement operates as conclusive evidence that (a) all and only such extensions of time, if any, as are due under clause 2.25 have been given and (b) the reimbursement of direct loss and/or expense, if any, to the Contractor pursuant to clause 4.20 is in final settlement of all and any claims which the Contractor has or may have arising out of the occurrence of any of the Relevant Matters, whether such claim be breach of contract, duty of care, statutory duty or otherwise. In consequence, the Contractor is not entitled to any extension of time beyond 11 July 2018, nor any additional sums beyond those certified under cl 4.20."

102. The Employer said that these matters had appeared to be common ground in the adjudication and that they follow inevitably from the application of the terms of the Contract to the events which have transpired. Mr. Shirazi accepted that such a declaration would preclude arguments by the Contractor that it was entitled to extensions of time but said that there did not appear to be any real dispute that these were precluded.

103. The Contractor said that such a declaration was not appropriate. It would operate to preclude a line of defence which would otherwise potentially be available to the Contractor in response to the Employer's liquidated damages claim. The Contractor would wish to argue that it had been prevented from completing the Works and that in those circumstances the prevention principle operated with the consequence that time for completion had been at large or at least that the Employer was not able to claim liquidated damages on the basis of the Contractor's alleged delay.

104. I am satisfied that it would not be appropriate to grant a declaration in respect of the operation of clause 1.8.1. On one view there is no dispute about these matters and in the absence of a dispute a declaration would in any event not be appropriate. On a different, and I am satisfied a more accurate, analysis there is real potential for a dispute about the causes of and responsibility for any delay or delays in the performance of the

works and about the scope for the Contractor to advance allegations of the Employer's failings in those regards in defence of the latter's liquidated damages claim when and if that is advanced. That dispute would be highly fact-specific. The application of clause 1.8.1 to that dispute is best considered in a setting where findings can be made as to the disputed matters of fact. Any ruling as to the operation of clause 1.8.1 needs to be made in the light of findings as to those facts or at least in a setting where the court will be able to consider whether or not the clause obviates the need to address the disputed matters of fact. The current proceedings are not such a setting.

Did the Adjudicator have Jurisdiction to determine whether the Final Statement was conclusive?

105. It is common ground that an adjudicator does not have jurisdiction to determine an issue unless a dispute in relation to that issue has crystallised before the start of the adjudication. Here, as I have explained at [41] – [44] above, the adjudicator noted the Employer's contention that he lacked jurisdiction on the issue of the conclusivity of the Final Statement because there had not been a crystallised dispute before the start of the adjudication. He then in very short terms found that there was a crystallised dispute in this regard and that he did have jurisdiction.

106. In his skeleton argument Mr. Shirazi said, at [23], that "at no stage before the adjudication was started did either party raise the conclusivity (or not) of the Final Statement." He said that matters went even further than that and that by relying on the Employer's 18th December 2020 notice in support of its argument as to the due date the Contractor had accepted that the Final Statement was not conclusive.

107. The Contractor, through Mr. Collings, submitted that the conclusivity of the Final Statement was clearly in issue when the matter was referred to adjudication with the consequence that there was a crystallised dispute by that time. Mr. Collings said that this followed from the repeated references in the pre-adjudication correspondence to clause 4.12.6: references which were only relevant if there was in reality a dispute as to the conclusivity of the Final Statement. Alternatively, he said that the adjudicator's finding as to the conclusivity of the Final Statement followed inevitably from his conclusions as to the due date and the ineffectiveness of the letter of 18th December 2020. As a final fallback position the Contractor submitted that if the adjudicator had lacked jurisdiction on this question his conclusion in that regard could be severed from the balance of the decision. This was because, as it was put in Mr. Collings's skeleton argument at [16], "it did not affect the substance of the decision which [the Contractor was seeking] to enforce" which was the liability to make payment in the absence of a valid Payment Notice.

108. In *Amec Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC) Jackson J, at first instance, set out the following propositions for the purposes of identifying when a dispute has crystallised for the purposes of adjudication or arbitration.

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

> 2. Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.
>
> 3. The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
>
> 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.
>
> 5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.
>
> 6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.
>
> 7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

109. On appeal at [2005] EWCA Civ 291, [2005] 1 WLR 2339 May LJ (with whose judgment Hooper LJ agreed) said, at [31], that he was "broadly content" to accept those propositions as a correct statement of the law. However, he did so with some

qualifications. Those included noting that for the purposes of the ICE scheme relevant there (and here section 108 of the Housing Grants, Construction and Regeneration Act 1996 is to the same effect) reference was made to a "dispute or difference" which phrase was said to be "less hard-edged than 'dispute' alone" with the consequence that the court should "lean in favour of an inclusive interpretation of what amounts to a dispute or difference". It is to be noted that, at [62] and following, Rix LJ expressed a greater degree of qualification of the propositions emphasising again that "the word 'difference' probably goes wider than the concept of a 'dispute'".

110. I approach the question on the basis of Jackson J's propositions supplemented by the qualifications of the Court of Appeal with the consequence that I am to be conscious that the question is whether there was a "dispute or difference" and am to lean in favour of an inclusive interpretation of that phrase. In my judgment this requires me to look to the reality of the parties' positions and to consider whether in truth there was a dispute or difference about the relevant matter before the adjudication. That requires consideration of the substance of the parties' positions and is not to be constrained by an artificial or unduly narrow reading. In his skeleton argument Mr. Shirazi said, at [102], that "where nobody says anything at all about conclusivity before the adjudication started, no dispute can have crystallised about conclusivity". In my judgement that places an unduly narrow emphasis on the precise language used. The language used will be of great significance but the important thing is the underlying subject matter and whether there is a dispute or difference about a particular issue and not whether any particular words are or are not used. However, I am conscious that there is a distinction between there being a dispute as to the correctness of the sums set out in the Final Statement and a dispute as to the conclusivity of that statement and that it is the latter which needs to have crystallised for the adjudicator to have had jurisdiction as to conclusivity.

111. I am satisfied that a realistic analysis of the exchanges here shows that the parties were in dispute as to whether or not the Final Statement had become conclusive. The Employer's notice of 18th December 2020 disputed the Final Statement and said that it was doing so "in accordance with clause 4.12.6". The Employer's email of 19th January 2021 attached an invoice for the sum payable under the Final Statement and said that it was payable "pursuant to clauses 4.12.6 and 4.12.7" of the Contract. The invocation of clause 4.12.6 can only sensibly be seen as an assertion of the conclusivity of the Final Statement. The Employer's response of 20th January 2021 asserted that neither the due date nor the final date for payment had yet occurred. The Contractor's response of 22nd January 2021 was mainly directed to the Employer's contentions as to the due date but it was also maintaining the Contractor's stance that the Employer was bound by the Final Statement. This is apparent from the contention at (e) that the Employer cannot "unwind [the] reality" of the period to the date for final payment having already begun by 18th December 2020 and that effect is to be given "to the agreed terms of the Contract regarding our Final Statement". The letter from the Employer's solicitors of 29th January 2021 focused on the argument that the due date would not occur until one month from the Notice of Completion of Making Good of 13th January 2021. However, it is clear that the purpose of that contention was to say that the period for giving a Payment Notice remained open. That necessarily involved the assertion that the Final Statement was not conclusive.

112. It was inherent in those exchanges both that there was a dispute as to the conclusivity of the Final Statement and that that dispute had crystallised in advance of the adjudication. It follows that the adjudicator was right to proceed on the basis that he had jurisdiction to determine the question of whether the Final Statement was conclusive.

Was there a Material Breach of the Requirements of Natural Justice in the Adjudicator's Treatment of the Employer's Liquidated Damages Argument?

113. I have quoted the adjudicator's conclusion in respect of the liquidated damages claim at [47] above. Did that conclusion involve a material breach of the rules of natural justice and if it did what are the consequences?

114. The starting point in considering whether there has been such a breach is Coulson J's analysis in *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC), [2010] BLR 452. At [17] and following the learned judge considered the various authorities concluding, at [22], with this summary of the applicable principles:

> "22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub—issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.
>
> 22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast*, *Broadwell* and *Thermal Energy*.
>
> 22.3. However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.
>
> 22.4. It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Limited v William Verry Limited* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd v City and General (Holborn) Ltd* [2006] EWHC 848 (TCC).
>
> 22.5. A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor

> which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party."

115. At [25] – [26] Coulson J explained further the operation of those principles in this way:

> 25. It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of those words: that was, for example, what went wrong in *Broadwell*. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication. "
>
> 26. As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim."

116. In *Global Switch Estates Ltd v Sudlows Ltd* [2020] EWHC 3314 (TCC), [2021] BLR 111 O'Farrell J gave further consideration to the question of when a matter falls outside the scope of a dispute which has been referred to adjudication and when there is a defence which is capable of being raised and which the adjudicator needs to consider. Having considered *Pilon* together with the earlier decisions of Jackson J and the Court of Appeal in *Carillion v Devonport Royal Dockyard* [2005] EWCA 1358 and of Akenhead J in *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) and the subsequent decisions of Akenhead J in *Kitt v The Laundry Building Ltd* [2014] EWHC 4250 (TCC) and of the Supreme Court in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25; [2020] BLR 497, O'Farrell J summarised the position in this way, at [50]:

> "Applying those legal principles to the circumstances that arise in this case, I make the following observations.
>
> i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.
>
> ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the

> underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.
>
> iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.
>
> iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.
>
> v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.
>
> vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.
>
> vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.
>
> viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.
>
> ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.
>
> x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced."

117. It will be noted that, at points (iv) and (v) O'Farrell J distinguished between cases in which purely declaratory relief is sought where there will not be scope for a monetary defence based on matters unrelated to the declaratory relief and those where payment is sought in which case a monetary defence arising out of other matters may have to be considered. The judge explained the operation of that distinction on the facts before her in this way, at [56]:

> "The adjudicator correctly identified in paragraph 44 of the decision that the notice of adjudication set the boundaries of his jurisdiction. However, he failed to appreciate that what GSEL was claiming in the notice (at paragraph 31) was not only the

> true valuation of specific parts of Interim Applications 27 but also payment of the net sum considered due having regard to the sums already paid and applicable retention. The adjudicator was entitled to limit the declaratory relief to the issues of valuation identified by GSEL but determination of the claim for payment required him to consider all of the matters raised by Sudlows in support of its case that it was entitled to additional sums as part of the valuation. The adjudicator's failure to take into account Sudlows' defence based on its additional claims for loss and expense amounted to a breach of the rules of natural justice."

118. It follows that where there is a claim for payment a defence of set off can be raised and will necessarily be part of the dispute which an adjudicator addressing such a claim has to determine. It is important to keep in mind the distinction between (a) considering an asserted defence and then concluding as a result of that consideration that it is not a tenable defence in the particular circumstances and (b) declining to consider an asserted defence. The former will be an exercise which the adjudicator will have jurisdiction to undertake and a conclusion that the defence is not tenable even if expressed in short terms is unlikely to involve a breach of the rules of natural justice. Conversely the latter is likely to be such a breach.

119. Here the Employer says that he was entitled to advance his claim to liquidated damages as a set off against the Contractor's claim for payment of the sum in the Final Statement. He says that the adjudicator deliberately declined to consider that defence and by doing so the adjudicator committed a material breach of the rules of natural justice or failed fully to exercise his jurisdiction.

120. The Contractor disagrees with the Employer's analysis of the Decision. It says that it is wrong to characterise that decision as involving a failure to take account of the Employer's liquidated damages defence. In his skeleton argument Mr. Collings put the matter thus, at [19]:

> "… On the contrary he [the adjudicator] did consider it [the liquidated damages defence] and he concluded that, in the particular circumstances of this case, [the Employer] was not entitled to raise a claim for LADs in set-off against sums that he found due in respect of the Contract Sum as set out in the Final Statement".

121. The Contractor's argument is that when, at [236], the adjudicator said that the absence of a Payment Notice or a Pay Less Notice meant that "the sum to be paid … is the sum stated as due in the Final Statement …" he was accepting the Contractor's argument that the absence of a Pay Less Notice precluded the setting off of the liquidated damages. That was an adequate consideration of the set off defence and so the adjudicator is to be regarded as having addressed the defence. The Contractor says that the concluding words of [238] of the decision with the assessment that the liquidated damages "cannot be raised in set off in these circumstances" support that interpretation and show the adjudicator was having regard to the absence of a Pay Less Notice.

122. The Contractor says that the conclusion that the absence of a Pay Less Notice precluded a set off was right as a matter of law in the light of the decisions in *Clarke Contracts*

Ltd v The Burrell Co (Construction Management Ltd) [2002] SLT 103 and *Rupert Morgan Building Services (LCC) Ltd v Jervis* [2003] EWCA Civ 1563.

123. Alternatively the Contractor said that any error was an error of law made by the adjudicator within his jurisdiction of a kind which should not prevent enforcement of the Decision. In support of that contention the Contractor relied on the decision of Edwards-Stuart J in *Urang Commerical Ltd v Century Investments Ltd & another* [2011] EWHC 1561 (TCC). However, the situation which was being considered by Edwards-Stuart J was rather different from the circumstances of the present case. There enforcement was being resisted on the grounds that the adjudicator had failed to make a ruling on the defendants' counterclaims in breach of natural justice. Rejecting that submission Edwards-Stuart J found that the adjudicator had in fact considered the counterclaims but had concluded the absence of a withholding notice meant that they were not effective as defences because he could not assess their value. This can be seen from the judgment at [17], [30], and [31].

124. At [17] Edwards-Stuart J summarised the claimant's submissions as follows:

> "17. Mr Samuel Townend, who appeared for Urang, accepted that in principle the counterclaim could be deployed as a defence to all the claims, save for the claim in respect of the balance due under Interim Valuation No 10. However, he submitted that the adjudicator did not fail to address the counterclaim but simply regarded it as a defence that was bound to fail in the absence of a withholding notice. If this was an error, then he submits that it was an error made by the adjudicator when addressing the right question, namely whether or not the counterclaim could be deployed as a defence to Urang's claims in the adjudication."

125. That submission was accepted as is apparent from [30] and [31] where Edwards-Stuart J said:

> "30. I have already set out in paragraphs 49 and 50 of the Decision in which he concluded that in the absence of a withholding notice he was "unable to assess the value" of Century's counterclaim.
>
> 31. Mr Khan submits that in adopting this approach the adjudicator wrongly failed to deal with an issue that was before him, namely to consider the counterclaim. In my judgment, this is not a correct submission. The question for the adjudicator was whether, and if so to what extent, Century's counterclaim could be deployed as a defence to Urang's claims in the adjudication. If the adjudicator concluded, as he did, that the counterclaim could not be deployed as a defence to the claims in the absence of a valid withholding notice, then he answered the question. The fact that he answered it wrongly affords Century no defence."

126. It follows that the decision in that case does not assist in considering the effect of a failure to address a defence of set off. Similarly it cannot assist in the key question of

whether the adjudicator in the current case in fact addressed the set off defence that being necessarily a fact-specific matter.

127. In considering whether that defence should have been addressed and the consequences of any failure to do so it is to be noted that here the Contractor had sought payment of the sum due by reason of the Final Statement. It had not sought solely a declaration or declarations as to valuations but had instead sought (and indeed it obtained) a decision that a particular sum was to be paid. It follows that this was a case of the type identified by O'Farrell J at [50 (v)] in *Global Switch* where the Employer was "entitled to rely on all available defences".

128. I return then to the key question of whether the adjudicator addressed the defence of set off. The Employer says that the adjudicator deliberately declined to consider the set off defence while the Contractor said he did consider and reject it.

129. I find that there were two elements in the adjudicator's conclusion in respect of the Employer's liquidated damages claim. The first was contained in the first sentence of [238] where the adjudicator said that he had no power to open up the Final Statement. The second, contained in the second sentence, was that the liquidated damages claim was not part of the dispute which the adjudicator had been asked to decide and that, as a consequence, it could not be raised by way of set off.

130. The first of those elements was the adjudicator's assessment of and conclusion upon the Employer's argument that account should have been taken of the liquidated damages claim in the calculation of the Final Statement. It follows that the first element of [238] was a decision addressing that part of the Employer's case and finding that it did not operate as a defence.

131. The crucial part of the Decision for current purposes is the second sentence of [238]. It is clear that in that sentence the adjudicator set out his conclusion that he had declined to consider the liquidated damages claim as a potential set off. The adjudicator said in terms that he was declining to consider the potential set off because he did not regard it as part of the dispute before him. The Contractor's interpretation that it was a consideration and a rejection of the set off albeit in short terms is untenable in the light of the language used by the adjudicator. The adjudicator did not, even when account is taken of the concision of his language, say that he had considered the liquidated damages claim and had found it precluded by the absence of a Pay Less Notice. Instead he said in clear language that "it is not part of the dispute I have been asked to decide" and "therefore [it] cannot be raised in these circumstances". When he used the words "these circumstances" the adjudicator was referring not to the contention that there had not been a Pay Less Notice but back to the first part of that sentence where he had said that the liquidated damages were not part of the dispute he had been asked to decide. Those were the circumstances in which the defence of set off could not be raised. The Contractor's interpretation of that sentence fails to take account of the adjudicator's use of the word "therefore".

132. Accordingly, the Employer is right in his contention that the adjudicator deliberately declined to consider the defence that the liquidated damages claim operated as a set off and did so because of the view he took of the scope of the dispute before him. That view was incorrect and meant that the adjudicator failed to address a defence which was before him. The defence advanced a set off in the sum of £343,237.74 against the

amount sought by the Contractor of £479,957.80. In those circumstances there was a failure by the adjudicator to exercise his jurisdiction which amounted to a material breach of the rules of natural justice. A conclusion that the absence of a Pay Less Notice prevented the Employer advancing the liquidated damages claim as a set off may or may not have been correct and would have been a decision within the adjudicator's jurisdiction but that was not the conclusion reached by the adjudicator. Instead he declined to consider the set off defence.

133. Although I was addressed briefly on the possibility of severing the Decision if I found that the adjudicator should not have dealt with the question of the conclusivity of the Final Statement neither counsel addressed me on the scope for severance if I found there had been a breach of natural justice through the failure to consider the set off defence. I will invite further submissions in the event that it becomes necessary to consider consequential matters but my provisional assessment is that the adjudicator's failure to consider the liquidated damages claim in the sum of £343,237.74 was a discrete matter and not capable of tainting or affecting his decision as to amounts in excess of that sum. In those circumstances I am minded to adopt the approach commended by Pepperall J in *Willow Corp SARL v MTD Contractors Ltd* [2019] EWHC 1591 (TCC) at [74] namely considering whether there is "a core nucleus of the decision that can be safely enforced". Here the decision to the extent that it awarded a sum in excess of £343,237.44 cannot have been affected by the adjudicator's breach of natural justice and the decision in respect of the balance over that sum can safely be enforced.

The Consequences flowing from the preceding Conclusions.

134. The effect of the findings I have made and the conclusions I have reached is as follows.

135. I decline to declare that the due date was 13th February 2021 and, will hear further submissions, as to whether it is appropriate to declare that it was no later than 5th January 2021.

136. I declare that the Employer's letter of 18th December 2020 was effective to prevent the Final Statement becoming conclusive for the purposes of clause 4.12.6 although the impact of this declaration will be at least partially limited given my conclusion as to the due date with the consequence that the Employer's Payment Notice of 10th February 2021 was more than five days after the due date.

137. I decline to make any declaration as to the effect of clause 1.8.1.

138. I have concluded that the adjudicator had jurisdiction to address the question of the conclusivity of the Final Statement and the fact that he did so does not affect the conclusivity of his decision.

139. However, there was a material breach of the rules of natural justice in the adjudicator's failure to consider the Employer's contention that he was entitled to set off his liquidated damages claim and, subject to submissions, the decision is only enforceable to the extent of the balance over the amount of that claim.