Neutral Citation Number: [2022] EWHC 155 (TCC)

Claim No: HT-2021-000378

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

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

Date: 27/01/2022

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

JOHN GRAHAM CONSTRUCTION LIMITED **Claimant**

- and -

TECNICAS REUNIDAS UK LIMITED **Defendant**

- -
- -

Neil Dowers (instructed by **Carson McDowell LLP**) for the **Claimant**
Andrew Rigney QC and Carlo Taczaski (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing dates: 6 December 2021

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE MORRIS

Mr Justice Morris :

Introduction

1. This is an application by John Graham Construction Limited ("the Claimant" (or "JGCL")) for summary judgment to enforce the decision of Mr Christopher Ennis ("the Adjudicator") dated 16 April 2021 (and corrected on 20 April 2021) ("the Decision" or "Adjudication 4"). By Adjudication 4, the Adjudicator ordered Tecnicas Reunidas UK Limited ("the Defendant" (or "TR" or "TRL")) to pay sums. The Defendant has paid part of those sums. However it has not paid fully the part of the Adjudication 4 relating to a disputed contra charge in the sum of £355,724.95. The contra charge was in respect of "*provisional costs incurred appointing another subcontractors* [sic] *to carry out Graham's abandoned works*" ("the Contra Charge"). The total sum now outstanding and claimed by the Claimant is £346,101.18 (which includes interest up to the date of the hearing).

2. The Claimant was employed by the Defendant, pursuant to a sub-contract ("the Subcontract"), as a subcontractor in respect of the construction of the Tees Renewable Energy Plant Biomass Power Station. There have been a number of disputes between the parties, resulting in four adjudications and two arbitrations. The first arbitration ("Arbitration 1") concluded in early 2021 and, by two partial awards (together "Award 1") made a final determination of matters which were referred to the arbitration tribunal. The second arbitration is continuing. As will be explained, Award 1 overturned the decision of the adjudicator in the first adjudication ("Adjudication 1").

3. The Defendant has not paid the Contra Charge because it contends that it is a severable and distinct part of Adjudication 4 and because, by reaching the decision that that sum was payable by the Defendant, the Adjudicator exceeded his jurisdiction. The Adjudicator wrongly decided that the decision in Adjudication 1, despite being overturned by Award 1, continued to have effect and "insulated the Claimant from liability for breach of contract". In so doing, the Adjudicator exceeded his jurisdiction.

4. In response, the Claimant contends that the Defendant participated in Adjudication 4 without reserving its position and has waived its right to raise a jurisdictional challenge; and in any event the Adjudicator did not exceed his jurisdiction.

The Factual Background

5. During the course of 2018 the Claimant and the Defendant were in dispute as to the scope of the works covered by the Subcontract. The Claimant considered that the subcontract works were limited to works necessary to achieve certain "Milestones" set out in the Subcontract and began to refuse to carry out works which it considered to extend beyond those Milestones and/or refused to carry them out for the rates and prices agreed in the Subcontract.

Adjudication 1

6. In February 2019 the Claimant referred the dispute as to scope of the works to adjudication in what was Adjudication 1. The adjudicator in Adjudication 1 agreed

with the Claimant and on 5 March 2019 declared that the scope of the Subcontract works was limited as the Claimant alleged.

Arbitration Award 1

7. On 3 June 2019 the Defendant referred the dispute about the Claimant's scope of works to arbitration (Arbitration 1) for final resolution. The dispute was stated to be as follows:

> *"The dispute relates to the scope of work required to be carried out by Graham and as to whether, contractually or otherwise, that scope relates, or was or is to be treated as relating, to all civil works in connection with the project, save for certain identified exceptions, or is that described in the intermediate milestones ('the Milestones') set out or referred to in the Subcontract documentation. The pleadings identify issues relating to the construction and interpretation of the Subcontract and as to various estoppel and rectification matters."*

8. The proceedings in Arbitration 1 were split. There was an initial hearing in April 2020 in relation to the parties' cases on contractual interpretation. This led to the First Partial Award dated 26 June 2020. There was a later hearing in December 2020 and a Second Partial Award dated 24 February 2021, which considered the parties' cases on estoppel and rectification. The outcome of Arbitration 1 was that the decision in Adjudication 1 was held to be wrong. In the First Partial Award, the tribunal held that the scope of the work contracted to be carried out by the Claimant "was defined by reference to the works set out in the Unit Price List [the BOQ]" and included all civil works in connection with the Project identified in the Unit Price List, *including but not limited* to the works identified in that List required to complete the foundation work broadly identified in Milestones 1-14. Thus the scope of the work was not limited as the Claimant alleged, but was wider, as the Defendant had contended.

Alternative contractors employed by the Defendant

9. By the time of Award 1, the Claimant had refused to undertake various items of works and the Defendant had arranged for alternative contractors to undertake various of those items. According to the Defendant, the Claimant's refusal to undertake those works had started prior to, and had continued after, Adjudication 1.

Dispute as to Interim Payment Application no 47

10. In the meantime in December 2020 a dispute between the parties crystallised as to the true value of the Claimant's interim payment application no 47. As part of its payment notice in response, the Defendant applied the Contra Charge. The Contra Charge represented the Defendant's provisionally quantified costs of others undertaking some of the works (falling within the scope as determined by Award 1) and represented claimed damages for breach of contract on the part of the Claimant in having failed and/or refused to carry out those works.

Adjudication 4

Reference and the Parties' contentions

11. On 5 March 2021 the Claimant gave notice of its intention to refer to adjudication a dispute "as to the correct value of Interim Payment Application Number 47", thereby commencing Adjudication 4. On the same date the Claimant set out the dispute as to the validity of the Contra Charge in the Notice of Adjudication, simply stating that "the Contra charge is invalid and that JGCL is entitled to be certified and paid the amount deduced [sic] by TR". In its Referral dated 12 March 2021, the Claimant addressed the Contra Charge, arguing that the Defendant had not demonstrated that it was entitled to levy the Contra Charge, as it had not demonstrated breach of contract, causation or loss and damage.

12. In its Response dated 26 March 2021, the Defendant addressed the Contra Charge, stating that the Claimant had not completed works within its scope as defined in Award 1, and set out the contractual basis on which it relied to justify the Contra Charge. At paragraph 125, the Defendant summarised the position as follows:

> *"Regrettably, … as the project progressed Graham did not accept that all of the work within [sic] was within its scope was in fact within its scope. It refused to carry out certain works, and when it left Site, it left a quantity of Works unfinished and abandoned. Those works had to be completed by others."*

It is notable that, earlier at paragraphs 102 and 103 of the Response in relation to a different part of the claim, the Defendant put down a marker that if the Adjudicator considered himself bound by comments made by the adjudicator in Adjudication 2 and declined to consider the fresh evidence it put forward in this Adjudication, then that would be a breach of natural justice and that the Defendant would rely on such breach in any subsequent enforcement proceedings.

The Claimant's Reply

13. On 1 April 2021, the Claimant submitted its Reply. In relation to the Contra Charge, it put forward three arguments. Significantly, the second argument was that the Claimant was *not* in breach of contract because it was, at the time that it left site, following the temporarily binding decision in Adjudication 1. In a summary of its position, at paragraphs 14 to 18, the Claimant submitted that Adjudication 1 was a crucial element in the legal and factual matrix. It was binding until Award 1, by which time the Claimant had left the site by mutual agreement. Refusal was not a breach of contract because Adjudication 1 was binding on the parties. The fact that Award 1 decided the scope differently is irrelevant to the conduct of the parties as at the time Adjudication 1 was binding and there was no relevant breach of contract. The Claimant was obliged to follow Adjudication 1 from 5 March 2019 until Award 1, which itself was issued long after the Claimant had finished its works at the site.

14. The Claimant then addressed this second argument in detail at paragraphs 87 to 95, submitting in particular as follows:

> *"90. […] JGCL did not refuse to undertake any works until after Adjudicator's decision no 1 dated 5 March 2019*

> *that decided that JGCL's scope of works was limited. JGCL was not in breach of contract as it was complying with the binding decision of the adjudicator, as it was obliged to do, pursuant to Section 108(3) of the Construction Act.*
>
> *…*
>
> *95. TR's argument as set out in paragraphs 128 to 131 is fundamentally flawed and TR cannot rely on the First or Second Partial Award to establish a breach of contract by JGCL. As noted above, JGCL was entitled to rely upon the Adjudicator's Decision No 1 dated 5 March 2019 as it was binding upon the Parties and JGCL was not in breach for refusing to undertake works that was outside the scope of JGCL's works as decided by the adjudicator. Similarly TR was entitled to instruct third parties to undertake works outside the scope decided by the adjudicator without being in breach of JGCL's contract by omitting work from JGCL's scope and instructing others to do this work. The fact that the arbitrators decided the point differently in June 2020 and February 2021 is irrelevant to the conduct of the Parties, as at the time the adjudicator's decision was binding and therefore no breach of contract on either side arose."*
>
> *(emphasis added)*

The Defendant's Rejoinder

15. In its Rejoinder dated 8 April 2021 the Defendant addressed the Claimant's argument about Adjudication 1 and Award 1 (at paragraphs 62 to 68), contending that the Claimant's submission was wrong and that Award 1 established that the Claimant was in breach of contract when it refused to carry out works that were outside its scope as decided in Adjudication 1 but inside its scope as decided in Award 1. The Claimant's submission that it was entitled to rely on Adjudication 1 showed a complete failure to understand the statutory basis of adjudication under the 1996 Act and the status of an adjudication decision. The Claimant was entitled to rely upon Adjudication 1 until the true position was determined by arbitration, but it did so at its own risk, knowing that the situation could be turned on its head if the position was successfully challenged. In its Rejoinder, the Defendant did not reserve its position on jurisdiction or raise any argument that a finding along the lines of the Claimant's submissions would be outside the Adjudicator's jurisdiction.

Adjudication 4: The Decision

16. In the Decision dated 16 April 2021, the Adjudicator decided, inter alia, that the Defendant was not entitled to levy the Contra Charge. The issue of the Contra Charge is addressed at section 6 of the Decision. After summarising the parties' contentions in section 6.1, the Adjudicator continued as follows:

> *"6.2 Analysis*

6.2.1 TRL's submission - in effect - invites me to decide whether the Conditions justify its levying of the contra charge claimed on the basis that JGC failed to perform its Subcontract Works and was thus in breach of contract. The contractual basis cited is concerned with the scope of the Subcontract Works. This was an issue which was the subject of the Adjudication before Mr Kilvington ("Adjudication 1") but which was reversed by the First Partial Award.

...

6.2.4 Certainly it seems that JGC was more than happy to quit Site. Whether or not it was "...undoubtedly the case that JGCL left Site with the agreement and blessing of TR", as JGC avers and TRL denies, it does appear to be correct, as JGC avers, that TRL did not write to JGC at the time asking it to stay at site to complete other works, nor did it subsequently write to JGC asking it to return to site to complete outstanding works. No doubt this was because the decision in Adjudication no. 1 rendered agreement and compliance with JGC to any such request highly unlikely.

6.2.5 Adjudication no. 1 is likely also to have been a material consideration in TRL's decision to descope JGC's Subcontract Works, and in particular the East Ramp works. This element would presumably still have been incomplete at the time general descoping took place, and JGC had claimed for an extension of time and substantial prolongation costs. Descoping will have cut short any further entitlement for JGC beyond 26 September 2019, the end date determined in the Adjudication before Mr Collie ("Adjudication no. 3"); the fact that he awarded an extension of time to JGC for this element would tend to vindicate TRL's decision to descope this element. TRL's more general decision to descope work found to be outwith JGC's Subcontract work scope in Adjudication no. 1, which was still effective at that time, and to award it to others, is therefore also likely to have been the result of Adjudication no. 1 and the delays in respect of which JGC was making claims.

6.3 Conclusions

6.3.1 I agree that the Parties were bound - albeit temporarily - by the Decision in Adjudication no. 1, which was

published on 5 March 2019, until publication of the First Partial Award on 26 June 2020 which reversed Adjudication no. 1. The Adjudicator had decided that JGC's position as to contractual interpretation was correct: it is trite law that parties are obliged to observe and abide by an adjudicator's decision until the underlying dispute is finally determined by subsequent legal proceedings.

6.3.2 I have considered, but rejected, TRL's submission that JGC's actions after Adjudication no. 1 were not the result of the adjudication itself, but of JGC's decision to decline to carry out parts of the Subcontract work scope. JGC will have felt its position vindicated by the Adjudicator's decision, and although its stance was subsequently found in the Awards to be incorrect and thus in breach of contract, JGC was entitled to rely upon that decision - as TRL itself notes. TRL says that this was at JGC's own risk. In my view it would be invidious if abiding by an adjudicator's decision were to be deemed equivalent to proceeding at risk of major financial penalties that would result if the decision were to be reversed at a later stage, for reasons that I expand upon below.

6.3.3 The First Partial Award, although reversing the Decision in Adjudication no 1, cannot, as a matter of fact, have a retrospective effect on the lawfulness of the subsequent actions of the Parties, because the Parties were obliged to give effect - albeit temporarily - to that Decision. Neither should be penalised for doing so.

6.3.4 I would distinguish the issue considered here from one in which an adjudication takes place after termination by a subcontractor, where the issue might involve deciding whether there was wrongful termination or repudiation by one or the other party: the die would have been cast, as it were, and any adjudication [temporarily] determining compensation would be capable of reversal in a subsequent arbitration without any effect upon what in fact had actually occurred, because the casus belli would have arisen from actions already taken. Here, the actions that form the casus belli occurred after conclusion of the adjudication. Those actions can be said to have been caused, or at least influenced, by complying with the adjudicator's decision.

6.3.5 This is also different from reversal at arbitration of an adjudicator's decision involving simply payment of money: any sums paid in complying with the adjudicator's decision can (subject to solvency of the Party holding the amount decided) be paid back, with

interest, and the parties restored to the position in which they would otherwise have been. Here, the effects of Adjudication no. 1 cannot be undone in this way. In effect, TR claims that it is entitled to recover excess costs arising as a result of the actions which followed Adjudication no. 1, but this highlights the factual basis of JGC's contention: any such excess costs arise as a result of the decision in Adjudication no. 1, which legitimised - albeit temporarily - JGC's refusal to carry out the work which had been decided to be outwith its work scope and which was thus not part of its contractual obligations. This in turn is likely further to have influenced TRL's decision to instruct such work to be carried out by others.

6.3.6 The alternative scenario would be for JGC to have speculated at the time that the decision was wrong - which would fly in the face of its submissions to the Adjudicator in that reference - and instead to accede to TRL's instructions to carry out work that the Adjudicator had determined to be outside the Subcontract work scope and which JGC considered itself entitled, at that stage ipso facto, to decline. Unless the adjudication decision was quite patently wrong and obviously susceptible to challenge and reversal in formal proceedings, that appears to me to be an absurd scenario.

6.3.7 TRL submits that an adjudication should not result in a final determination, but it would be more patently absurd if it were to be simply ignored. Recourse to adjudication would be rendered entirely pointless if, upon achieving a decision in line with its contentions, a referring party should - instead of relying on it and proceeding accordingly - ignore it altogether and proceed as if it had actually failed in the adjudication, merely because of a risk of later reversal in formal proceedings. To make any such decision on a rational basis and to proceed on such an assumption would require JGC to have decided, upon analysis, that its own submissions in the Adjudication were specious and that the Adjudicator's decision was wrong.

6.3.8 Short of unusual clairvoyance on JGC's part, JGC personnel would need to possess highly sophisticated legal qualifications equivalent to those of the eventual eminent arbitral tribunal - whose Awards of 70 and 77 pages respectively are by no means a summary dismissal of either JGC's contentions or the Adjudicator's conclusions - and at the least, legal qualifications superior to those of the Adjudicator.

6.3.9 I therefore conclude that TRL is not entitled to levy the contra charges claimed." (emphasis added)

Events subsequent to the Decision

17. Shortly after the Decision, on 24 April 2021, the Defendant asserted in correspondence, and for the first time, that, in relation to the Contra Charge, the Adjudicator had acted outside of his jurisdiction and was wrong and therefore that part of the Decision is unenforceable.

18. On 30 September 2021 the Claimant commenced these proceedings for enforcement of the Decision, seeking summary judgment. By the witness statement of Ron Nobbs dated 8 November 2021, the Defendant set out the basis upon which it contends that the Adjudicator lacked jurisdiction, relying upon the three arguments set out in paragraph 21 below.

19. The Defendant is challenging a number of aspects of adjudication decisions in the further arbitral proceedings, including Adjudication 4 in respect of the Contra Charge. Those proceedings are due to be heard in Spring next year.

The Parties' submissions in summary and the Issues

20. The Claimant applies for summary judgment to enforce the Decision, seeking payment of the unpaid Contra Charge plus interest.

21. The Defendant resists summary judgment on the ground that the Adjudicator acted in excess of his jurisdiction for three separate, but interlinked, reasons, namely that the Adjudicator

    (1) undermined and in substance overrode Award 1;
    (2) failed to act in accordance with the powers granted to him by the Subcontract;
    (3) answered the wrong question.

    In essence it submits that Adjudication 4 was so fundamentally wrong that the Adjudicator had no jurisdiction. Award 1 did have retrospective effect. The Adjudicator refused to give effect to Award 1 and had no jurisdiction to so refuse.

22. The Claimant denies that the Adjudicator acted outside his jurisdiction. The Defendant's arguments amount to no more than an assertion that the Adjudicator was wrong. The Adjudicator resolved the dispute referred to him and expressly did not re-open any disputes decided in Award 1, to do so. Any errors he made were within his jurisdiction. In any event, the Defendant has waived its right to raise a jurisdictional challenge at this stage.

23. The Defendant responds that it did not waive its right to object to jurisdiction for two reasons. First, the jurisdictional error here was fundamental and not capable of being waived. Secondly, at no point prior to publication of the Decision, was the Defendant in a position to waive its right to object, since it did not have actual or constructive knowledge of the jurisdictional error until that point in time.

24. Thus the two issues are:

(1) Did the Adjudicator act in excess of his jurisdiction?

(2) If so, did the Defendant waive its right to object to the Adjudicator's jurisdiction?

Before addressing these two issues, I set out the relevant legal background.

The Relevant Legal Background and Principles

The Scheme and the Subcontract

25. The Adjudicator was acting pursuant to s.108 Housing Grants, Construction and Regeneration Act 1996, the Subcontract and the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme").

The Scheme

26. The Construction Subcontract General Conditions ("the General Terms"), which formed part of the Subcontract, provided by Clause 39.2 that the Scheme applied to the Subcontract. Under the heading "Powers of the adjudicator", the Scheme itself provides, inter alia, by paragraph 12(a) that:

> *"the adjudicator shall – (a) act impartially in carrying out his duties and shall do so in accordance with the relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract"(emphasis added)*

Paragraph 23(2) of the Scheme provides that an adjudication decision is binding and shall be complied with by the parties "*until the dispute is finally determined … by arbitration …*"

Terms of the Subcontract

27. Clause 39.3 of the General Terms contained dispute resolution provisions, inter alia, as follows

> *"39.3 Arbitration*
>
> *Should no amicable settlement be reached through negotiation, and unless otherwise specified in the Subcontract, the Parties expressly agree that any and all disputes, controversies, matters or claims of any nature whatsoever directly or indirectly arising out of, based upon, relating to or in connection with the formation, validity, existence, interpretation, application, implementation, performance, breach or termination of the Subcontract any provision or part thereof or any activities carried out in connection therewith, shall be finally settled by arbitration …*
>
> *…*

> *The Parties expressly state their express undertaking to abide by and comply with the arbitral award so rendered which shall be final and binding for all purposes.*
>
> *However, the performance of the Parties' contractual obligations shall not be suspended pending resolution of any such dispute."*

Enforcement of adjudication decisions

(1) General principles

28. As regards the approach of the Court to enforcement of the decisions of an adjudicator, the following general principles are derived from *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15 (at §§52, 84, 85 and 87):

    (1) The adjudication procedure does not involve the final determination of anybody's rights.

    (2) The decision of an adjudicator must be enforced, even if it results from errors of procedure, fact or law.

    (3) However, the court will not enforce a decision, where the adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice.

    (4) Errors of law, fact or procedure will be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

    (5) The Court must respect the adjudicator's decision unless it is plain that the question decided was not the question referred to him or the manner in which he had gone about the task was obviously unfair.

    (6) In the overwhelming majority of cases, if the losing party does not accept the adjudicator's decision as correct in fact or law, the proper course is to pay the amount it is ordered to pay by the adjudicator, and then to take legal or arbitration proceedings to establish the true position.

(2) The binding nature of a prior decision (in adjudication and in arbitration)

29. The effect of a prior adjudicator's decision in a subsequent adjudication has been considered in a number of cases including, in particular, *Benfield Construction Limited v Trudson (Hatton) Limited* [2008] EWHC 2333 (TCC) §34; *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC) 127 Con LR 110 §§41 and 67 and *Amey Wye Valley Ltd v The County of Herefordshire District Council* [2016] EWHC 2368 (TCC) [2016] BLR 698 §§14, 15, 28, 31, 34 and 35. The issue is also addressed in *Coulson on Construction Adjudication* (4th edn) §7.145. From these authorities, the following general propositions can be stated:

    (1) The parties are bound by the decision of an adjudicator until finally determined by court or arbitration.

(2) They cannot seek a further decision by an adjudicator if the dispute or difference has already been the subject of a decision by an adjudicator.

(3) The extent to which a decision is binding depends on an analysis of the terms, scope and extent of the dispute or difference referred to second adjudication and the terms, scope and extent of the decision made in the first adjudication.

(4) The relevant question is whether the dispute or difference is "the same or substantially the same".

(5) Whether one dispute is substantially the same as another dispute is a question of fact and degree.

(6) The second adjudicator has no jurisdiction to determine a dispute which is the same or substantially the same as a dispute determined in an earlier adjudication; if he purports to do so, the decision is a nullity.

It is common ground that the foregoing principles apply, a fortiori, to the effect of a prior arbitration award upon a subsequent adjudication.

30. As to the precise circumstances where this rule operates so as to exclude the second adjudicator's jurisdiction, slightly differing language has been used in the cases:

(1) A second adjudicator cannot *open up any matters decided* by the first adjudicator: *Coulson* supra.

(2) The second adjudicator can decide nothing *to override or undermine* the first adjudicator's decision: *Balfour Beatty* §41.

(3) The second adjudicator must not *purport to decide again (or re-decide) something* which has already been adjudicated upon: *Balfour Beatty* §41 and *Amey Wye Valley* §31.

(4) The second adjudicator must not *materially* decide *matters contrary to what has been decided* in the first adjudication: *Balfour Beatty,* heading above §66.

(5) The second adjudicator must not decide the later dispute *in a way which is materially inconsistent with the earlier decision*: *Balfour Beatty* §67.

(6) The second adjudicator must not *re-decide something that was not before him*: *Amey Wye Valley* §35.

31. Drawing these statements together, in my judgment, for the exclusion of jurisdiction to apply, the second decision must override or undermine the first, in sense of deciding again something which has already been decided. In my judgment, there is a distinction to be drawn between the content of the first decision and a second decision which determines the consequences of that first decision: *Amey Wye Valley* §§14 and 35. By way of examples, a dispute as to the true construction of contractual terms and a dispute as to the financial consequences of the true construction as found are not the same or substantially the same dispute; further an error of fact or law in

applying the first decision may not amount to an excess of jurisdiction; see *Amey Wye Valley, supra*.

(3) Answering the wrong question

32. If the adjudicator decides a dispute which was not referred to him, then his decision is outside his jurisdiction. But if he decides a dispute which was referred to him, but that decision was mistaken, it remains a valid and binding decision, even if the mistake is of fundamental importance*: Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] BLR 49 §25**.** The Adjudicator is entitled to give a wrong answer to the right question which was referred to him. In deciding whether a decision has been made outside an adjudicator's terms of reference, the court should give a fair natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference and the Court should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction: *Bouygues* §36.

33. In considering this issue, it is important to distinguish between, on the one hand, the underlying dispute between the parties and, on the other, the issues and legal arguments which the parties choose to deploy when setting out their side of the dispute: *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC) §48.

34. In my judgment, the issue is what "dispute" has been referred to the adjudicator and not what particular question or sub-question or issue falls to be determined. The key question is "did the adjudicator decide the dispute that had been referred to him?"

(4) Waiver of a jurisdictional objection

35. As to waiver of a jurisdictional objection, I have been referred to three decisions of Akenhead J, namely in *Aedifice Partnership Ltd v Shah* 132 Con LR 100; [2010] EWHC 2106 (TCC) §21(e); *CN Associates (A Firm) v Holbeton Limited* [2011] BLR 261; [2011] EWHC 43 (TCC) §33; *Brims Construction Ltd v A2M Development Limited* [2013] EWHC 3262 (TCC) §25 to 27 and to the judgment of Coulson LJ in the Court of Appeal in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2019] 3 All ER 337; [2019] EWCA Civ 27 §§91 to 99; and *Coulson on Construction Adjudication*, supra, §7.22. From these authorities, the following general principles can be stated in summary:

    (1) An objection to jurisdiction will be waived where a party participates in the adjudication without any reservation of rights, *provided that* the grounds of the jurisdiction objection were known to, or capable of being discovered by, that party: *Aedifice* and *CN Associates*.

    (2) Waiver does not apply to jurisdictional challenges which only emerge once the adjudicator's decision comes out (such as an adjudicator deciding a dispute which has not been referred to adjudication): *Brims* §25.

    (3) A failure to raise a jurisdictional objection which it was open to a party to make *during* the adjudication, can be taken as a waiver: *Brims* §27.

(4) The fact that the party objecting had been represented by experienced leading counsel and/or solicitors throughout the adjudication may be a factor leading to a conclusion that it could not be said that that party did not know or should not have known about the grounds of the jurisdiction objection: *Bresco* §99.

36. In *Bresco,* in the course of addressing the issue of waiver, Coulson LJ stated at §91:

> *"In my view, the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour."*

37. Finally in relation to waiver, as explained below, the Defendant submits, in reliance upon the recent judgment of HH Judge Bird in *Aqua Leisure International Limited v Benchmark Leisure Limited* [2020] EWHC 3511 (TCC), that there is a further principle: namely, where a jurisdiction objection is "fundamental", it is incapable of being waived. I address this case in the course of discussion of the argument in paragraphs 75 to 78 below.

Issue (1): Excess of jurisdiction

The Parties' submissions

38. I set out, in turn, each party's submissions on the three, interlinked, reasons relied upon by the Defendant.

The Defendant's case

(1) "Undermining the Award"

39. The Defendant submits that the Adjudicator exceeded his jurisdiction because he refused to give effect to the final and binding decision in Award 1. Instead he sought to go behind that decision and to apply the decision in Adjudication 1. Once a dispute is decided in arbitration, it cannot be overridden or undermined in a subsequent adjudication: see *Balfour Beatty*, supra §41. The Decision is materially inconsistent with the Award and in law that is sufficient: see *Balfour Beatty* §67.

40. After Adjudication 1, the Claimant refused to undertake works which the Defendant contended fell within its scope, and which the Claimant contended fell outside the scope. Then, as the Adjudicator accepted, Award 1 reversed the decision in Adjudication 1. The works which the Claimant had refused to undertake were within

its scope. Award 1 declared the parties' rights and obligations, as they had always been. The Adjudicator however wrongly gave "continuing effect" to Adjudication 1, when he held (at paragraph 6.3.3) that Award 1 could not have retrospective effect. In this way he went behind, undermined and ignored Award 1, which he had no jurisdiction to do.

41. The effect of the Decision is that the Claimant's scope of work varied over time and was different before and then after Award 1. But the scope is, and always was, as defined by Award 1. The Decision insulates the Claimant from a claim or liability under the Subcontract and thus from the consequences of the Award and by not giving effect to the Award, the Adjudicator was undermining it.

42. Mr Taczalski, who conducted the Defendant's oral argument, submitted that the Claimant's characterisation of the Adjudicator's analysis as being one of "causation" does not add anything. The Adjudicator was straining not to give effect to the consequences of Award 1. Unlike the position in *Amey Wye Valley*, here the Adjudicator was doing his best to get round that prior binding decision because he thought it was unfair.

(2) No power

43. Secondly, the same result is reached by considering the contractual basis upon which the Adjudicator was empowered to act. By paragraph 12(a) of the Scheme, the Adjudicator had to act "in accordance with any relevant terms of the contract". Amongst such "relevant terms" is clause 39.3 of the General Terms which requires all disputes to be finally settled by arbitration and imposes an obligation upon the parties to abide by any arbitral award which is final and binding for all purposes. Accordingly paragraph 12(a) of the Scheme imposes upon the Adjudicator an obligation to recognise fully the final binding nature of the arbitration. However by finding that Adjudication 1 insulated the Claimant from its liabilities as finally determined by Award 1, the Adjudicator failed "to act in accordance with any relevant terms" (namely clause 39.3) and by acting in breach of paragraph 12(a) of the Scheme, he had no power to reach the decision which he reached.

(3) The wrong question

44. The Adjudicator answered the wrong question and thus his decision was in excess of his jurisdiction. The question he was asked to determine was whether the Defendant had a proper basis for withholding the £355,724.95. However it is wrong to proceed at the highest level of abstraction. The Adjudicator had to address the rights and liabilities of the parties under the terms of the Subcontract and which flowed from Award 1. In section 6.3 he did not analyse those rights and liabilities.

45. The Defendant's case was that it was entitled to withhold as a result of the Claimant's breach of contract in not performing work which was within scope and as a result the Defendant suffered loss. The question has two components: (1) was there a breach of contract and (2) if so, was £355,724.95 a sum which represented the loss which the Defendant had suffered as a consequence of such breach? The Adjudicator answered the first part of the question, but did not answer the second part. He did not address the question of what loss was caused by the breach of contract. In this way, he failed to address the right question, or rather addressed the wrong question.

46. The Adjudicator did not address the Defendant's case that by not performing works within scope the Claimant was in breach of clause 3.2 of the General Terms with the consequence that it was liable for loss suffered as a result. Rather the Adjudicator accepted the Claimant was in breach of contract, but nevertheless found that the Defendant was not entitled to withhold the sum. His reasons for doing so were to consider whether there was a duty to comply temporarily with an adjudicator's temporarily binding decision and then to come to the conclusion that there was such a duty and that "neither party should be penalised for doing so". The Adjudicator did not decide whether there was a contractual basis to withhold the money, but rather whether the Claimant's reliance on Adjudication 1 enabled it to avoid the consequences of the decision in Award 1. The Adjudicator was not looking at what was contractually due, rather he was straining to avoid what he saw as an unfair result.

The Claimant's case

(1) "Undermining the Award"

47. Whilst an adjudicator cannot reopen a dispute that has been finally determined by arbitration, that was not the position here.

48. There are two questions: first, is the question determined by the second decision the same or substantially the same as the question determined in Award 1 and, secondly, does Adjudication 4 materially purport to decide something that has been effectively determined in Award 1? As to the first question, and comparing the "terms, scope and extent" of Award 1 and of the Decision, they are not substantially the same dispute. The terms, scope and extent of the dispute in Award 1 was the scope of the work as a matter of construction of the Subcontract; the dispute decided by the Adjudicator was whether, as a financial consequence of Award 1, the Defendant was entitled to levy the Contra Charge. As to the second question, Adjudication 4 did not purport to re-decide something that had already been decided. The Adjudicator did not say Award 1 was wrong. In fact he repeatedly acknowledged the effect of Award 1 and that it had reversed Adjudication 1 and was binding on him. Adjudication 4 answers a question fundamentally different from the question referred to and decided in Award 1.

49. In fact on analysis of paragraphs 6.2.4, 6.2.5 6.3.2 and 6.3.3, the Decision was based on causation. Even if there was an earlier breach of contract, the employment of others to do those works was not caused by that breach, but by the intervening and temporarily binding nature of Adjudication 1. Whether that analysis was right is a question for subsequent arbitration. But, right or wrong, it was certainly within jurisdiction. The Adjudicator decided the effect of Award 1 as a matter of law on the basis of causation of loss – if that was mistaken, that is irrelevant.

50. The Adjudicator did ask himself what the breach caused and, although he could have expressed himself more clearly, he rejected the Defendant's case at paragraph 6.3.2. He had jurisdiction to consider causation, the second question posed by the Defendant, and that can be opened up in Arbitration 2.

(2) No power

51. The Claimant submits that this alternative basis closely mirrors the first "Undermining the Award" basis. Paragraph 12(a) of the Scheme applies only to the terms of the contract that set out how the adjudicator should carry out his duties and not to the terms as to the substantive rights of the parties. "Relevant terms" means terms relevant to the carrying out of his duties – the word "relevant" limits the contractual terms to which paragraph 12(a) refers. If it referred to all substantive rights under the terms, then any time an adjudicator erred in interpreting or applying a contract, it would mean he acted outside his jurisdiction and his decision would be unenforceable. That would undermine the general principle underlying adjudications, that an error of law or fact of itself does not render an adjudication unenforceable. Clause 39.3 is not a "relevant term" within paragraph 12(a) of the Scheme, which is limited to procedural matters, such as how the Adjudication is handled. Clause 39.3 relates to the way in which disputes are finally determined.

(3) The wrong question

52. In considering this issue, the Court must apply the "sensible" approach identified in *Bouygues*, see paragraph 32 above. The dispute referred was as to the correct value of Interim payment no 47 and, in the present context, specifically whether the Contra Charge is invalid and whether the Claimant is entitled to be certified and paid the amount deducted. The decision was that set out at paragraph 6.3.9 of the Decision. That is the answer to the dispute which was referred to the Adjudicator in respect of the Contra Charge. In this way, he gave an answer to the question he was asked. Any questions asked and answered in order to reach that conclusion were part of the Adjudicator's reasoning, informed by the arguments raised. They were not of themselves the decision itself nor the answer to the matter referred. The Defendant's reliance upon the Adjudicator's reference (at paragraph 6.3.3) to not wishing to penalise either party was doing no more than pick out one line in the middle of the reasoning. If the Adjudicator's reasoning was wrong, that is irrelevant, provided that he resolved the dispute referred to him.

53. How the Adjudicator got to his answer is not a jurisdictional question. The question he was asked and the question he answered were one and the same thing. Moreover the Adjudicator answered the question asked even at the level of abstraction advocated by Mr Taczalski. At paragraph 6.3.2, the Adjudicator did answer the second question as posed by Mr Taczalski in argument, namely "was the sum of £355,000 loss flowing from the breach?"

Discussion and analysis

(1) Undermining the Award

54. First, whilst the test to be applied has been expressed in a variety of ways (i.e. undermine, override, re-decide), in my judgment, there is a key distinction to be drawn between, on the one hand, the nature of the first decision (what it decided) and the consequences of that decision. There is a difference between "overriding" and "failing properly to apply": see *Amey Wye Valley* §§28, 34 and 35. Where the first decision is a decision on a dispute as to the construction of contractual terms, then that dispute is to be distinguished from a dispute as to the application or consequences of a particular construction. Thus the decision in the latter case, whatever that decision is, does not override, undermine or re-decide the first decision. That is so, even if the

second decision is wrong as a matter of law or fact. The second decision is not "in excess of jurisdiction".

55. Secondly, in the present case, applying the test in paragraph 29(3) and (4) above, the question determined by the Decision is not the same or substantially the same as the question determined in Award 1. The dispute in Award 1 was as to the terms and interpretation of the Subcontract. There was no reference to, or consideration of, the financial consequences of the scope of the work. By contrast, the dispute in Adjudication 4 was as to the financial consequences of the true interpretation. In Award 1 the dispute related to the scope of the work to be carried out under the Subcontract and whether the scope related to all civil works or was that described in the intermediate milestones. It did not address any dispute about the financial consequences – such as entitlement to payment or to damages or to levying contra charges flowing from the Subcontract as properly interpreted. By contrast, Adjudication 4 concerned the Claimant's entitlement to payment in respect of various matters, including the Defendant's entitlement to levy the Contra Charge. The Adjudicator was not "re-deciding something that was not before him": *Amey Wye Valley* §35. He did not decide (or purport to decide) that the scope of the works under the Subcontract was anything other than that as decided in Award 1. Far from "overriding" Award 1, the Adjudicator expressly acknowledged that Award 1 was binding as to scope (paragraphs 6.2.1 and 6.3.1); he did not re-open that dispute. He did not accept the Claimant's submission that it was *not* in breach of contract. Rather he considered whether the effect of Award 1 was that the Defendant was entitled to levy the Contra Charge. He decided that it was not so entitled and whether he was wrong about that is irrelevant to his jurisdiction. Whether he has correctly "given effect to" or found the correct "consequences" is a separate matter. The Defendant's case in substance is that the Adjudicator "failed properly to apply" the decision in Award 1 as to the scope of work. The Adjudicator may have failed to apply Award 1 correctly, but he has not undermined it.

56. Thirdly, I accept Mr Dowers' submission, that, on analysis of the Decision, the Adjudicator rejected the Defendant's case as a matter of causation. Having accepted that the Claimant was in breach of contract, he concluded that that breach was not the cause of its decision not to carry out the works; rather, at the time, it was the binding nature of Adjudication 1 which was the cause of its refusal and the cause of the Defendant awarding the works to others (and incurring the costs of so doing). Whilst not expressed succinctly, in my judgment, this is the true import of paragraphs 6.2.5, 6.3.2 to 6.3.5 (see in particular references to "result of the adjudication", "arising as a result of", "effects" "caused by"). (This is relevant too to the third reason: see paragraphs 61 and 62 below).

57. Finally the Defendant put its case on the basis that the Decision insulates the Claimant from liability for breach of contract. But it does not. (The fact that the Defendant so argued highlights the fallacy in its case on excess of jurisdiction). The Decision does not insulate Claimant from any eventual liability for damages. If the Defendant is correct that the Adjudicator's conclusion as to the consequences of the acknowledged breach of contract is wrong, as a matter of fact or law, that is a matter for a final binding court judgment or arbitration award, and indeed has been referred to Arbitration 2. On this hypothesis, the Defendant will in due course be able to enforce Award 1 and ultimately the Claimant is not "insulated" from liability.

58. In my judgment, Adjudication 4 did not undermine or override Award 1.

(2) No power

59. Mr Taczalski recognised that this is essentially the same argument as in the Undermining Issue, but looked at through the prism of the contractual provisions, rather than the general law. He accepted that this argument does not materially add to his case on the Undermining Issue, which for the reasons set out above, I have not accepted. Thus, this argument fails too. In any event, even if clause 39.3 is a "relevant term" within the meaning of paragraph 12(a), it does not add anything to the accepted position, under the general law, (see paragraph 29(1) and (2) above) that an adjudicator is bound by a prior arbitration award or court judgment (on the same issue). In the light of this conclusion, whether clause 39.3 is a "relevant term" within the meaning of paragraph 12(a) of the Scheme does not arise for determination and I express no concluded view. I agree that "relevant term" refers to a limited class of the contractual terms between the parties, and certainly, cannot include terms which define the parties' substantive rights and liabilities. Were it otherwise, any error of law by the adjudicator would give rise to an excess of jurisdiction. Whether the obligation to settle disputes by arbitration is a substantive or procedural term is less clear.

(3) The wrong question

60. First, considering the issue at the most general level of abstraction, the relevant question was "was the Defendant entitled to levy the Contra Charge?" The Adjudicator answered that question at paragraph 6.3.9 of the Decision, concluding that the Defendant was not so entitled. The Adjudicator's error relied upon by the Defendant, if any, was in his reasons for not accepting the arguments it chose to deploy when setting out its side of the dispute. That does not amount to answering the wrong question. The reasons for a decision are not the same thing as the answer to the question to be decided itself.

61. Secondly, even assuming that, at a more specific level of abstraction, the questions for the Adjudicator are correctly characterised as two, in the way suggested by Mr Taczalski, in my judgment the Adjudicator answered both questions. He addressed the question of breach clearly – finding in favour of the Defendant. Then as to the question of loss flowing from breach, the Adjudicator addressed that too, albeit in somewhat less clear terms. For the reasons given above, I accept the Claimant's analysis of the Decision as being one of causation. He concluded that the loss claimed in the Contra Charge did not flow from the breach of contract. The incurring of the costs of other contractor was caused by the Claimant's decision to abide by the terms of Adjudication 1 (as it was required to do at the time). That was a conclusion that the loss was caused by an intervening event. Whether it is right or wrong is immaterial; it was the Adjudicator's answer to the correct question.

62. Finally, in making its case that the Adjudicator answered the wrong question, the Defendant relied heavily upon his (allegedly erroneous) concern, expressed in a single sentence in paragraph 6.3.3, that neither party should be penalised for complying with Adjudication 1. However, when the totality of the Adjudicator's reasoning at paragraphs 6.3.1 to 6.3.5 is considered it is clear that the Adjudicator addressed the

issue of causation (the second question) and that single sentence does not detract from that conclusion.

63. In my judgment, the Adjudicator answered the correct question (at either level of abstraction) and did not, in excess of his jurisdiction, answer the wrong question.

Conclusion on excess of jurisdiction

64. For the foregoing reasons, I conclude that in finding at paragraph 6.3.9 of the Decision that the Defendant was not entitled to levy the Contra Charge, the Adjudicator did not exceed his jurisdiction and that the Decision in relation to the Contra Charge is fully enforceable.

Issue (2): Waiver of objection to jurisdiction

65. In the light of my conclusion on Issue (1), this issue does not arise for determination. Nevertheless I consider the position if, contrary to the foregoing, I had concluded that the Adjudicator did exceed his jurisdiction.

The Parties' submissions

The Claimant's case

66. The objection to jurisdiction based on the first two reasons ("undermining" and "no power") has been waived. The points were known or capable of being known to the Defendant by the time of its Rejoinder at the latest and were not raised or reserved in the course of the adjudication. (The Claimant accepts that if the third reason for lack of jurisdiction had been established, the Defendant did not on the facts waive that objection, because it was not known until the Decision itself that the Adjudicator had answered the wrong question).

67. The Defendant should have raised its challenge to jurisdiction at the latest once it received the Claimant's Reply on 1 April 2021. It was clear from paragraphs 90 and 95 that the Claimant was inviting the Adjudicator to consider the effect of Adjudication 1 and to make the finding which the Defendant now complains was in excess of jurisdiction. Even if the Defendant did not know how the Adjudicator would answer the question until the Decision, it did know that he had been asked by the Claimant to answer the question in a particular way and, if answered in that way, would be outside jurisdiction and that triggered the obligation to raise the jurisdiction objection.

68. As illustrated by paragraph 102 and 103 of its Response, the Defendant was aware of the need to raise an enforcement point, but did not do so in relation to jurisdiction concerning the Contra Charge. Moreover the Defendant was represented by experienced construction counsel and solicitors; either they did not see the point or, if they did, they decided not to raise it. The Defendant responded extensively in its Rejoinder. It argued that the Claimant's submission was wrong, but not that the Claimant was inviting the Adjudicator to exceed his jurisdiction. The Defendant did not say "if you accept the Claimant's case, you will be exceeding your jurisdiction".

69. If a jurisdiction objection is suspected, it is then incumbent to raise it and to give the Adjudicator the chance to decide it and the other party the chance to address it. Here after losing the point in the Adjudication the Defendant had attempted to concoct a jurisdictional challenge "in order to defeat the enforcement of the adjudicator's decision at the eleventh hour": see *Bresco* §91.

The Defendant's case

70. The Defendant submits that it has not waived its objection to jurisdiction, for two reasons.

(1) "Fundamental point of jurisdiction"

71. First, it contends that the Adjudicator's error was not an error in the course of appointment or of the scope of the referral exceeding the scope of the notice. Rather the Adjudicator lacked the power or jurisdiction to reach the conclusion which he came to. He was jurisdictionally obliged to "give effect" to Award 1. He had no power to undermine it or to choose not to apply it. Despite accepting in the Decision that Award 1 established that the Claimant was in breach of contract, the Adjudicator declined to give effect to that determination and so the Decision was a nullity. The jurisdictional objection here is one "in the most fundamental sense", and was simply not capable of being waived: see *Aqua Leisure*, supra, §43. In that case it was held that, whatever the conduct of the parties, the adjudicator simply lacked the power to award costs and that lack of power was not something which the parties could override. So too here, the Adjudicator did not have the power to give continued effect to the decision in Adjudication 1, rather than to apply the consequences that flowed from Award 1. Issues as to waiver (whether by election or estoppel) were, and are, irrelevant.

(2) Objection not known

72. Secondly, and in any event, at no point prior to publication of the Decision, did the Defendant have actual or constructive knowledge of its right to object to jurisdiction and for that reason there could be no waiver either by election or estoppel. The point about jurisdiction was not apparent until the publication of the Decision. The Defendant could not have been aware of the jurisdiction objection from the Claimant's submission – the causation argument was not referred to, rather the "no breach" argument was put forward and that was not accepted. Where one party is making a submission which, if accepted, would take the adjudicator outside jurisdiction and the other party is rebutting those submissions, the Adjudicator has not yet decided and has not trespassed outside jurisdiction. The choice did not arise until the Decision. The Decision had never previously been characterised as one of causation and the Defendant cannot be faulted for not anticipating that or warning the Adjudicator about the myriad ways in which he might exceed his jurisdiction. The Decision is not on all fours with the Claimant's submissions. All the decided cases are where the defect in jurisdiction was patent from the outset. Here the Adjudicator did not go outside his jurisdiction until the point of decision.

The Claimant's response on "fundamental point of jurisdiction"

73. The Claimant submits that there is no such thing as an unwaivable jurisdiction objection. Every jurisdiction objection necessarily involves an absence of power to do something. The leading authorities make no such qualification. The approach of Coulson LJ in *Bresco* suggests to the contrary. In any event, *Aqua Leisure* does not establish such a qualification; in particular the key passages are obiter.

Discussion and analysis

74. If I had found that the Adjudicator exceeded his jurisdiction because the Adjudicator asked and answered the wrong question, then it is accepted that no question of waiver could have arisen. The fact that he had answered the wrong question would only have been known after publication of the decision. Subject to this, I consider the Defendant's two points in turn.

(1) Fundamental point of jurisdiction

Aqua Leisure

75. In *Aqua Leisure* the claimant sought enforcement of the decision of an adjudicator. Part of that decision related to payment of a sum in respect of legal costs under s.5A Late Payment of Commercial Debts (Interest) Act 1998. At the time of the decision it was the common understanding that the adjudicator had power to award those costs. In a subsequent decision of this Court, it was held that the adjudicator did not have such a power: *Enviroflow v Redhill* [2017] EWHC 2159 (TCC). Thus in the enforcement proceedings, the defendant sought a declaration that those costs were not payable by it. The claimant contended that the issue was one of the adjudicator's jurisdiction, that there was no reservation of position and thus the defendant had waived its right to object to jurisdiction. HH Judge Bird sitting as Judge of the High Court held that the adjudicator had no jurisdiction to award costs under the 1998 Act and that the defendant had not waived any right to raise the point of jurisdiction. He held that the issue was "one of jurisdiction in the most fundamental sense"; the adjudicator had no jurisdiction to make the award at all because the statute had no application at all (§43). He held that it was not surprising that there was no reservation of rights, since at the time, and before *Enviroflow*, everyone accepted that there was jurisdiction to make such an award (§44). It was for that reason that he concluded that it would be wrong to hold that the defendant had waived any right to raise "this fundamental point of jurisdiction" (§45).

76. HH Judge Bird then went on to consider (at §§46 to 50) the position if he was wrong in his primary analysis and held, acknowledging that he had heard no argument on the point, that this was a fundamental point of jurisdiction which was not capable of being waived (§47). The absence of jurisdiction did not arise out of a mere procedural failure, but out of an express statutory provision removing the right to rely on the 1998 Act. The parties could not simply override the effect of the statute by agreement or by conduct and the statutory removal of the right to rely on the 1998 Act meant that the claimant could not have been taken to have relied on the defendant's failure to raise the point as a waiver of the right ever to do so (§50 (iii)).

Discussion

77. I do not accept the Defendant's contention here. First, I am not satisfied, on the basis of the decision in *Aqua Leisure* alone, that there is a distinct class of jurisdictional objection (such as the absence of power by reason of statutory provision) which is so fundamental that it cannot be waived. The judge's decision in the case was that there was no waiver because the right to object was not known at the relevant time (§45). Thus his analysis in the ensuing paragraphs was obiter and moreover had not been the subject of argument by the parties. Moreover, in a general sense, any jurisdiction objection to an adjudicator's decision is based on the fact that the adjudicator has no statutory power to act.

78. Further, the existence of such a distinct class is inconsistent with the approach of Coulson LJ in *Bresco.* In that case, the claimants were companies in liquidation. Issues of jurisdiction and waiver of jurisdiction arose. On jurisdiction, it was contended that an adjudicator could never have the jurisdiction to deal with a claim by a company in insolvent liquidation. However the Court of Appeal held, on that issue, that as a matter of jurisdiction, the contractual claim of an insolvent contractor continued to exist following liquidation, and so might theoretically be referred to adjudication. The right to refer a dispute to adjudication was not automatically lost when it went into liquidation. Nevertheless the Coulson LJ went on to consider the issue of waiver of jurisdiction objection, in the event that the jurisdiction objection had been well founded and held that the Defendant had waived any such right to object. There was no suggestion that a jurisdiction objection arising by operation of law (i.e. the insolvency of the claimant) was not capable of being waived.

79. Secondly, even if there is a separate class of fundamental jurisdictional objection (where there is no statutory power for the adjudicator to do something), I do not think that the present case would have fallen into that category. The excess of jurisdiction here (if any) would have been based on the "undermining issue". In my judgment, absence of jurisdiction in such a case is not "fundamental" in the same way as purporting to act where no statutory power to do so exists or there is express statutory provision removing the right to act.

(2) Objection not known

80. This issue only arises if I had found that, whilst the Adjudicator did answer the right question, the Decision nevertheless undermined Award 1. Since the Defendant's arguments on the Undermining Issue and the Wrong Question were closely interrelated (because both were based on an alleged failure properly to address the consequences of the breach of contract), it would have been difficult to have reached such a conclusion. Nevertheless I consider the position, on that hypothesis.

81. The Claimant argued that there was no breach of contract. If the Adjudicator had accepted that argument, with the result that he had acted in excess of jurisdiction, then in my judgment the Defendant should have raised its objection in the course of the adjudication. It was on notice as to the very issue which would have resulted in the excess of jurisdiction.

82. However, where, as here, the Adjudicator reached a decision (in excess of jurisdiction) on a basis different from that contended for by the other party, the position is less clear. On the one hand, the Defendant was on notice that the Claimant's argument of "no breach" if accepted would involve excess of jurisdiction

and was therefore on notice of a potential excess of jurisdiction at that time. Furthermore, the fact that that party was represented in the adjudication by experienced and expert lawyers militates in favour of a finding of at least constructive knowledge. However, I conclude that in this case, given the course of the detailed argument by the parties, the Defendant could not have anticipated that the Adjudicator would have reached his conclusion on the basis of a different, causation, analysis. The Claimant's argument in its Reply was based firmly on "no breach of contract". (Indeed the fact that the Defendant did not raise any jurisdiction objection in the course of the argument before the Adjudicator, based on the Undermining Issue or the No Power issue, rather confirms my conclusion on Issue (1) that, on analysis, the Decision did not involve any excess of jurisdiction in the first place).

83. Where an adjudicator decides the case on a different basis from that put forward by one party, and one which the other party could not have anticipated, and that basis of decision leads to an excess of jurisdiction, then the latter party did not know or could not reasonably have known of the basis of the excess of jurisdiction, and a failure to raise an objection to jurisdiction prior to the adjudicator's decision would not amount to a waiver.

84. I conclude that, if and in so far as I had held that, by deciding on the causation basis, the Adjudicator had undermined Award 1 and had thus exceeded his jurisdiction, then I would have found that the Defendant did not have actual or constructive knowledge of the jurisdiction objection and thus its failure to raise such an objection prior to the Decision did not amount to a waiver of the objection.

Conclusions

85. In the light of my conclusions in paragraph 64 above, I find that the Adjudicator did not act in excess of jurisdiction in reaching his conclusion at paragraph 6.3.9 of the Decision, and that the Claimant is entitled to summary judgment in respect of outstanding amounts relating to the Contra Charge, together with interest. In those circumstances, no question of waiver of an objection to jurisdiction arises (Had it been necessary to do so, I would have concluded that the Defendant did not waive any jurisdiction objection).

86. I will hear the parties on the precise amount of the judgment sum and all matters consequential upon this judgment. In the meantime I am grateful to counsel for the assistance they have provided to the Court.