Case No:

Neutral Citation Number: [2010] EWHC 419 (TCC)

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

St. Dunstan's House
133-137 Fleet Street
London EC4A 1HD

Date: Wednesday, 24th February 2010

Before:

MR. JUSTICE COULSON

- -

Between:

AMEC GROUP LIMITED	**Claimant**
- and -	
THAMES WATER UTILITIES LIMITED	**Defendant**

- -
- -

MR. SIMON HARGREAVES QCand LUCY GARRETT (instructed by **Messrs. Nabarro LLP**) for the **Claimant**
MR. ANTHONY SPEAIGHT QC (instructed by **Messrs. Charles Brown Solicitors**) for the **Defendant**

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Judgment

A. INTRODUCTION

1. This is a claim by AMEC to enforce, by way of summary judgment, an adjudicator's decision dated 24th December 2009 for just less than £1 million. The claim originated in a Framework Agreement dated February 2005, pursuant to which AMEC were engaged by TWUL to carry out construction and maintenance work. Each separate package of work was the subject of a separate order, referred to in the papers as a "works order" or "works contract". There were apparently over 300,000 such orders/contracts let under the Framework Agreement.

2. In response to this claim for summary judgment, TWUL rely on a variety of separate reasons why the adjudicator's decision should not be enforced. There are three lever arch files of documents and two files of authorities. The submissions of the parties extended to a detailed analysis of the submissions in the adjudication as well as the inter partes correspondence. In my judgment, that kind of detailed analysis is not appropriate on an application to enforce an adjudicator's decision, just as it would not be appropriate on an application for permission to appeal against an arbitrator's award under section 69 of the ***Arbitration Act 1996***. I would add that, at least in general terms, the greater the detail that a defendant invites the court to consider in resisting an application of this kind, the less likely it must be that it is the kind of "plain case" necessary to avoid enforcement.

3. I propose to deal with the issues that arise on this application in this way. First, I set out the details of the Framework Agreement (**Section B below**) and a brief chronology (**Section C below**). At **Section D** I set out some general principles relating to the enforcement and adjudication decisions.

4. Thereafter, I deal with the various reasons put forward by TWUL as to why the decision in this case should not be enforced in the following sequence:

4.1 Jurisdiction (**Section E** below)

Did the dispute arise under the Framework Agreement? If not, TWUL say that the adjudicator did not have the jurisdiction to deal with this dispute. They maintain that the disputes arose across a whole series of works contracts and that therefore the adjudicator appointed under the Framework Agreement did not have the jurisdiction to make a money decision. In addition, they say that, if the dispute did not arise under the Framework Agreement, the ICE adjudication procedure, pursuant to which this adjudication was conducted, did not comply with the ***Housing Grants (Construction and Regeneration) Act 1996*** ("the 1996 Act") and/or the adjudicator purported to deal with more than one dispute at the same time.

4.2 Natural Justice (**Section F** below)

Did the adjudicator act in breach of natural justice:

(a) In dealing with the dispute at all, given its alleged complexity and the late provision of documentation;

(b) In respect of TWUL's further response, sent just over two days before the adjudication decision had to be provided?

4.3 Error: Failure to Address Issue/ Error (**Section G** below)

Did the adjudicator make an error and/or fail to deal with TWUL's defence to the claims brought by AMEC, such that he failed to ask himself the right question and/or failed to conduct the adjudication fairly?

5. There are two final areas of argument: an issue as to approbation and reprobation, and a point about severability. I address these in **Section H** below. There is a short summary of my conclusions at **Section I** below. Although the range of matters raised on this application has made it feel rather like an exam question or an obstacle course, I should express my thanks to both leading counsel for their considerable assistance.

B. THE FRAMEWORK AGREEMENT

6. The parties entered into a Framework Agreement in February 2005. Section A comprised the Form of Agreement and a number of annexures. Section B comprised the specification, and Section C constituted the conditions of the works contracts. Clause 2 of Section A recorded the basic agreement between the parties in these terms:

> "b) This Agreement enables Thames Water to award contracts (referred to in this agreement as 'Contracts' and each one a 'Contract') to the Contractor for the provision of services and/or the execution of works pursuant to and within the scope of this Agreement.
>
> c) This Agreement constitutes a standing offer from the Contractor to Thames Water to provide services and/or execute works as described in Section A2 and shall remain open for acceptance by Thames Water for as many times as Thames Water chooses during the currency of this Agreement. An individual Contract shall be made by Thames Water issuing to the Contractor an order in the form set out in Section A4 or in an emergency by issuing an oral instruction to the Contractor in either case in accordance with the procedure set out in section A4 and either of which shall constitute an acceptance by Thames Water and the Contractor's standing offer. The Contract shall be made on the date that Thames Water issues an order.
>
> d) The core terms governing this Agreement and the performance of a Contractor's obligations under this Agreement and any Contracts entered into pursuant to it, are set out in Annex 2. In addition, the Conditions of Contract set out in Section C shall apply to any Contracts entered into pursuant to this Agreement."

7. Annex 1 contained a list of documents constituting the Framework Agreement. This included extracts from the tender summary letter of 19th January2005 which contained details of rates, start-up payments and the like.

8. Annex 2 was entitled "Terms Governing The Agreement And Any Contracts". They were the important terms governing the performance of the Framework Agreement. Two parts of Annex 2 are particularly relevant for these purposes: clauses 9 and 12.

9. Clause 9 set out a detailed payment mechanism which included the following:

> "9.1.1 Following completion of the services and/or works to be performed by the Contractor under any Contract awarded pursuant to this Agreement, the Contractor shall complete a Payment Application in the form prescribed by Thames Water's payment system, the format of which is set out in Section A4. The Contractor shall submit a bundle comprising of all payment applications completed in each calendar month to Thames Water within seven days after the end of the relevant calendar month. …
>
> 9.2 Thames Water shall verify the accuracy of all the payment applications received and, subject to paragraph 9.7, a single aggregated payment in respect of all such applications properly made out and received from the Contractor in relation to each calendar month shall become due 14 days after the date on which the relevant applications are received by Thames Water. The final date for payment shall be 28 days after the date on which the relevant applications are received and in accordance with Section A4 subclause 4, 4.10 …
>
> 9.4 Without prejudice to any other remedy which it may have, Thames Water shall be entitled (subject to paragraph 9.5) to deduct from any payment due to the Contractor any sum which is due from the Contractor to Thames Water under the same Contract or a different Contract awarded under this Agreement.
>
> 9.5 If Thames Water intends to withhold any amount from or set off any amount against any payment which is due to the Contractor, including any deduction as provided for in paragraph 9.4, Thames Water shall give notice to the Contractor not later than five days before the final date for payment specifying the amount it proposes to withhold and the ground for withholding payment. If there is more than one ground such notice shall specify separately each ground and the amount attributable to it."

Accordingly, the payment provisions of the Framework Agreement expressly envisaged an aggregated claim, an aggregated verification of payment and an aggregated withholding notice.

10. Clause 12 set out the adjudication procedure incorporated within the Framework Agreement. It was in this form:

> "12.2 Notwithstanding the provisions of paragraph 12.1 either party may at any time refer any dispute or difference arising out of or in connection with this Agreement to adjudication. Such an adjudication shall be conducted in accordance with the Institution of Civil Engineers Adjudication Procedure 1997 or any published amendment thereof, which procedure shall form part of this Agreement.
>
> 12.3 Subject to paragraph 12.2 either party may refer any dispute or difference arising out of or in connection with this Agreement to the arbitration of a person to be agreed upon between the parties or, failing agreement, within six weeks to some person appointed on the application of either party by the President for the time being of the Chartered Institute of Arbitrators. Such arbitration shall be conducted in accordance with the Institution of Civil Engineers Arbitration Procedure 1997 or any published amendment thereof, which procedure shall form part of this Agreement.
>
> 12.4 Any dispute or difference arising out of or in connection with any Contract awarded pursuant to this Agreement shall be resolved in accordance with the Dispute Resolution provisions contained in the relevant Conditions of Contract."

11. It is convenient here just to identify the relevant parts of the ICE adjudication procedure expressly referred to in clause 12. The general principles set out at clause 1.1 of the procedure include the following:

> "The adjudication shall be conducted in accordance with the edition of the ICE Adjudication procedures which is current at the date of issue of a notice in writing of the intention to refer a dispute to adjudication. … If a conflict arises between this procedure and the Contract then this procedure shall prevail.
>
> The objective of adjudication is to reach a fair, rapid and inexpensive determination of a dispute arising under the Contract and this procedure shall be interpreted accordingly.
>
> …
>
> In making a decision the Adjudicator may take the initiative in ascertaining the facts and the law. The adjudication shall be neither an expert determination nor an arbitration but the Adjudicator may rely on his own expert knowledge and experience.
>
> The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration if the

Contract provides for arbitration or if the parties otherwise agree to arbitration or by agreement.

The parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration. …

Clause 5 contained the following provisions:

"5.1 The Adjudicator shall reach his decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred. The period of 28 days may be extended by up to 14 days with the consent of the referring party.

5.5 The Adjudicator shall have complete discretion as to how to conduct the adjudication and shall establish the procedure and timetable subject to any limitation that there may be in the Contract or the Act. He shall not be required to observe any rule of evidence, procedure or otherwise of any court. Without prejudice to the generality of these powers he may:

(a) ask for further written information;

(b) meet and question the parties and their representatives.

…

(d) request the production of documents or the attendance of people whom he considers could assist;

(e) set times for (a) – (d) and similar activities.

…

(g) issue such further directions as he considers to be appropriate."

Finally, clause 6 provided that:

"The Adjudicator shall reach his decision and so notify the parties within the time limits in paragraph 5.1 and may reach a decision on different aspects of the dispute at different times. He shall not be required to give reasons."

12. Section C of the Framework Agreement set out the conditions of contract to be entered into by the parties in respect of each works order. Clause 2 of Section C provided that each works contract would consist of both these conditions, and the Framework Agreement to which I have previously referred.

13. As to payment, clause 19.2 of Section C provided that:

> "In consideration of the proper performance of the services in accordance with the Contract, the Purchaser shall pay the Contractor the price in accordance with the Framework Agreement."

'The price' was defined as the amount payable to the contractor calculated in accordance with Section A5 of the Framework Agreement.

14. The parties are agreed that the Framework Agreement itself was *not* a construction contract within the meaning of the 1996 Act. The myriad works contracts did fall within that definition.

C. BRIEF CHRONOLOGY

15. From February 2005, pursuant to the Framework Agreement, TWUL requested AMEC to carry out extensive works, both in South London and in an area of operations known as 'North London District 21'. AMEC were paid in accordance with the Schedule of Rates, which was adjusted by agreement between the parties, all as envisaged by the Framework Agreement.

16. Disputes arose between the parties. AMEC claimed that they were not being paid in accordance with the Framework Agreement. By Application 57, AMEC made an aggregated claim for sums due across a wide range of works contracts, as envisaged by clause 9.1.1 of Annex 2 to the Framework Agreement (paragraph 9 above). On 6th October 2009 TWUL served an aggregated withholding notice pursuant to clause 9.5 of Annex 2, setting out various alleged set-offs and defences to the claims that had been made by AMEC.

17. On 30th October 2009 AMEC served a notice of adjudication in respect of their outstanding claims. This was designed to challenge the validity of many of the set-offs and defences set out in the withholding notice. Mr. Don Rodgers was appointed as the adjudicator.

18. The notice of adjudication is the document in which the dispute being referred is identified. It therefore forms the basis of the adjudicator's jurisdiction: see clause 2.1 of the ICE adjudication procedure and ***Mecright Limited v. TA Morris Development) Limited*** (unreported; 26th June 2001 (TCC)). Paragraph 3.1 of the notice of adjudication is in this form:

> "3.1 In this Adjudication the Adjudicator is being asked to determine a dispute between the parties concerning the amounts that AMEC is entitled to withhold in respect of 'Measured Works' carried out pursuant to the Framework Agreement together with any entitlement that AMEC may have for interest/financing charges arising from:
>
> 3.1.1 delays by Thames Water in certifying moneys as due in respect of Measured Works;
>
> 3.1.2 failures by Thames Water to certify moneys as due in respect of Measured Works; and/or

3.1.3 wrongful deductions from payments due to AMEC in respect of Measured Works.

3.2 In order to determine this dispute it will be necessary for the Adjudicator to rule upon the validity of Thames Water's claimed set offs and/or counterclaims as articulated in the various so-called Withholding Notices issued by Thames Water up to and including the 'Withholding Notice' issued by Thames Water on 6th October 2009."

19. On 24th December 2009, the adjudicator produced a written decision in which, having taken account of AMEC's claims and TWUL's cross-claims, he awarded AMEC £959,907.67 to be paid by 6th January 2010. He also made provision for the payment of his fees. A sum of £189,744.42 plus VAT has been paid by TWUL to AMEC but no other sums have been paid pursuant to the adjudicator's decision.

20. On 29th January 2010, AMEC commenced these proceedings, seeking the sum awarded by the adjudicator plus VAT and interest, and the adjudicator's fees. The total sum sought was £1,169,991.50. From that falls to be deducted the sum paid to date, identified in paragraph 19 above. The net sum sought by AMEC in this application is therefore £947,041.81 together with interest in the sum of £3,113.76, making a total of **£950,155.57**.

D. GENERAL PRINCIPLES OF ENFORCEMENT

21. The general principles governing an enforcement application of this sort are well-known:

(a) Adjudication was designed to give rise to a quick and inexpensive dispute resolution procedure, and it would be contrary to the 1996 Act if adjudicators' decisions were not generally enforced summarily: see ***Macob Civil Engineering Limited v. Morrison Construction Limited*** [1999] BLR 93.

(b) Decisions will be enforced even if they contain an obvious mistake: see ***Bouygues (UK) Limited v. Dahl-Jensen (UK) Limited*** [2000] BLR 522. As Chadwick LJ put it in ***Carillion Construction Limited v. Devonport Royal Dockyard Limited*** [2005] EWCA Civ 1358:

> "The need to have the 'right' answer has been subordinated to the need to have an answer quickly."

(c) The most common challenge to the enforcement of an adjudicator's decision is the suggestion that the adjudicator did not have the jurisdiction to reach the decision that he did: see, by way of example only, ***Balfour Beatty Limited v. London Borough of Lambeth*** [2002] EWHC 597 (TCC) and ***Pegram Shopfitters Limited v. Tally Weijl (UK) Limited*** [2003] EWCA Civ 1750. However, the decision will be enforced "as long as he [the Adjudicator] asks himself a question or questions which have actually been referred to him for decision and seeks to answer such question or questions": see the decision of His Honour Judge Seymour QC in ***Shimizu Europe Limited v. Automajor Limited*** [2002] BLR 113.

(d) The other principal way in which adjudicators' decisions may be challenged is by reference to the rules of natural justice. I deal with the principles that arise in relation to that kind of challenge in greater detail in **Sections F and G** below.

22. There was some debate in the papers in this case about the possible differences between an adjudication under the 1996 Act, and an adjudication occurring pursuant to a series of express contractual provisions. There was a suggestion that, because this was a contractual adjudication, different rules applied on enforcement. Although it was not expressly referred to by either counsel, the decision of His Honour Judge Thornton QC in ***Steve Domsalla (trading as Domsalla Building Services) v. Kenneth Dyason*** [2007] EWHC 1174 (TCC) might be taken as providing some support for that proposition. In similar vein, in his second statement, AMEC's solicitor, Mr. Radford, said that, because this was a contractual adjudication, the court did not have jurisdiction "to decide whether the adjudicator's decision that the claimant is currently seeking to enforce was right or wrong".

23. In my judgment, that passage misunderstands the status of an adjudicator's decision. Whether that decision is issued pursuant to the 1996 Act, or by reference to a contractual adjudication mechanism, such a decision is temporarily binding. As a result, on an application to enforce, the court is not permitted to investigate whether the decision was right or wrong: indeed, such considerations are irrelevant. All that matters is whether the adjudicator had the jurisdiction to reach the decision that he did, and that he reached it by a fair process, making every allowance for the strict time constraints imposed in adjudication.

24. There is therefore no difference in principle in the status of a decision provided by an adjudicator pursuant to the 1996 Act, and a decision provided pursuant to a contractual mechanism. Indeed, in the vast majority of cases even that is a distinction without a difference, because both types of decision are produced pursuant to a contractual mechanism. The former is the product of the implied terms referable to the 1996 Act (otherwise known as the Scheme for Construction Contracts, referred to below as "the Scheme"), whilst the latter is created by express terms. There is no difference in the status or enforceability of the resulting decision, and there is nothing in any decision by the Court of Appeal to suggest otherwise. The only potential difference would be a matter of emphasis only, such as where the rules to which a contractual adjudication may be subject expressly permit a particular procedural step, or grant the adjudicator a specific power, which would not otherwise be regarded as typical or implied by the Scheme. But that, so it seems to me, is as far as any potential difference may go.

E. THE JURISDICTIONAL CHALLENGE

E1 The Wrong Contract?

25. TWUL's principal challenge as to jurisdiction is that the dispute that was referred to the adjudicator did not arise under the Framework Agreement, but under the numerous individual works contracts instead. TWUL therefore argue that, because the adjudicator was appointed under the Framework Agreement, and conducted the adjudication accordance with the ICE procedure referred to there, he had no jurisdiction.

26. It seems to me that that argument must fail for two separate reasons.

27. First, it seems to me that the dispute that arose between the parties was about the validity of AMEC's claim, pursuant to Application 57. That application arose pursuant to clause 9.1.1 of the Framework Agreement (paragraph 9 above). The claim also can be said to have arisen under clause 19.2 of the works contracts (paragraph 13 above), which clause also referred expressly back to the Framework Agreement. It seems to me, therefore, that AMEC's claim for payment arose plainly under the Framework Agreement.

28. Equally, the dispute was also concerned with the validity or otherwise of the withholding notice served by TWUL on 6th October 2009, and which essentially constituted their defence to the claims made. As we have seen, that was a notice served pursuant to clause 9.5 of Annex 2 of the Framework Agreement (paragraph 9 above). Thus the defence to this claim also arose expressly by reference to the terms of the Framework Agreement.

29. Secondly, if that were in any way doubtful, I note that clause 12.2 of the Framework Agreement imposed the contractual adjudication mechanism on "any dispute or difference arising out of or in connection with this Agreement". The expression "in connection with" is to be given a very wide application and denotes any link at all: see ***Ashville Investments Limited v. Elmer Contractors Limited*** [1989] QB 488. In my judgment, it is beyond argument that the dispute about Application 57, and the withholding notice that is relied on in support of the defence to that application, arose 'in connection with' the Framework Agreement.

30. I should add for completeness that, if the relevant contract was not the Framework Agreement, but the works contract(s), that of itself did not necessarily deprive the adjudicator of jurisdiction (although there would probably be other difficulties). Clause 2 of the conditions of each works contract (Section C of the Framework Agreement), provided that the Framework Agreement would be incorporated into the works contract. Thus, provided that those contracts contained no different dispute resolution mechanism, the mechanism at clause 12 of the Framework Agreement (adjudication in accordance with the ICE procedure) would also be incorporated into the works contracts. That could also have given the adjudicator the necessary jurisdiction, although there might well be a different problem relating to the reference of multiple disputes. I deal with that point in paragraphs 36 to 38 below.

31. Mr. Speaight maintained that clause 12.4 of the Framework Agreement envisaged that the works contracts would or might have a separate disputes resolution procedure, and that disputes arising in relation to those individual works contracts should be decided by reference to that (different) procedure. It seems to me that there are two separate difficulties with that analysis. The first is that it ignores clause 9 of the Framework Agreement, and clause 19 of the works contract, both of which point inexorably back towards a dispute arising out of an aggregated application and/or an aggregated withholding notice, which dispute could only be resolved by the adjudicator appointed under the Framework Agreement.

32. Secondly, the works contracts did not have an express and separate dispute resolution provision. Thus, the argument would have to be that the works contracts contained, by way of implication, the Scheme. But the case for the implication of the Scheme

would be very difficult, because the express terms at clause 12 of the Framework Agreement were incorporated into each works contract, and already provided for a particular dispute resolution mechanism in accordance with the ICE procedure.

33. It is also important to note that both parties acted pursuant to clause 9 by, respectively, making an aggregated application for sums due, and providing an aggregated withholding notice in response. Clause 12 of the Framework Agreement envisaged that one adjudication would deal with the dispute that arose. If TWUL were right, the effect of clauses 9 and 12 would be bypassed altogether, and instead the validity of any aggregated application or withholding notice could never be dealt with in a single adjudication. Instead, there would have to be hundreds of separate adjudications, each for a trifling sum, each arising under an individual works contract. It seems to me that that was not what the parties agreed in the Framework Agreement and it would not give rise to a solution that could be described as commercially sensible.

34. For all those reasons, I conclude that the dispute arose in this case under the Framework Agreement, and that accordingly the adjudicator was properly appointed and had jurisdiction to deal with the dispute that was referred to him. The principal jurisdiction challenge therefore fails.

E2 The ICE Procedure and a Single Dispute

35. TWUL also submitted that the ICE procedure did not comply with the 1996 Act, but the parties were agreed that if I decided, as I have, that the dispute arose under the Framework Agreement, then the parties were at liberty to agree the adjudication provisions set out in Clause 12 which incorporated the ICE procedure. On my findings, the 1996 Act is therefore irrelevant and this jurisdictional challenge does not now arise.

36. Similarly, TWUL's other argument, that the adjudicator wrongly decided more than more dispute, would only arise at all if the dispute had not arisen under the Framework Agreement, but under the numerous works contracts. The argument would then be that, in such circumstances, where there were hundreds, if not thousands, of separate disputes, the adjudicator did not have the power to consider them in a single adjudication. Again, that does not expressly arise here, because of my finding that there was one dispute under the Framework Agreement.

37. I should add that, if I had concluded that the dispute(s) had arisen under a series of works contracts, then the multiple dispute point would probably have been successful, despite the fact that this is not historically a fertile ground for challenge[1]. The usual reason for the failure of this sort of point is because of the width of the definition which the courts have given to the word "dispute", as set out by His Honour Judge Thornton QC in ***Fastrack Contractors Limited v. Morrison Construction Limited*** [2000] BLR 168.

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[1] One of the very few reported cases where this ground of challenge was upheld, ***Grovedeck v. Capital Demolitions Limited*** [2000] BLR 181, involved claims for work on two separate sites. The judge's comments were in any event *obiter*, because he had already decided for other reasons that the adjudicator did not have the necessary jurisdiction.)

38. Here if (contrary to my view) the disputes had arisen under a whole series of different works contracts, then that would seem to me to be a plain example of more than one dispute having being referred to the same adjudicator, and would therefore have fallen outside the 1996 Act: see, in a slightly different context, ***Enterprise Managed Services Limited. v. Tony McFadden Utilities Limited*** [2009] EWHC 3222 (TCC). But that probable result only serves to highlight the commercial practicalities that these parties embraced when they agreed, at clause 9 of the Framework Agreement, to serve aggregated applications and aggregated withholding notices, and agreed at clause 12 to adjudication under the Framework Agreement. As I have indicated, any other result would prevent any sort of meaningful adjudication.

39. Accordingly, for all those reasons, the jurisdictional challenge fails. The adjudicator had the jurisdiction to reach his decision of 24th December 2009.

F. NATURAL JUSTICE

F1 The Issues

40. TWUL say that the Adjudicator failed to deal with the adjudication, certainly in its latter stages, in a way that was in accordance with the rules of natural justice. They put this argument in a number of different ways but essentially it comes down to three points:

(a) that the adjudication was too big or too complex to be properly resolved in adjudication;

(b) that the adjudicator failed to have regard to TWUL's further response, served on 21.12.09;

(c) that the adjudicator failed to have regard to the entirety of TWUL's cross-claims/set off in respect of the streetworks.

41. I address those points by setting out in rather more detail the procedural history of the adjudication (**section F2** below); then I address the legal principles referable to natural justice generally and size and complexity in particular (**section F3** below); and then I analyse at **section F4** below the complaints about size and complexity and the further response. I deal separately in **Section G** with the particular issue about the streetworks.

F2 Outline History of the Adjudication

42. The referral notice was served by AMEC on 13th November 2009. This meant that the 28 days for the adjudicator's decision, as referred to in the ICE procedure, expired on 11th December 2009. The principal part of the referral notice, including sections 9, 10 and 11, was given over to AMEC's complaints about the validity of the withholding notice generally and, in particular, the sum of £918,534.47 withheld by TWUL in relation to streetworks. AMEC alleged, amongst other things, that TWUL had wholly failed to justify or substantiate many of the individual cross-claims relied on in the withholding notice. The referral notice contained, at appendix 8, a detailed response to those individual cross-claims.

43. Although, on 20th November 2009, TWUL took the jurisdiction point that I have addressed in **Section E1** above, the adjudicator correctly rejected it and continued with the adjudication. TWUL next threatened that their response would be supported by 200 files and database called Kearynet, concerned with remedial works. In the event, on 27th November 2009, the response was served, together with 50 lever arch files. Those files were not the subject of any cross-referencing in the response itself. Neither was there any cross-referencing to the Kearynet system.

44. There is no doubt that TWUL's response, and the 13 appendices attached to it, comprised an extensive statement (amongst other things) in support of the withholding notice. Some of the appendices contained details of the defects complained of, together with photographs and the like. It is clear from the papers that much of this material, certainly in that form, was new and had not been provided to AMEC before.

45. On 1st December 2009, in response to a request from the adjudicator, AMEC agreed to extend time by seven days, so that his decision had to be produced by 18th December. At a meeting on 8th December with the adjudicator, fixed in order that the Kearynet system could be demonstrated to him, the adjudicator asked for further time, and there was an agreement that time would be extended again by six days, to 24th December 2009. The documents also demonstrate that, at this meeting, TWUL accepted that at least some of the items in the withholding notice had been incorrectly deducted.

46. The extension to 24th December 2009 was clearly based on the understanding that AMEC's reply to TWUL's response was going to be a significant document. In the circumstances it seems to me that this was unsurprising. In an adjudication where a contractor challenges a withholding notice, on the grounds that the employer has not properly substantiated the items being withheld, it is almost inevitable that the employer will seek to make good any alleged gaps when he serves his response. Consequently, the reply served by the contractor thereafter provides him with his first (and last) opportunity to put in a detailed defence to those items that had not previously been substantiated, or had been the subject of modification or clarification in the employer's response. That is an important and inevitable step in the adjudication process. Accordingly, I do not consider that AMEC's reply in the present case was anything other than an ordinary, even mundane, step: contrary to the points made by TWUL's solicitors in the correspondence to the adjudicator, I do not regard it as some form of tactical manoeuvre.

47. The reply was extensive and dealt in detail with the issues of substantiation. In respect of the streetworks cross-claim, AMEC pointed out at Section 6 that:

(a) Even on TWUL's own figures, there was an overclaim of £200,000-odd, with the total claim being therefore no more than £787,000;

(b) On AMEC's analysis, there was no evidence to support an additional £400,000 worth of the streetworks cross-claims: see paragraphs 6.4.2 and 6.4.3 of the reply;

(c) There was evidence to support a cross-claim on streetworks of just over £200,000: see paragraph 6.11 of the reply.

That analysis was referred to in the documents as 'AMEC's audit'.

48. On 14th December 2009, TWUL complained about the extensive nature of AMEC's audit. On the following day they wrote to the adjudicator and, amongst other things, asked these express questions:

> "1. Given the lateness of the submission of the 'audit' do you intend to admit the document into the adjudication?
>
> 2. What are the criteria by which AMEC have undertaken the 'audit' and are you satisfied the criteria adopted in the 'audit' can be relied upon in the adjudication? If your answer to either question is 'No', it will substantially reduce the new material TWUL will have to respond to.
>
> 3. How do you propose testing/checking the 'audit'?
>
> 4. Do you consider you will be able to test/check the 'audit' in the remaining time available in this adjudication?"

I accept Mr. Hargreaves' submission that this was a somewhat hectoring tone to adopt with the adjudicator, who was at this point in the last stages of the adjudication, and was entitled to proper assistance from both parties in order to resolve the detailed dispute that had arisen.

49. TWUL sought permission to put in a further response and AMEC objected to that application. On the same day, 15th December 2009, the Adjudicator sent a rather weary e-mail to both parties in these terms:

> "Given the volume of documentation recently submitted, can the parties attempt to agree tomorrow and let me know either way tomorrow, whether they are in agreement to extend the period by which I am to reach my decision. If so, please advise me tomorrow of the extension.
>
> If the parties cannot agree I will extend the time for final submissions that the parties may wish to make to no later than 21st December."

No agreement as to an extension was reached. The second part of the Adjudicator's e-mail therefore came into force. He had not agreed to the specific request from TWUL to allow them the opportunity of providing a further response, but he had allowed both parties to put in "final submissions" if they chose to avail themselves of that opportunity.

50. TWUL did put in a further response on 21st December 2009. It came with 15 appendices. It appeared to be comprehensive, in that there was nothing on the face of the further response that suggested that further information would have been made available had further time been available. The further response took issue with much of AMEC's audit.

51. The adjudicator's decision was provided on 24th December 2009. It consisted of 28 closely-typed pages. Although the ICE procedure did not oblige the adjudicator to give reasons, the parties had agreed that the adjudicator should provide reasons. The more general parts of the decision included the following paragraphs:

> "5.15 Whilst I have not carried out a forensic analysis of all documents submitted by the Parties, which are numerous, I have spent considerable time and I believe sufficient time reviewing the documents in order to appreciate the nature of the issues presented to me and to understand the case of each party in relation to the principal issues. In respect to quantum, I am satisfied that I am able to do justice between the Parties and arrive at an overall figure which properly reflects the merits of the case as I find them.
>
> 5.16 I do not believe the dispute is so complex that I am unable to give a proper and considered decision within the time constraints of this adjudication.
>
> …
>
> 6.2 Whilst I have considered and taken account of the whole of each submission I have not necessarily made reference in my Decision to each specific point made by each Party.
>
> 6.3 The principal (sic) that I have to apply is that a Party who asserts a material fact has the legal or ultimate burden of proof in respect of that fact. To discharge the burden of proof a party must present evidence to support its assertion of a material fact. I must conclude the presented evidence is more convincing than that offered by the opposing party and of sufficient weight to justify, on the balance of probabilities, in that party's favour.
>
> 6.4 In presenting my reasons I have not necessarily presented my detailed analysis of the Parties' submissions."

52. At Section 9 of the decision, the adjudicator dealt with the streetworks cross-claim, identifying correctly the £981,534.47 claimed by TWUL in that connection. He then went on to analyse in detail the five 'big ticket' items that comprised the streetworks cross-claim.

53. At Section 10 the Adjudicator totalled up the sums which he concluded TWUL were entitled to deduct from AMEC. This included a total sum of around £220,000-odd in respect of the streetworks (ie a sum larger than the figure admitted by AMEC: see paragraph 47(c) above). At paragraph 12.2, he deducted the total from the sums otherwise due to AMEC and arrived at a net figure in AMEC's favour of £959,907.66. That calculation formed the basis of his decision. The adjudicator also did a separate calculation of a figure of £923,778.38 which, he said, TWUL were *not* entitled to deduct from sums due to AMEC. As Mr. Speaight correctly pointed out, the adjudicator would have erred if he had awarded that figure to AMEC, because that figure had to be deducted from the £1.7 million-odd which made up TWUL's gross

cross-claim, not the £1.3 million that had been claimed by AMEC originally. However, the adjudicator did not in fact utilise the £923,778.38 figure and it formed no part of his final decision.

F3 Natural Justice/Applicable Principles

F3.1 General

54. The authorities establish the following general principles concerning the interplay between adjudication and natural justice:

(a) The rules of natural justice generally apply to adjudication: see ***Discain Project Services Limited v. Opecprime Developments Limited*** [2001] BLR 287 and ***RSL (South West) Limited v. Stansell Limited*** [2003] EWHC 1390 (TCC).

(b) However, the speed with which an adjudication must be carried out and completed, whether pursuant to the Act or a timetable imposed by the contractual procedure, and the temporary nature of any consequential decision, means that the enforcement of a decision is "not to be thwarted by an overly-sensitive concern for procedural niceties": see His Honour Judge Humphrey Lloyd QC in ***Balfour Beatty v. Lambeth***.

(c) The court should not give any encouragement to a defendant "scrabbling around to find some arguments, however tenuous, to resist payment…It is only too easy in a complex case for a party who is dissatisfied with the decision of an Adjudicator to comb through the Adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'": see the judgment of Chadwick LJ in ***Carillion v Devonport.***

(d) The court must at all times have regard to what Chadwick LJ held were the very limited grounds on which an adjudication decision could ever be resisted. As he said in paragraph 85 of his judgment, a decision would be enforced:

> "…unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator."

Mr. Hargreaves correctly pointed out that, later in paragraph 87 of the same judgment, Chadwick LJ referred to the futility of such challenges, "save in the plainest cases".

F3.2 The Authorities on Size and Complexity

55. In advancing this part of his argument, Mr. Speaight relied on remarks by His Honour Judge Toulmin CMG QC in ***AWG Construction Services Limited v. Rockingham Motor Speedway Limited*** [2004] EWHC 888 (TCC) where, following the decision of His Honour Judge Wilcox in ***London and Amsterdam Properties Limited v. Waterman Partnership Limited*** [2004] BLR 179, the judge wondered whether there might be claims which were so big and so complicated that they were inherently unsuitable for adjudication. However, as Mr. Speaight very properly acknowledged,

in ***CIB Properties Limited v. Birse Construction Limited*** [2005] 1 WLR 2252 the same judge said that his earlier view had been "erroneous". He went on to say:

> "The test is not, therefore, whether the dispute is too complicated to refer to adjudication but where the adjudicator was able to reach a fair decision within the time limits allowed by the parties."

56. In a subsequent passage in the same judgment relied on by both counsel, Judge Toulmin identified the point in these terms:

> "173. In my view, the test which the adjudicator set himself, namely that he could only reach a decision if (a) he had sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (b) if he was satisfied that he could do broad justice between the parties, was impeccable.
>
> 174. He was also correct to acknowledge that if he had had more time he could have refined his decision further. That is inherent in this adjudication procedure."

57. In a more recent case concerned with a similar issue, ***HS Works Limited v. Enterprise Managed Services Limited*** [2009] BLR 378, Akenhead J pointed out that no enforcement application had ever failed simply because of the size of the claim originally referred. He said that what was important was:

> "49. …
>
> (a) A most important factor in the consideration by the Court is whether and if so upon what basis the adjudicator felt able to reach his decision in the time available.
>
> (b) In terms of the opportunity available to the defending party in an adjudication, the court can and should look at the opportunities available to that party before the adjudication started to address the subject matter of the adjudication and at what that party was able to and did do in the time available in the adjudication to address the material provided to it and the adjudicator."

58. At paragraph 56 of the same judgment Akenhead J said this:

> "I also bear in mind, in considering these last two topics, that one should remember that this 28 day adjudication period called for in statute, and provided for here contractually by the parties, provides a tight timescale for disputes. Parliament provided for 'any' relevant dispute to be referable to adjudication and must have envisaged that there would be simple as well as the immensely detailed and complex disputes which can arise on a construction contract. It is often said, with

> some justification, that construction adjudications provide in many cases only 'rough' justice but Parliament and the contractual parties here have expressly legislated for the potential for such justice. One should not equate necessarily an adjudicator's approach over 28 days with that of a judge or arbitrator who tries the final version of the dispute after exchange of pleadings, evidence and reports over a period of often 6 to 18 months. One has to judge what an adjudicator does against the context of the period provided by the statute or the contract."

59. I should add for completeness that, although I was referred to my own decisions in ***William Verry Limited v. Furlong Homes Limited*** [2005] EWHC 138 (TCC) and ***Enterprise Managed Services v. Tony McFadden***, I do not consider that they add any points of principle to the cases I have already cited.

60. In my judgment, therefore, the law on this subject can be summarised as follows:

(a) The mere fact that an adjudication is concerned with a large or complex dispute does not of itself make it unsuitable for adjudication: see ***CIB v. Birse***.

(b) What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator had: (i) sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (ii) was satisfied that he could do broad justice between the parties (see ***CIB v. Birse***).

(c) If the adjudicator felt able to reach a decision within the time limit then a court, when considering whether or not that conclusion was outside the rules of natural justice, would consider the basis on which the adjudicator reached that conclusion (***HS Properties***). In practical terms, that consideration is likely to amount to no more than a scrutiny of the particular allegations as to why the defendant claims that the adjudicator acted in breach of natural justice.

(d) If the allegation is, as here, that the adjudicator failed to have sufficient regard to the material provided by one party, the court will consider that by reference to the nature of the material; the timing of the provision of that material; and the opportunities available to the parties, both before and during the adjudication, to address the subject matter of that material.

F4 Analysis

61. It follows from my summary of the principles that size/complexity will not of itself be sufficient to found a complaint based on a breach of natural justice. Thus, the question becomes that set out at paragraph 173 of the judgment in ***Birse***. Those questions in the present case can be answered by reference both to the specific criticisms of unfairness that TWUL made, and by reference to more general considerations.

62. TWUL's specific criticism under the label of breach of natural justice is to the effect that the adjudicator failed to have regard and/or sufficient regard to their further

response dated 21st December 2009 and was thus in breach of the rules of natural justice. In my judgment, that argument fails at each stage.

63. First, I consider that the adjudicator was not obliged to consider the further response in any detail. I do not go as far as to say that he could ignore it altogether, principally because of his letter of 15th December 2009 (referred to in paragraph 49 above) which invited 'final submissions'. However, it seems to me that, in view of the fact that the further response was provided just over two days before he had to complete his final decision, the adjudicator was not acting in breach of natural justice if he simply glanced at the material that it contained, to see its general nature and to see if it contained anything of real significance.

64. I say that because, in my judgment, in an adjudication with a tight timetable, an adjudicator is not obliged to consider in detail a second round submission or pleading, served very late in the adjudication process. His overriding obligation is to complete his decision within the time limit. If that means that he cannot read or digest in detail a document provided just over two days before that decision had to be finalised and provided to the parties, then that is simply one of the consequences of the adjudication process. In adjudication, a requirement to consider every round of the parties' submissions in detail, which might be required of a judge or an arbitrator pursuant to the rules of natural justice, will always be tempered by the adjudicator's overriding obligation to comply with the time limits.

65. As has been pointed out elsewhere, it is becoming very common for parties in adjudication to believe that they are in some way entitled to respond to every submission put in by the other party. In my view, unless the contract or the relevant adjudication rules expressly permit it, they do not have such an entitlement. Adjudication is not intended to resolve disputes by reference to innumerable rounds of submissions or pleadings.

66. A recent example of this in practice can be found in the decision of Ramsey J in ***GPS Marine Contractors Limited v. Ringway Infrastructure Services Limited*** [2010] EWHC 283 (TCC). That was another adjudication enforcement dispute where numerous points were taken and the judgment runs to over 100 paragraphs. There, one of the issues was the adjudicator's refusal to have any regard at all to a rejoinder, i.e. like the further response here, a second submission document served by the respondent party and, also like the further response here, served two days before the decision was due. Ramsey J held at paragraph 106 of his judgment that "in the context of a rapid summary procedure leading to a temporarily binding decision, the adjudicator was entitled to and needed to limit the number of rounds of submissions". There the period simply did not allow the responding party to serve a further document. That ground for challenge was therefore dismissed.

67. In addition on this aspect of TWUL's challenge, I note for completeness that there was no provision in the ICE procedure that allowed for a further response from the responding party, just as there is no express provision in the Scheme which permits the responding party a second opportunity to address the points made by the claiming party. Indeed, that would be, amongst other things, contrary to the usual rules of civil litigation, which allow a claiming party to have the last word.

68. Secondly, I find as a matter of fact that the adjudicator *did* have regard to the further response. The allegation that he did not do so is based upon the fact that, at paragraph 4 of his decision, under the heading "Procedural Matters", he made no reference to the further response. But it seems to me that it is incorrect to say that, because the document is not mentioned there, I must conclude that the adjudicator had no regard to it. That is particularly so given:

(a) His repeated references to the fact that he took into account all the documents (see the paragraphs referred to at paragraph 51 above);

(b) His specific confirmation that he took account of all relevant material, as set out in his e-mail to AMEC's solicitors of 15th February 2010;

(c) His specific reference to the dispute about the time to be given to TWUL for any further response, set out in some detail at paragraphs 5.13 and 5.14 of his decision.

69. On behalf of TWUL, Mr. Speaight submitted that the mere fact that an adjudicator says that he has had regard to all relevant material is not necessarily definitive. For that proposition he relied, amongst other things, on the decision of His Honour Judge Raynor QC in ***Broardwell v. K3D Property Partnership Limited*** [2006] Adj CS 04/21. I accept that formulaic words in a decision are not, by themselves, enough to justify a finding that the adjudicator had regard to all of the documents, and that such a finding will depend on a proper analysis of the decision itself. But in a case of this sort where, as I have said, the decision ran to 28 closely-typed pages, I do not consider that I can draw the inference that the adjudicator ignored any of the documents sent to him simply because of that one omission; on the contrary, I find that he did have regard to all the documents.

70. More generally, even if I was wrong about both of the two previous findings that I have made, I would still conclude that there had been no material breach of natural justice in respect of the further response. The authorities require a defendant, who is challenging a decision on this ground, to show that their rights have been materially affected by the adjudicator's alleged failure to have regard to the document in question: see ***Kier Regional v City and General (Holborn)*** [2006] EWHC 848 (TCC). I do not consider that there is any such evidence here. The further response put in by TWUL comprised two very different elements. The first consisted of a rehash of matters that had already been advanced in the original response. The second – and this was quite extensive – was a series of arguments and materials which were new but which, in my judgment, should have been either part of TWUL's original withholding notice in October, or certainly their original response in the adjudication, dated 27th November 2009. As I have said, in their referral notice AMEC produced a detailed breakdown, doing their best with the items that they understood to be the subject of the withholding notice: thus, a detailed response in relation to those individual items could and should have been in TWUL's original response of 27th November 2009.

71. That last point is important because of what Akenhead J said in ***HS Works v. Enterprise*** (paragraph 57 above). One of the facts which an adjudicator will take into account, when deciding on a timetable and considering whether further submissions can be provided late in the day, is what opportunities the parties have had to consider the subject matter of the dispute prior to, as well as during, the

adjudication itself. Those same considerations would inform the court's analysis of a challenge based on an adjudicator's alleged failure to have regard to a late submission. In this case, the withholding notice was TWUL's creation. They should have known from the outset precisely how they could justify every item in it. Thus, because they only served much of that justification with their original response, the party under time pressure in the adjudication was AMEC, not TWUL. AMEC did manage to produce a reply which set out their defence to the allegations and the substantiation that had been provided in the original response. In those circumstances, TWUL were not entitled to a further bite at the cherry, and even if they chose to avail themselves of such an opportunity, the adjudicator was not obliged to wade through their further submissions in microscopic detail.

72. That analysis, I think, provides an answer to Mr. Speaight's example of an issue which he said the adjudicator had failed to pick up from the further response. That concerned the rates for defective work which had originally been the subject of the withholding notice at a figure of £317. That was challenged by AMEC (albeit not in their original claim, but in their reply) and they put forward a cost figure of £223. In the further response, served on 21st December, TWUL said that on a cost-based approach the figure should be £353. The Adjudicator plumped for the £223 figure. TWUL complain that, as a result, he must have had no regard to the further response.

73. The first point is that there is nothing in the adjudicator's decision to indicate that the adjudicator did not consider (and reject) the £353 figure. He simply said that he had plumped for the £223 figure. He was plainly entitled to do so. Furthermore, given that TWUL's Withholding Notice was based on the £317 figure, it was not open to them to seek a higher rate in any event. Thus, the argument about the further response is, in reality, just an example of the sort of scrabbling in the detail which Chadwick LJ deplored in ***Devonport v. Carillion***.

74. Standing back from the detail for a moment, it seems to me that, as to complexity generally, this was not a particularly complex or difficult dispute. Specifically:

(a) Unlike ***CIB v. Birse***, the adjudication was concerned with no more than 60 or 70 files, as opposed to the 150 files there. Moreover, due to the absence of cross-referencing, the background files in the present case were of very limited value to the adjudicator.

(b) Unlike ***CIB v. Birse*****,** the sums at stake, whilst significant, were not huge; they were only about £1 million, compared to the £16.6 million at stake in ***CIB v. Birse****,*

(c) There was never any suggestion of complexity until TWUL provided their original response. Even then the complaint did not stem from AMEC, who dealt with the original response in their reply, but from TWUL, when they sought to have a second attempt at substantiation.

(d) The adjudicator was able to provide his decision by the necessary date (as extended). He provided a detailed decision which, on its face, dealt carefully with the issues.

75. In all those circumstances, therefore, it seems to me that, subject to the next section, the adjudicator dealt fairly and properly with the dispute and cannot now be criticised.

He asked himself the right question, namely, what, if anything, was due from TWUL to AMEC, and he considered whether he could deal with that issue in the time, by asking himself the question identified by Judge Toulmin in ***Birse***. The allegations of breach of natural justice based on complexity and the further response are therefore rejected. It seems to me that this is very far from being a plain case of unfairness of the sort referred to by Chadwick LJ in ***Carillion***.

G. ERROR/FAILURE TO ADDRESS ISSUE

G1 The Complaint

76. TWUL's last complaint concerns the streetworks cross-claim. They say that, whilst the adjudicator dealt at section 9 of his decision with the five 'big ticket' items of this head of cross-claim, concluding that TWUL had an entitlement to deduct about £220,000, he failed expressly to address the mass of smaller streetworks items, with a total value of over half a million pounds. Thus, they say, the adjudicator failed to respond to the issues with which he had to deal and, in consequence, either his decision went outside his jurisdiction or he failed to comply with the rules of natural justice.

77. In response, Mr. Hargreaves submitted that the adjudicator's decision was inviolate and that, at the very worst, the adjudicator had made an error in answering the question that he was asked, which error was irrelevant to and can have no effect upon any application to enforce.

G2 The Applicable Principles

(a) Error

78. The leading case is, of course, ***Bouygues UK Limited v. Dahl-Jensen UK Limited***. In that case, the adjudicator erred because he considered the gross figures without having regard to retention. This resulted in a payment being due to Dahl-Jensen in circumstances where, had he not made the error, they would have been the paying party. The adjudicator's decision was upheld by Dyson J (as he then was) and again by the Court of Appeal. Buxton LJ said at paragraph 14:

> "Here, Mr Gard [the adjudicator] answered exactly the questions put to him. What went wrong was that in making the calculations to answer the question of whether the payments so far made under the sub-contract represented an overpayment or an underpayment, he overlooked the fact that that assessment should be based on the contract sum presently due for payment, that is the contract sum less the retention, rather than on the gross contract sum. That was an error, but an error made when he was acting within his jurisdiction. Provided that the Adjudicator acts within that jurisdiction his award stands and is enforceable."

79. Chadwick LJ approached the problem in the same way. At paragraphs 27 and 28 he said this:

> "The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error. As Knox J put it in ***Nikko Hotels (UK) Ltd v MEPC PLC*** [1991] 2 EGLR 103 at page 108, letter B, in the passage cited by Buxton LJ, if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.
>
> 28. I am satisfied, for the reasons given by Buxton LJ, that in the present case the adjudicator did confine himself to the determination of the issues put to him. This is not a case in which he can be said to have answered the wrong question. He answered the right question. But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations, it is accepted that, subject to the limitation to which I have already referred, his determination is binding upon the parties."

80. A decision which followed ***Bouygues*** is ***Shimizu Europe Limited v. Automajor Limited***. In that case the adjudicator held that a claim for a particular variation worth £161,996 was not in fact a variation at all. However, he awarded that sum to the contractor because he thought that the parties were agreed that there could be no challenge to that head of claim. Judge Seymour found that if there was a mistake, the position was no different to that in ***Bouygues*** and he enforced the award. At paragraph 23 of his judgment he said:

> "What, in my judgment, Mr. Haller in fact decided in the Award, other than in relation to the costs of the adjudication, was that Automajor should pay Shimizu under the Contract the sum of £321,300.99. I consider that it is obvious that he had jurisdiction, given the terms of the Notice, to decide both that some sum was payable by Automajor to Shimizu and what that sum was. Miss Dumaresq did not suggest the contrary. Once the issues referred to Mr. Haller for decision are correctly identified, it becomes plain, it seems to me, that, if Mr. Haller made a mistake, it was as to a matter relevant, or possibly relevant, to the evaluation of what sum, if any, should be paid by Automajor to Shimizu under the Contract. It was not a mistake as to what he was being asked to decide. He asked himself, it seems to me, the correct question. He answered that question."

(b) Failure to Address the Issue

81. There are a number of cases in which the adjudicator's failure to engage with the central question in the adjudication has led to the refusal by the court to enforce the decision. The starting point is the Scottish case of ***Ballast PLC v. The Burrell***

Company (Construction Management) Limited [2001] BLR 529 where the Adjudicator refused to carry out a valuation because the parties had departed from the terms of the written contract. He therefore wholly failed to deal with the dispute that had been referred to him. Lord Reid said:

> "In other words, he appears to have considered that it was impossible, as a matter of construction of his own powers, for him to take into consideration, within the framework of adjudication, even the possibility that the parties might depart from the terms of the JCT conditions. Such an approach was in my view wrong in law; nor did I understand counsel for the respondents to argue the contrary, his submission being directed rather to the proposition that the error was one with which the court could not interfere. As I have mentioned, I was not addressed on the details of the dispute or referred to any of the documentation submitted to the adjudicator, apart from the notice of adjudication and the referral notice. Even from the terms of the referral notice, however (from which I quoted earlier), it is apparent that there were allegations that variations had been instructed by or on behalf of the respondents otherwise than in the form stipulated in the JCT conditions, and that the respondents had in bad faith prevented the issue of certificates. Given that allegations of that nature were being made, the adjudicator's error was material. As a result of that error, the adjudicator misconstrued his powers, and in consequence failed to exercise his jurisdiction to determine the dispute. His decision is therefore a nullity."

82. It has subsequently been suggested, in particular by Judge Seymour in ***Shimizu***, that the approach of Lord Reid in ***Ballast v. Burrell*** might be explained by the particular requirements of Scots law, and in particular by the fact that third party decisions are there open to judicial review. It was apparently for that reason that Judge Seymour had no regard to that case in reaching his conclusions in ***Shimizu***. I should say that, in my judgment, the approach of Lord Reid in ***Ballast v. Burrell*** was in accordance with English law and we shall see in a moment a number of other decisions where similar conclusions were reached by an English court. As I pointed out during argument, in truth the ***Ballast*** point did not really arise in ***Shimizu*** at all, given that, so it seems to me, it was a clear and obvious example of a legitimate mistake of the kind referred to in ***Bouygues.***

83. *In* ***AWG Construction*** at paragraph 128 in his judgment, Judge Toulmin referred to ***Ballast*** as a case where "the adjudicator did not reach a decision which was responsive to the issues referred in the adjudication."

84. In ***Broadwell v.K3D*** the adjudicator failed to deal with the responding party's counterclaim in its entirety because it was not referred to in the notice of adjudication. Judge Raynor concluded that, in consequence, the adjudicator had failed to address the responding party's defence, and therefore had not completed the adjudication in accordance with the rules of natural justice.

85. In ***Thermal Energy Construction Limited v. AE & E Lentjes UK Limited*** [2009] EWHC 408 (TCC), His Honour Judge Stephen Davies refused to enforce an adjudicator's decision in circumstances where the adjudicator had wholly failed to address the set-off and counterclaim raised by the defendant. The same judge reached the same conclusion in ***Quartzelec Limited v. Honeywell Control Systems Limited*** [2009] BLR 328 as a result of the adjudicator's failure (because of his misunderstanding of the legal position) to address what was referred to as the defendant's "omissions defence" and had clearly had regard to one side only of the equation when calculating the net payer and payee.

86. Thus there are two strands of authority. If the adjudicator makes an error of calculation his decision will still be enforced (see, for example, ***Bouygues***). But if he fails to address the critical element of the dispute, his decision will not be enforced (see, for example, ***Ballast*** and ***Quartzelec***). There was at least a suggestion in this case that these authorities may be difficult to reconcile.

G3 Analysis

87. In my judgment there is no inconsistency between these two lines of authority. If an adjudicator wrongly fails to have regard to the responding party's defence to the claim, because he erroneously thought that he could not do so, (as for example happened in ***Broadwell***), then he was not addressing the question that had been asked of him. He manifestly could not engage with the dispute that had been referred if he was failing to consider the responding party's defence to the claiming party's claim. Of course, such a conclusion can only be reached by the court "in the plainest cases" (Chadwick LJ in ***Devonport***).

88. On the other hand, if the adjudicator sought to answer the right question and engage with the dispute that had arisen between the parties, even if in so doing he made a mistake and forgot something or gave undue significance to something else, then that decision was still enforceable and no jurisdictional issue or breach of natural justice could arise (see ***Bouygues***). There is a significant difference in law between, on the one hand, not answering the right question at all and, on the other, answering the right question but in the wrong way.

89. In my judgment, it is a relatively simple matter to apply that analysis to this case. Here, the adjudicator had to answer the question: what, if anything, was due and owing from TWUL to AMEC? He sought to answer that question by looking at each side of the equation: what was due to AMEC? What set offs could be justified by TWUL?

90. If, for example, the adjudicator had failed to have any regard at all to the set-offs claimed by TWUL, because he wrongly believed that some legal principle prevented any consideration of the withholding notice, his decision would be unenforceable, for the same reasons as set out in ***Boardwell*** and the other authorities noted above. He would have failed to address the question referred to him. But if he had regard to the set-off in the withholding notice, even if he made a mistake in the way in which he dealt with that set-off, or in his calculation of its effect or worth, then his decision would be enforceable, as it was in ***Bouygues***.

91. In the present case, I am not prepared to find that the adjudicator made an error in respect of the streetworks cross-claim. The streetworks cross-claim was highly contentious and a large part of it, on AMEC's case at least, was wholly unsubstantiated. The adjudicator dealt with the 'big ticket' items on the face of his decision. He was not obliged in his written decision to go painstakingly through the thousands of smaller items that made up the streetworks claim, particularly given that the ICE adjudication procedure did not require him to give reasons for his decision at all. In his calculation, he had regard to the larger items, and even then he made significant reductions to the sums that he found could be deducted. He made no express reference to, or allowance for, the smaller items. The effect of his decision, therefore, was to disallow the majority of the streetworks cross-claim. There is nothing on the face of the decision which would allow me to conclude that the adjudicator had made a mistake in disallowing the majority of this large head of cross-claim, particularly given AMEC's fundamental criticisms of it. It seems to me that his analysis, on the face of the decision, was entirely rational.

92. If I am wrong about that, however, and the adjudicator did make an error, I conclude that that is all that it was: an error in calculating the full worth of the streetworks cross-claim. He attached a significant value, some £220,000 to this item of cross-claim. If he has erred at all, it is because, at least on TWUL's case, he did not give it an ever higher value by adding in at least some of the items that were not the 5 'big ticket' items. That was therefore an error of calculation of precisely the same sort as occurred in ***Bouygues***. It does not seem to me that that could affect, as a matter of principle, the enforceability of his decision.

93. It may be that a certain amount of confusion has arisen out of the references in some of the earlier cases to the need for an adjudicator to 'respond to the issues'. That means nothing more or less than addressing the question that the adjudicator has been asked by the parties to answer, i.e. what, if anything, is due; what, if anything, is the period of culpable delay, and so on. The expression was not intended to convey an obligation on the part of the adjudicator to provide an answer to each and every issue that may be raised in the parties' submissions, and it would be absurd to suggest that a failure to address a particular issue (no matter how trivial) on the face of a decision in some way amounted to an automatic breach of natural justice. Furthermore, it is not for the court on an enforcement application to pick through every pleaded issue – in the present case there were literally thousands of them – to see if each had been answered by the adjudicator. What matters, as I have said, is whether he attempted to answer the broad question that he had been asked. It seems to me plain that this adjudicator did so. Thus the last ground of challenge to his decision falls away.

H. APPROBATION/REPROBATION AND SEVERABILITY

H1 Approbation/Reprobation

94. On behalf of AMEC, Mr. Hargreaves had a further submission, to the effect that, in his statement Mr. Lunt, TWUL's Field Operations Manager, made plain that he had used the adjudicator's decision as the basis for subsequent payments and, more importantly, a fresh withholding notice. Mr. Hargreaves argued that this was a clear case of approbation and that TWUL could not, in response to this application, at the same time, seek to challenge that decision. In this regard he relied on the decision of

His Honour Judge Seymour QC in ***Durtnell and Sons v. Kaduna Limited*** [2003] BLR 225.

95. In the light of the other decisions that I have reached, it is unnecessary for me to decide this issue, but I should make two points about it. First, as a matter of principle, it seems to me that TWUL's conduct must arguably amount to approbation and reprobation: it is surprising to see evidence from a defendant, opposing an adjudicator's decision on numerous grounds, also cheerfully admitting to implementing that same decision across a range of ongoing contractual disputes.

96. But secondly, if this point had been critical, I would have needed to have been persuaded that, with great respect, Judge Seymour's analysis of benefit, a vital ingredient of this argument, was correct. At paragraph 47 of his judgment Judge Seymour said:

> "I accept that for the doctrine to apply it is necessary for a party, with knowledge that it is open to him to object to the decision, to take the benefit of part of it. However, I do not accept that what constitutes a *'benefit'* for this purpose depends simply upon whether the party whose receipt of a *'benefit'* is in question has obtained a net cash sum or an entitlement to a payment. It is, in my judgment, a *'benefit'* to a party, for the purposes of the doctrine, that his liability to another party in respect of any particular matter is crystallised on an interim basis at a particular amount, even though that is an amount which he is called upon to pay. Thus a party who contends that his obligation towards another party is limited to payment of a particular sum by reason of the decision of an adjudicator has both claimed and derived a *'benefit'* from that decision. It is probably also correct, as Mr. Bowdery submitted, that a party who is, in consequence of the decision of an adjudicator, entitled to take possession of a building and does so, has claimed and derived a *'benefit'* from the decision.

97. Taken to its logical conclusion, a benefit so defined could mean that a party who has lost an adjudication, and has dutifully followed every aspect of the decision against him when preparing his next withholding notice, would still be deriving a benefit from the decision. That seems, on the face of it, to be a surprising conclusion. No authority is identified by Judge Seymour in support of his definition. Thus, whilst I can see that a losing party who seeks to rely positively on some aspect of a decision on which he has been successful, whilst continuing to challenge the decision as a whole, might be attempting to gain a benefit, I find it difficult to reach the same conclusion when the losing party has simply applied, to his detriment, the findings of the adjudicator on which he has been unsuccessful.

98. Accordingly, for that reason, I decline to answer the approbation/reprobation issue. In any event, as I have said, it is not necessary for me to do so, given my other conclusions.

H2 Severability

99. Mr. Hargreaves also argued that if I had been against him on the streetworks argument, the decision could have been severed and the maximum sum claimed in respect of the other, smaller streetworks items could have been deducted from the sum awarded by the adjudicator and the smaller net amount could then have been enforced by way of summary judgment. In this regard he relied on ***Cantillion Limited v. Urvasco Limited*** [2008] BLR 250 (TCC).

100. Again, it is unnecessary for me to decide that issue, in view of my other findings but, on the face of it, if the streetworks argument advanced by TWUL (which I have analysed in **Section G** above) had been successful, then it seems to me that this would have been an appropriate case for severance.

I. CONCLUSIONS

101. For the reasons set out in **Section E** above, I conclude that the dispute arose under the Framework Agreement and that the adjudicator had the necessary jurisdiction to deal with the adjudication.

102. For the reasons set out in **Section F** above, I conclude that there was no breach of natural justice either specifically in relation to the further response or, more generally, in relation to the size and complexity of the adjudication itself.

103. For the reasons set out in **Section G** above, I conclude that the argument in respect of the streetworks cross-claim does not give rise to a ground to challenge the decision, either in whole or in part. The adjudicator answered the question put to him. If – which I do not accept – he made an error in so doing, it was an error that he was entitled to make in accordance with the reasoning of the Court of Appeal in ***Bouygues***.

104. Accordingly, TWUL's challenges to the decision fail and there will be judgment for AMEC in the sum of **£950,155.57**. I will hear the parties separately on the issues of interest and costs.