Neutral Citation Number: [2022] EWHC 1235 (TCC)

Case No: HT-2022-MAN-000001

IN THE HIGH COURT OF JUSTICE
[BUSINESS AND PROPERTY COURTS IN MANCHESTER]
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Manchester Civil Justice Centre
Date handed down: 24 May 2022

Before His Honour Judge Stephen Davies sitting as a High Court Judge
Between :

Liverpool City Council	**Claimant**
- and -	
Vital Infrastructure Asset Management (Viam) Ltd (In Administration)	**Defendant**

…

Mr Vivek Kapoor (instructed by **DWF LLP, Solicitors, Liverpool**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing dates: 29 April 2022
Further submissions 5 and 16 May 2022
Date draft judgment circulated: 18 May 2022
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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives caselaw website. The date and time for hand-down is deemed to be 10:00am on 24 May 2022.
I direct that pursuant to CPR PD 39A paragraph 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.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and summary of decision

1. In this case the claimant, Liverpool City Council ("LCC"), was the respondent to an adjudication, brought by the defendant, Vital Infrastructure Asset Management (Viam) Ltd ("Vital"). The appointed adjudicator, Mr Howard Klein, proceeded with the adjudication in the face of jurisdictional objections raised by LCC and decided that LCC should: (a) pay Vital the sum of £128,500 and interest in relation to its maintenance of temporary fencing for highways works undertaken by Vital pursuant to a contract with LCC; and (b) be responsible for his fees and expenses.

2. Vital went into administration the day before the decision. LCC has not paid the amount decided by the adjudicator. LCC made an insolvency application seeking permission to bring Part 8 proceedings against Vital for declarations to the effect that the adjudicator had no jurisdiction because: (a) the adjudicator had no jurisdiction to determine the dispute referred, which arose under two contracts ("the two contracts issue"); (b) even if the adjudicator did have jurisdiction under what was known as the call-off contract, then (i) it failed to serve LCC in accordance with that contract so that the adjudicator was not validly appointed and had no jurisdiction ("the service issue"); and/or (ii) the adjudicator decided a question which had not been referred to him, so that his decision was a nullity ("the nullity issue").

3. I gave permission for LCC to bring the proceedings subject to terms as to costs as against the administrators. I also permitted the adjudicator to participate should he wish to do.

4. The proceedings having been commenced, the administrators decided that they did not wish to take any part in the proceedings. The adjudicator decided that he did not wish to participate in any formal way but he did, through his solicitors, make written representations. He also attended the hearing as an observer.

5. The hearing was conducted on 28 April 2022. Having made able and persuasive submissions on the two contracts issue and the notice issue Mr Kapoor proceeded to make similar submissions on the nullity issue. I observed that on one view the case being advanced might more properly be seen as a breach of natural justice argument than a nullity argument. I said that if LCC wished to argue the case on this basis I would need to be referred to the exchanges in the adjudication - not all of which had been placed before me - to see whether or not the argument was well-founded. I permitted LCC to advance this issue (the "natural justice issue"), since it was closely connected with the nullity issue which had been raised, giving directions for service by LCC of a supplemental skeleton and provision of the additional material.

6. I also permitted the adjudicator to see the supplemental skeleton and additional material and to make any observations he wished upon it, given that the natural justice argument as advanced involves some criticism of his conduct of the adjudication. He did so. His witness statement also raised matters which went beyond the natural justice issue. LCC complained about this. I directed that I would ignore those parts of this witness statement which did not respond to the natural justice issue. Mr Kapoor responded to his observations on the natural justice issue and I now produce this judgment.

7. In summary, my decision is that the claim fails on the two contracts, the notice and the nullity issues but succeeds on the natural justice issue. My reasons are as follows.

The relevant contracts

8. On 22 May 2019 LCC and Vital entered into a framework agreement in relation to highways planned work projects to a value of £500,000. This was a detailed bespoke contract comprising 59 clauses and 18 schedules. In summary, the framework agreement provided that each work project was to be the subject of an individual call-off contract, to be procured in accordance with a detailed procedure contained within schedule 7.

9. The framework agreement provided that the call-off contract should be in the form of the NEC3 engineering and construction contract ("the NEC3 contract") as amended and supplemented by the provisions in schedule 9 of the framework agreement. Clause 2.3 of the framework agreement stated that the provisions of the framework agreement should "supplement and compliment" the provisions of the call-off contract and also identified the order of precedence as between the documents forming each call-off contract. By recital (c) Vital agreed to be bound by the terms and conditions of the framework agreement in carrying out the projects.

10. On 25 September 2021 LCC and Vital entered into a call-off contract for what was referred to as "framework lot 1 - K1-006", accepting Vital's tender in the sum of £488,992.41 on the basis that the "Works are to be carried out in accordance with the terms and conditions of the Highways Planned Works Framework Agreement – Lot 1 (Works and Services <£500,000), and the additional Contract Data provided in Appendix A".

The dispute resolution and notification provisions of the framework agreement and the call-off contracts

11. The dispute resolution provisions of the framework agreement and the call-off contracts are key to the two contracts issue and the service issue.

12. Clauses 47.1 and 47.1.1 of the framework agreement read, relevantly, as follows:

> "47.1. … Should any dispute arise between the Parties under or in relation to this Framework Agreement: 47.1.1 where such dispute or difference involves matters which arise under and/or relate to any Works and Services for Projects, such dispute or difference shall be resolved in accordance with the dispute resolution provisions of the relevant Call-off Contract forming part of the Memorandum of Agreement (including, where applicable, the mediation, adjudication and/or litigation provisions of such agreement)."

13. Clause 47.3 stated: "where the dispute or difference relates solely to this Framework Agreement and does not involve matters which arise under and/or relate to any Projects then the dispute or difference shall be resolved in accordance with clauses 47 to 48 (inclusive), as applicable".

14. Clause 48 referred to mediation, clause 49 referred to consultation, clause 50 referred to adjudication and clause 51 referred to legal proceedings. It is likely that the reference in clause 47.3 to clauses 47 to 48 is an error and should refer to clauses 48 to 51, but that is not critical to my decision.

15. Clause 50 stated: "Nothing in this Framework Agreement shall prevent the Parties from referring a dispute to adjudication at any time. Either Party may at any time refer such dispute or difference to adjudication in accordance with the provisions of the Scheme except for the purposes of the Scheme the nominating body shall be that stated in the Framework Particulars",

16. The Scheme was defined as: "Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011". The Framework Particulars identified the nominating body as the Royal Institution of Chartered Surveyors.

17. Clause 53, titled "Notices", stated by clause 53.1, relevantly, that:

> "All notices under this Framework Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Framework Agreement shall be served by sending the same by first class post, email or by hand to the following addresses: … If to the Employer: The Head of Procurement, Liverpool City Council, Commercial Procurement Unit, 4th Floor, Liverpool City Council, Cunard Building, Water Street, Liverpool L3 1DS".

18. In my judgment what is apparent from these provisions is that disputes arising under and in relation to the framework agreement and any individual call-off contract should be resolved in accordance with the dispute resolution provisions of the relevant call-off contract, whereas disputes arising only under or in relation to the framework agreement should be resolved in accordance with the dispute resolution provision of the framework agreement. It follows in my judgment that the adjudication provisions of clause 50 and the notice provisions of clause 53 have no application to such a case.

19. As regards the call-off contracts Appendix A, entitled "contract data", identified the "conditions of contract" as being the core clauses and other specified clauses from the NEC3 contract and the framework agreement. It also identified "the Employer" as "name: Liverpool City Council (LCC)" and its address as "Cunard Building, Pier Head, Water Street, Liverpool, L3 1DS". It stated that "the Employer is represented by … Andy Barr (LCC Divisional Manager - Highways & Transport" and the same address was given. It stated that "the adjudicator is to be agreed between the Employer and the Contractor from the Institution of Civil Engineers list of Adjudicators in the event of a dispute" and identified the adjudicator nominating body as the ICE.

20. Option W2, being a specified applicable clause from the NEC3 contract, made provision for disputes arising under or in connection with the contract to be referred to and decided by an adjudicator. Clause W2.3 provided that before a dispute could be referred the referring party must give a notice of adjudication to the other party "with a brief description of the dispute and the decision which he wishes the adjudicator to make".

21. Clause 13.2 of the NEC3 contract stated that a communication takes effect when "received at the last address notified by the recipient for receiving communications or, if none is notified, at the address of the recipient stated in the contract data".

22. It is not suggested by LCC that at any time after entry into the call-off contract the subject of this case it notified Vital of an address for receiving communications. Thus, the address is that "stated in the contract data".

23. LCC contends that any notice which was required to be given under the call-off contract, including a notice of adjudication, had to be given to Andy Barr (LCC Divisional Manager - Highways & Transport), Cunard Building, Pier Head, Water Street, Liverpool, L3 1DS. In response to a point made by Vital during the adjudication, to the effect that this would have been impossible at the time of the notice of adjudication because Mr Barr was not contactable at that address, LCC contends that

the notice had to be served on the LCC Divisional Manager - Highways & Transport, Cunard Building, Pier Head, Water Street, Liverpool, L3 1DS.

24. In my judgment however LCC is wrong in seeking to contend that the "recipient" stated in the contract data is a reference to a specified person or a person occupying a specified position. There is nothing in the call-off contract which says that the recipient is, or must be, a specified person or that a notice must be addressed to a specified person identified in the contract for that purpose. Clause 13.2 simply states that a notice must be received at the relevant address of the "recipient". In the context of clause 13 and Option W2 the recipient is simply the "Employer", in contrast for example to the project manager or the supervisor as other specified identified recipients. The contract data merely identifies the address of the Employer as Cunard Building, Pier Head, Water Street, Liverpool, L3 1DS. The fact that its representative is identified as Mr Barr as LCC Divisional Manager - Highways & Transport does not, in my judgment, mean that he is the "recipient" or that the "address" to which a notice of adjudication must be sent must include his name and/or position.

The two contracts issue and the notice issue

25. In the light of my conclusions in relation to the dispute resolution and notice provisions of the framework agreement and the call-off contract I can deal with these issues relatively shortly.

26. The notice of adjudication was sent to LCC under cover of a letter addressed to the Head of Procurement precisely as specified under clause 53 of the framework agreement. It also stated that it was given pursuant to clause 53 of the framework agreement and that following service Vital would apply to the ICE to appoint an adjudicator. The inconsistency is apparent, in that there are clear references both to the dispute resolution and notice provisions of the framework agreement but also to the nominating body as being the ICE, that under the call-off contract, as opposed to the RICS as specified under the framework agreement.

27. As to the notice of adjudication itself, under section 2, headed "the contract", it identified the contracts as being both the framework agreement and the call-off contract K1-006, identified the dispute resolution procedure as being that applicable under clause 47.1 of the framework agreement and option W2 of and the applicable contract data for the call-off contract, thus explaining why the nominating body was to be the ICE.

28. Under section 3, headed "nature and brief description of the dispute", it stated that: "3.1. The dispute concerns an error and/or ambiguity and/or inconsistency in the Framework Agreement Schedule Rates; more specifically the interpretation of the HMEP Method of Measurement rules contained in the Framework and the Call off Agreement for the use of Temporary Fencing". After explaining the positions advanced by both parties it concludes at 3.7 by saying that "there is a difference of £129,000.00 that VIAM assert is due and payable by LCC".

29. Whilst I shall need to explain this in a little more detail when addressing the natural justice issue, what is readily apparent is that although the dispute is said to relate to, and to arise in relation to, both the framework agreement and the call-off contract, the ultimate remedy claimed is a financial payment under the call-off contract.

30. However, it is also true that under section 5, headed "the redress sought", Vital sought a series of declarations, by way of building blocks to the ultimate remedy claimed, including a declaration as to the proper method of measuring temporary fencing.

31. Mr Klein was duly appointed as adjudicator and LCC raised both the two contracts issue and the notice issue with him. He decided that notwithstanding these challenges to his jurisdiction he did indeed have jurisdiction and proceeded to determine the dispute on its merits. Since he did not have jurisdiction to rule on his own jurisdiction the court is not concerned with the reasons he gave for that decision and must decide the question of jurisdiction without reference to his reasons, which is what I now do.

32. As to the two contracts issue, it is well-established that a dispute said to arise under more than one contract cannot in general be the subject of one reference to adjudication, because to do so would contravene the well-established principle that only a singe dispute can be referred: see s.108 of the *Housing Grants, Construction and Regeneration Act 1996* and the commentary in *Coulson on Construction Adjudication* (4th edition) at paragraph 2.85 and following.

33. However, in my judgment this principle can have no application here, for three separate reasons.

34. The first, and simplest, is that under the particular contractual adjudication provisions agreed between the parties in this case it was expressly contemplated that a dispute might raise questions both under the framework agreement and under an individual call-off contract and, in such circumstances, it could be referred to adjudication under the adjudication provisions of the call-off contract.

35. The second flows from the analysis and principles expounded by Akenhead J in *Witney Town Council v Beam Construction (Cheltenham) Ltd* [2011] EWHC 2332 (TCC), where at paragraph 38(vii) he observed that "Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim no 1 cannot be decided without deciding all or parts of disputed claim no 2, that establishes such a clear link and points to there being only one dispute".

36. In this case, what is apparent in my judgment is that the individual declarations sought by the notice of adjudication were all staging posts along the way to the resolution of the ultimate dispute, which was whether or not Vital was entitled to be paid a further £129,000 under the call-off contract. Vital was not seeking a decision under the framework agreement as a freestanding decision. It was simply one step along the way to obtaining the payment which LCC disputed that it was liable to make under the call-off contract.

37. The third, which is connected with the second, is that as I have said the terms of the framework agreement were incorporated into the call-off contract. It follows that Vital did not, on a proper analysis, need to seek a declaration as to the framework agreement in order to obtain the ultimate relief which it was seeking. It was sufficient for it to persuade the adjudicator that the proper analysis of the terms of the framework agreement as incorporated into the call-off contract was as it contended for.

38. As to the notice issue, for the reasons I have given it is apparent that on a proper analysis of the framework agreement and the call-off contract the notice of adjudication was required to be given under and sent in accordance with the provisions of the call-off contract. As I have also concluded, the notice provisions of the call-off contract only required the notice of adjudication to be sent to LCC at Cunard Building. Here, that is precisely what was done. The fact that it was also addressed to the Head of Procurement at the Commercial Procurement Unit of that address was undoubtedly a mistake but, in my judgment, an immaterial mistake.

39. I am glad to be able to reach this conclusion. It is clear that the notice of adjudication was received and was passed to the appropriate person and/or department within LCC who were able to instruct solicitors who responded without delay or difficulty. I accept the general principle, as illustrated by the decision of Christopher Clarke J in *Vision Homes Ltd v Lanscville Construction* Ltd [2009] EWHC 2042 (TCC), that an adjudicator will lack jurisdiction where the nomination had been sought prior to service of the Notice of Adjudication. However, as noted by Coulson in paragraph 4.25 of *Construction Adjudication*, this argument was also addressed by Carr J in *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC), where she concluded that "the omission of the contractually specified address was irrelevant because the first notice of adjudication achieved its purpose and was brought to the attention of the University at the correct time".

The nullity issue

40. I now turn to the third issue.

41. The case as advanced by LCC was that the adjudicator had failed to answer the questions put to him in the notice of adjudication and/or answered the wrong question so that his decision was thereby a nullity. In particular, the complaint was that the adjudicator had failed to engage with the individual declarations sought in the notice of adjudication as regards the terms of the framework agreement and, instead, had assessed the value of the maintenance of the temporary fencing by reference to the bill of quantities ("the BoQ") of the call-off contract and, thus determined a dispute which was not referred to him and for which he had no jurisdiction.

42. It seems to me that this argument as advanced on that narrow basis is misconceived for the following reasons, as I ventured to suggest at the oral hearing.

43. First, as I have already determined, the essential dispute which was referred was LCC's failure to pay the sum claimed for the maintenance of the temporary fencing and the specific legal and factual grounds upon which it was claimed under the notice of adjudication were not separate disputes which had to be separately decided but steps along the way to Viam securing the essential relief of a decision that LCC was obliged to make payment as claimed.

44. Second, by reference to the adjudicator's decision the basis on which he reached that conclusion is clearly set out. Thus in paragraphs 28 - 30 he referred to evidence put before him in the adjudication to the effect that LCC had issued a project manager's compensation event notice valuing the temporary fencing in accordance with CECA rates. In paragraph 52.3 he said that "the parties have agreed … by the belatedly issued Project Manager's Compensation Event Notice issued on 16 March 2021 that there was a typographical error in the Framework Agreement Schedule of Rates whereby the unit of measurement should have been stated as Metres per Day". In paragraph 56 he identified that in consequence there were three valuation options for him to consider: (1) first, on the basis of that "belated acceptance", a rate of £2 per metre per day (being the rate per metre in the Schedule of Rates corrected to refer to a rate per metre per day); (2) second, on the basis of Vital's bespoke tender for the call-off contract, a lesser rate of £1 metre per day; and (3) third, on the basis of the build-up in the compensation event notice, a much lower rate of £0.08 per metre per day. He concluded at paragraphs 60 and following that option (2) should apply, because this was the agreement reached between the parties in relation to the call-off contract from which LCC ought not to be permitted to renege.

45. It is too well-established to need citation of authority that the court should not decide on an enforcement claim or on a Part 8 claim of this kind whether or not the adjudicator's decision was right or wrong.

The court can only decide whether or not the decision is unenforceable on well-established and limited grounds, such as lack of jurisdiction or procedural unfairness.

46. It follows that even if the adjudicator was wrong to conclude that LCC had agreed that the framework agreement schedule of rates contained a typographical error and should be amended to read £2 per metre per day, thereby leading him to make the decision which he did, that was an error which was within his jurisdiction, which was to decide the ultimate dispute about whether Vital was entitled to additional payment for the maintenance of the temporary fencing and, if so, what additional payment. It follows that LCC has no valid grounds for complaint on this basis. The decision of an adjudicator is not to be treated like an answer to an exam paper, where they have to answer every single point raised. It is enough that they decide the dispute referred to them and do not fail to deal with the key points raised by the parties in such a way as to breach natural justice, to which issue I now turn.

The natural justice issue

47. It follows, in my judgment, that if there are any valid grounds for complaint about this they are, as Mr Kapoor realistically and correctly accepted during the hearing, whether the adjudicator breached natural justice by finding that LCC had agreed that there was an error which should be amended in circumstances where, on LCC's case, not only was that something which was not true but was also something which Vital had never contended for and which the adjudicator had never identified as an issue for his determination. Thus, it is to this issue which I now turn.

48. The principles are well-established. In *AMEC v Whitefriars* [2004] EWCA Civ 1418 Dyson LJ summarised the position thus: "The common law rules of natural justice or procedural fairness are twofold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal". In *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), Akenhead J reviewed the case law on adjudicators' breaches of the rules of natural justice and concluded that the breach: (a) must be more than peripheral, it must be material; and (b) will be material if the adjudicator failed to bring to the parties' attention a point or issue that they ought to have been given an opportunity to comment on if it is either decisive or of considerable importance to the outcome of the dispute, and is not irrelevant or peripheral.

49. Examples are to be found in:

(a) *Corebuild Ltd v Cleaver and another* [2019] EWHC 2170 (TCC), where Mr Adam Constable QC, sitting as a deputy High Court judge, held the adjudicator had materially breached the rules of natural justice when he decided a point that had not been argued by the contractor and was not canvassed with the parties, denying them the opportunity to comment on it.

(b) *Cubex (UK) Ltd v Balfour Beatty Group Ltd* [2021] EWHC 3445 (TCC), where Simon Lofthouse QC, sitting as a deputy High Court judge, refused to enforce an adjudicator's decision, concluding that the adjudicator had failed to draw his contract analysis to the parties' attention, which was sufficient to be a material breach of the rules of natural justice.

50. The schedule of rates attached to the framework agreement ("the SoR") included 4 rates for maintenance of temporary fencing, each of which apply to a particular length. The first three rates are stated to be £x per metre per day, whereas the fourth, above 100m, is stated to be £2 per metre. It is, in my view, reasonably obvious that this is a mistake, because no-one could sensibly believe that a rate

for maintenance of temporary fencing could be expressed as anything other than a rate per metre per day. Otherwise, a contractor would receive the same for maintenance of the same length of fencing for a year as for a day.

51. However, that is not the basis on which the adjudicator decided this issue. Nor did he engage with the points made by LCC in its Response and, in particular, the points that: (a) because of the order of precedence clause in the framework agreement it was not possible for any such error simply to be corrected in favour of the rate specified in the BoQ submitted in relation to the call-off contract; (b) even if the error could be corrected under the call-off contract, it could only be corrected by applying the defined cost approach mandated by the provisions of the NEC3 contract.

52. LCC submits that on a fair analysis of the Response it did not admit that there was an error etc in the SoR. I accept this and, indeed, the adjudicator did not assert that LCC had made such an admission in its Response.

53. I also accept that the compensation event notice issued at the time did not contain any express acceptance that there was a typographical error in the SoR. Instead, it purported to be an instruction to extend the maintenance period of the temporary fencing on the basis that: (a) "in the absence of an applicable rate in the Frameworks Lot 1 the maintenance of the Herras fencing is to be valued in accordance with Defined Cost"; and (b) the instruction related to the extended period of Herras Fencing maintenance only.

54. The difficulty which the adjudicator faced was that Vital had not advanced its case in the notice of adjudication or in its Referral on the basis that there was a conflict between the SoR and the BoQ and that the rate in the BoQ took precedence, on the basis that it was consistent with the HMEP Method of Measurement whereas the rate in the SoR did not. On 20 May 2021 the adjudicator had emailed the parties, drawing their attention to this point, and identifying three options as ways forward. The first option was that he should "issue my Decision in accordance with Section 5 of [the] Notice of Adjudication, which may not resolve the dispute as Vital's remuneration for the maintenance of the block and mesh fencing should be assessed from the bespoke Bills of Quantities incorporated into the Call-Off Agreement, not the Framework Agreement's Schedule of Rates unit of measurement". The second was that the parties agreed to his making his decision on the basis of the above analysis, recognising that without agreement his decision "may be unenforceable". The third was for Vital to discontinue and raise a fresh notice of adjudication should LCC not concede the point.

55. The response from Vital's representative, rather unhelpfully for the adjudicator, was to reject his analysis and to insist that he proceed in accordance with the case advanced in the notice of adjudication. It did not seek to reply to LCC's Response by contending in the alternative to its primary case that LCC had, expressly or implicitly, admitted that the rate in the SoR was an error and that it could and should be corrected by taking the rate in the BoQ. Whether it could have sought to ride this alternative horse at that late stage in any event is a moot question which I do not need to decide.

56. Thus, when it came to making his decision, the adjudicator was left in a difficult position. I agree with the submission of Mr Kapoor that what he attempted to do, acting no doubt on the basis of his genuine view as to the merits of the case, was to seek to overcome this problem by finding a way around it. He sought to do by determining the dispute on the basis that LCC had, in its reference in the compensation event notice to there being no applicable rate in the SoR, made an implicit, if not an explicit, concession that the rate in the SoR, being expressed as a rate per metre rather than a rate per metre per day, was a mistake. However, that was not a case which had ever been advanced by Vital. Nor was it a point

which the adjudicator had given fair notice to LCC that he was considering and allowed it an opportunity to make submissions on the point before making his decision. Nor did he engage with the fundamental points made by LCC in its Response, where it did address in some detail the proper analysis of Vital's case and the compensation event notice, contending that the order of precedence clause prevented any mistake from being corrected in the way alleged by Vital other than in accordance with the defined costs approach adopted in the compensation event notice.

57. In my judgment these were fundamental departures from the obligation to follow a fair procedure. Indeed, in proceeding in this way he departed in a significant way from the approach he had spelled out in his email of 20 May 2021. He has not, in his supplemental observations, been able to explain in any way which I regard as convincing on what basis he considered that he was entitled to reach the decision he did without allowing LCC the opportunity to address him on the point. He has not been able to suggest that these departures from natural justice have had no practical adverse effect upon LCC. Indeed, it is apparent that LCC has lost the opportunity to have the substantive arguments which it did put forward determined by him and there is no suggestion or obvious basis for my concluding that these arguments were incontrovertibly misconceived.

58. In the circumstances it appears to me that LCC is entitled as against Vital to a declaration that the decision is unenforceable as a matter of law as having been reached in a procedurally unjust manner and, accordingly, that no sum is due from LCC to Vital on the basis of the decision. Of course nothing in this decision is in any way binding upon the adjudicator.