Neutral Citation Number: [2023] EWHC 11 (TCC)

Case No: HT-2022-LDS-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

The Court House
Oxford Row
Leeds LS1 3BG

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Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

- -

Between :

RAVESTEIN B.V.

Claimant

- and -

TRANT ENGINEERING LIMITED

Defendant

Mr Mischa Balen (instructed by **Tyr Solicitors**) for the **Claimant**
Mr Dalton Hale (instructed by **KT Construction Law Limited**) for the **Defendant**

Hearing date: 21 July 2022
Date draft circulated to the Parties: 22 December 2022
Date handed down: 9 January 2023

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APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Monday 9 January 2023.

Her Honour Judge Kelly

1. This judgment follows the hearing of the Claimant's application for permission to appeal and for other orders concerning the arbitration award dated 22 March 2022 and corrected on 4 April 2022 of Mr Robert J Evans pursuant to section 69 of the Arbitration Act 1996 ("the 1996 Act").

2. The claim was issued on 19 April 2022 and was supported by the Claimant's skeleton argument and other documents. The Defendant filed an acknowledgement of service contesting the claim on 4 May 2022 and filed a Respondent's notice, skeleton argument and authorities on 11 May 2022. The Claimant filed a skeleton argument in reply on 18 May 2022. By order dated 17 June 2022, the case was listed for an oral hearing. The hearing took place via Microsoft Teams on 21 July 2022.

3. I had the benefit of hearing oral submissions and reading the skeleton arguments of Mr Mischa Balen for the Claimant and Mr Dalton Hale for the Defendant, both of counsel.

Background

4. The background to the matter is set out in the corrected arbitration award dated 4 April 2022. The Claimant is a shipyard and construction company, incorporated under the laws of the Netherlands, which specialises in heavy steel construction work. The Defendant is an engineering procurement and construction company. The arbitration arose out of a subcontract between the parties dated 14 September 2010 which was made on an amended version of the NEC3 Engineering and Construction Subcontract June 2005 (with amendments June 2006), Option A: Priced Subcontract with Activity Schedule, Dispute Resolution Option W2 and a number of secondary options.

5. The Defendant referred a dispute to adjudication on 24 February 2021 where it alleged that the Claimant's works were defective and sought damages as a result. The Claimant did not, for the most part, take an active role in the adjudication. The adjudicator was appointed by the Institution of Civil Engineers and he issued his decision on 11 April 2021, with a correction on 16 April 2021. The adjudicator ordered the Claimant pay the Defendant damages of £454,083.09 plus VAT and costs.

Thereafter, judgment in default was obtained by the Defendant. The Defendant has not been paid.

6. The Claimant served a notice to refer a dispute to arbitration on 27 October 2021. The notice informed the Defendant of an intention to refer to arbitration the dispute concerning the Claimant's liability for defects as found by the adjudicator. The parties agreed that the arbitrator should first determine whether the Claimant had complied with clause W2.4(2) by giving a valid Notice of Dissatisfaction. It was not in dispute that if the Claimant had not given a valid Notice of Dissatisfaction, the adjudicator's decision had become final and binding and could not be the subject of further dispute resolution process.

7. The award of the arbitrator on jurisdiction was dated 22 March 2022 and corrected on 4 April 2022. The arbitrator found that the Claimant had not served a valid Notice of Dissatisfaction and as a result the adjudicator's decision was final and binding. The arbitrator did not have jurisdiction. The Claimant seeks leave to appeal the arbitrator's decision pursuant to section 69 of the 1996 Act.

8. The grounds for the application for permission to appeal as set out in the Claim Form are:

(1) determination of the question will substantially affect the rights of the parties because the effect of the arbitration decision was that the tribunal did not have jurisdiction to determine the dispute and so the adjudication decision became final and binding;
(2) the question was the only one which the tribunal was asked to determine;
(3) the decision of the tribunal was obviously wrong because:
    a. the tribunal incorrectly held that to comply with the relevant clauses, the Notice of Dissatisfaction had to both notify the matter in dispute and state the intention to refer it to the tribunal; and
    b. the tribunal incorrectly held that the Notice of Dissatisfaction served by the Claimant challenged only the jurisdiction of the adjudicator rather than contesting his underlying decision;
(4) alternatively, the question was one of public importance given the widespread use of the standard NEC3 Engineering and Construction Subcontract and the decision of the tribunal was open to serious doubt for the reasons set out in (1) to (3) above;
(5) it was just and proper in all the circumstances for the court to determine the question.

9. In its Respondent's notice, the Defendant sought to uphold the award of the arbitrator on the grounds that:

   (1) the decision of the arbitrator was not "obviously" wrong:

      a. The arbitrator had correctly interpreted the relevant notice provisions. A Notice of Dissatisfaction requires the dissatisfied party both to identify the matter disputed and to indicate an intention to refer the matter to arbitration, although the notice does not need to condescend into any particular detail.

      b. The adjudicator had correctly interpreted the relevant email alleged to be the Notice of Dissatisfaction as disputing the jurisdiction of the adjudicator only, rather than identifying a dispute concerning the underlying merits of the adjudicator's decision.

      c. The decision of the arbitrator that the relevant email alleged to be the Notice of Dissatisfaction did not identify the two separate elements required for the notice to be valid – that is it did not identify that it took issue with the underlying merits nor did it state any intention to refer the dispute to arbitration.

   (2) Although the correct interpretation of notice provisions in the standard form is capable of being a matter of public importance, it was denied that it was in this case and the decision of the arbitrator was open to serious or any doubt.

   (3) In any event, it was not just and proper in all the circumstances for the court to determine the question because the Claimant's continued to refusal to pay goes against the "pay now, argue later" objectives of the 1996 Act.

10. I do not propose to rehearse all of the arguments raised, nor all of the documentation referred to during the course of the hearing. However, I record that I read and considered the documentation as a whole, as well as all of the arguments raised by the parties before coming to my decision.

The Law

11. Section 69(3) of the 1996 Act provides that leave to appeal shall be given only if the court is satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

12. Section 82(1) of the 1996 Act defines a "question of law" as "for a court in England and Wales, a question of the law of England and Wales".

13. The burden is on the Claimant to persuade the court that permission to appeal should be given.

14. I was referred by the parties to the following cases:

(1) *Transport for Greater Manchester v Keir Construction Ltd* [2021] EWHC 804 (TCC)
(2) *Bunge SA v Nibulon Trading BV* [2013] EWHC 3936 (Comm)
(3) *MBE Electrical Contractors v Honeywell Control Systems* [2010] B.L.R. 561
(4) *Covington Marine Corp & Ors v Xiamen Shipbuilding Industry Co* [2006] 1 CLC 624
(5) *The Council of the City of Plymouth v D R Jones (Yeovil) Ltd* [2005] EWHC 2356 (TCC)
(6) *Finelvet A.g. v Vinava Shipping Co. Ltd* [1983] 1 WLR 1469
(7) *BTP Tioxide Ltd v Pioneer Shipping Ltd* [1982] AC 724
(8) *Fehn Schiffahrts GmbH v Romani Spa* [2018] 2 Lloyd's Rep. 385
(9) *The Pera* [1985] 2 Lloyd's Rep. 103
(10) *The Antaios* [1985] A.C. 191
(11) *Forrest v Glasser* [2006] 2 Lloyd's Rep. 392
(12) *The Abqaiq* [2012] 1 Lloyd's Rep 18
(13) *Rainy Sky SA v Koomin Bank* [2011] UKSC 50.

From those cases, I summarise the legal position.

15. The interpretation of a contract is a question of law. In considering whether an arbitrator's decision is wrong in law, the arbitrator's process of reasoning is split into three stages:

(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.
(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts when the decision is reached.
(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

16. Stage (2) is the proper subject matter of an appeal pursuant to section 69 of the 1996 Act. Pursuant to CPR PD62, paragraph 12.5, the only documents which can be put before the court are the award and any document (such as the contract or the relevant parts thereof) which is referred to in the award which the court needs to read to determine a question of law arising out of the award.

17. Objections as to an adjudicator's jurisdiction, if they are to bar enforcement of the award, have to be made in enforcement proceedings. Questions which relate to the merits of the dispute must be dealt with in arbitration. The courts strive to uphold adjudication and arbitration awards.

18. The construction of a contractual notice is similar to the process of construing a contract. The alleged Notice of Dissatisfaction must be construed objectively, by reference to how it would have been understood by a reasonable recipient. Where parties have used unambiguous language in contracts, the courts must apply it.

19. Permission to appeal should not normally be given unless it is apparent to the judge on reading the award itself that the meaning ascribed to the relevant clause by the arbitrator is obviously wrong. The threshold for establishing an error of law is very high. This is consistent with the public policy of striving to uphold arbitration awards. It is possible to infer an error of law even where an arbitrator correctly states the law but where the correct application of the law would inevitably lead to one answer and the arbitrator has arrived at another.

20. Although the correct interpretation of notice provisions in a standard contract is capable of being a matter of general public importance, if the facts to which the standard clauses fell to be applied were one-off events, it is less likely that the public interest criteria will apply so that the lesser threshold of serious doubt applies. The touchstone of compliance is commercial certainty rather than strictness.

21. Both parties relied upon, but sought a different interpretation of, the decision of O'Farrell J in *Transport for Greater Manchester v Kier Construction Limited (t/a Kier Construction – Northern)* [2021] EWHC 804 (TCC). In that case, the contract provided for adjudication and also incorporated Option W2. In that case, two emails were contended to be valid Notices of Dissatisfaction. The first email stated that having considered the reasoning given by the adjudicator:

"…it is clear that he has erred in law and in his interpretation and application of the express terms of contract between the parties in a number of fundamental respects.

"However, and without prejudice to TfGM's right and intention to seek formal resolution to reverse the outcome of the Decision, TfGM is prepared to comply with the Decision on a provisional basis."

22. The second email said:

"Further to the issue of Payment Assessment nr 48 and the subsequent payments to Kier in accordance with the Adjudicator's decision dated 25th November 2019, we record that it has been issued on a provisional basis only and without prejudice to TfGM's right and intent to seek formal resolution to reverse the Decision."

23. O'Farrell J concluded that the first email constituted a valid Notice of Dissatisfaction:

"42. Clauses W2.3(11) and W2.4 of the Contract provided that the Adjudicator's decision would be final and binding unless one of the parties notified the other within four weeks of notification of the decision that (i) it was dissatisfied with a matter decided by the Adjudicator and (ii) it intended to refer the matter to the Court.

"43. The Contract did not stipulate the form of words that had to be used, or the level of detail that was required in any notice of dissatisfaction. The purpose of the notice was to inform the other party within a specified, limited period of time that the adjudication decision was not accepted as final and binding. A valid notice would have to be clear and unambiguous so as to put the other party on notice that the decision was disputed but did not have to condescend to detail to explain or set out the grounds on which it was disputed."

24. As to the second email, the judge concluded that it was not a valid Notice of Dissatisfaction. However, that was as a result of failure to comply with other clauses of the contract including a failure to send the notice to the correct address. In paragraph 46 of the judgment, she said of the second email:

> "46. The substance of the email was sufficient to notify Kier that the adjudication decision was disputed. It confirmed that the payment made to Kier in accordance with the decision was without prejudice to TfGM's right and intent to seek formal resolution to reverse the decision. This was consistent with the letter sent a few days earlier. Although the main purpose of the email was to clarify the status of the payment made, in particular to ensure that the payment was not construed as acceptance of the adjudication decision, it also contained notification that the decision was disputed and would be referred to Court. That would have been sufficient for the purpose of clauses W2.3(11) and W2.4. However, the email was not sent in compliance with clause 13.2 and WI 920; nor was it sent to Kier's solicitors in accordance with the notification by Walker Morris. Therefore, it would not have constituted valid notice of dissatisfaction."

25. In reliance upon those paragraphs, the Claimant asserts that the correct interpretation of the decision in *Transport for Greater Manchester* is that a specific form of words is not prescribed, nor the level of detail to which the notice must descend. The only requirement is to inform the Defendant that the adjudicator's decision is not accepted as final and binding. The notice does not have to go further.

26. In contrast, the Defendant asserts that interpretation of the case requires consideration of the particular facts of and arguments made in the case. It is relevant that the complaint was that the notice was defective as a matter of substance, because the wording failed to identify the matters with which the party was dissatisfied when the relevant email asserted that the adjudicator had "…erred in law and his interpretation and application of the express terms of contract… in a number of fundamental respects". The decision of O'Farrell J still required the notice to identify both the matter disputed and the intention to refer the matter to arbitration.

27. The parties also disputed the correct interpretation of *The Pera* [1985] 2 Lloyd's Rep. 103. In that case, there was a dispute as to whether a time bar and notice clause was ambiguous or not. Lloyd LJ held:

> "At the very least the use of the word in the present context is ambiguous, in the sense that it is fairly capable of more than one meaning. In those circumstances it ought to be construed against the charterers for two quite separate but interrelated reasons:

> first, this is not the case of a standard form of clause… It is what one might call a "Do it yourself" clause which has been prepared by Petroship themselves, for use in connection with their business. If it is ambiguous, it ought to be construed contra proferentem."

28. The Claimant asserted that the arbitrator failed to properly apply the dicta of Lloyd LJ and the correct interpretation was that if there was any residual doubt over whether a notice complied with the contract, the balance would favour allowing the claim to proceed rather than stifling an otherwise legitimate claim.

29. The Defendant asserted that the case decided the correct interpretation of clauses rather than notices and could be distinguished on that basis. In any event, it was argued that as there is no ambiguity in the wording used here, the case would not help in any event. It was only where use of wording is ambiguous that the interpretation ought to be construed contra proferentem.

The Issues

30. The parties agree on the issues to be determined as follows:

(1) Will the determination of the validity of the Notice of Dissatisfaction substantially affect the rights of the Claimant / Defendant?

(2) Was the decision on a point of law 'obviously wrong'?

(3) Alternatively is the question one of general public importance and is the decision at least open to 'serious doubt'?

(4) Despite the agreement of the parties to resolve the matter by arbitration, is it just and proper in all the circumstances for the court to determine the question?

The Dispute

31. After the adjudication, the Claimant notified the Defendant of its intention to refer the matter to arbitration. The parties agreed that the first issue to be determined by the arbitrator was whether the Claimant had served a valid notice of dissatisfaction pursuant to clauses W2.3(11) and W2.4(2).

32. Clause W2.3(11) provides as follows:

"(11) the *Adjudicator's* decision is binding on the Parties unless and until revised by the *tribunal* and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The *Adjudicator's* decision is final and binding if neither Party has notified the other within the times required by this subcontract that he is dissatisfied with a matter decided by the *Adjudicator* and intends to refer the matter to the *tribunal*."

33. Clause W2.4(2) provides as follows:
"(2) If, after the *Adjudicator* notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the *tribunal*. The dispute may not be referred to the *tribunal* unless this notification is given within four weeks of the notification of the *Adjudicator's* decision."

34. The Notice of Dissatisfaction relied upon by the Claimant was alleged to be contained within an email dated Monday, 12 April 2021 at 13:05 from David Ravestein ("Mr Ravestein") to the adjudicator and copied to Mark Swallow ("Mr Swallow") from the Defendant and to the legal representatives of both parties for the adjudication. It read as follows:
"Mister Cousins,

After seven days you weren't entitled to make any rulings. You must also follow the rules of the UK in 1996 by the Housing Grants, Construction and Regeneration Act (Construction Act).

If you do not withdraw your ruling before tomorrow, our solicitor mister Hugh Smit will file request at ICE to reverse the ruling.

All rights reserved.

Kind regards"

35. That email was not the first email to be sent in respect of the adjudicator's decision. The Defendant asserts that the chain of correspondence is relevant. The adjudicator circulated his decision via email on 11 April 2021. The following day, 12 April 2022, by email timed at 10:48 and sent to the adjudicator and Mr Swallow and others, Mr Ravestein said:

"Dear Mister Cousins,

As stated many times we do not accept this adjudication and your jurisdiction in this case, therefore we do not recognition your ruling,

The referral notice we didn't receive within the 7 days, we received it at the 8th March 2021 at time 13.08, therefore the entire process is null and void.

All rights reserved."

36. The adjudicator responded on the same day at 12:40 to the parties and said amongst other things:

"…Ravestein did not raise this particular challenge to my jurisdiction before I reached my decision. If they had raised it, I would have considered it. However, I am afraid that they are too late now, as I do not have the jurisdiction to change or withdraw my decision.

"In my email dated 1 March I directed that TEL could serve the Referral electronically as well as by hard copy. In my email dated 3 March I confirmed to the Parties that I considered the Referral had been served on 2 March and Ravestein did not challenge that date during the adjudication".

37. After receipt of this email from the adjudicator, the Claimant responded with the email timed at 13:05 set out in paragraph 34 above and relied upon as the Notice of Dissatisfaction.

38. In his arbitration award on jurisdiction, the arbitrator set out the contents of the relevant emails and in relation to the email of 12 April 2021 at 10:48, he said at paragraph 24(ii) of the award:

"The criticism or complaint, within this email is clearly as to jurisdiction by reason of TEL's (alleged) failure to provide the Referral Notice within 7 days of the Notice of Adjudication (see Clause W2.3(2) and Section 108(2)(b) of the Housing Grants, Construction and Regeneration Act 1996 (as amended)). The reference to "as stated many times" must be a reference to communications prior to the issue of the Decision."

39. The arbitrator went on to find that the adjudicator's email in reply was "clearly a reference to the jurisdictional challenge. Nothing is said as to the correctness of the Decision."

40. The relevant findings of the arbitrator in respect of the correct interpretation of the judgment of O'Farrell J in the *Transport for Greater Manchester* case were at paragraphs 59 to 67 of his award and in respect of *The Pera* case at paragraph 68 of his award. I do not propose to set them out here.

The Parties' Submissions

41. The Claimant submitted that the determination of the question of law would substantially affect its rights because the decision of the arbitrator meant that the adjudicator's decision became final and binding. The only question which the arbitrator was asked to determine was whether the Notice of Dissatisfaction complied with the relevant clauses or not.

42. The arguments in support of the email dated 12 April 2021 at 13:05 being sufficient as a Notice of Dissatisfaction were largely the same as those argued before the arbitrator. Mr Balen argued that the arbitrator's decision was obviously wrong because:
    (1) the Claimant asked the adjudicator to withdraw his ruling, which made it clear that the Claimant did not accept the adjudicator's decision was final and binding;
    (2) the Claimant stated it would file a request with the ICE and so therefore made it clear that the merits of the adjudicator's decision was disputed, as ICE could only appoint an arbitrator to deal with the merits. An arbitrator would have no power to deal with a dispute as to the adjudicator's jurisdiction;
    (3) the correct interpretation of the judgment of O'Farrell J in *Transport for Greater Manchester* was that:
        a. no particular form of words, nor any particular level of detail, were required in the notice;
        b. all that was required was to inform the Defendant that the adjudicator's decision was not accepted as final and binding;
        c. it was not necessary to specify the specific matter in dispute;
        d. there was no requirement to refer to arbitration in terms and having stated that the ICE would be asked to "reverse the ruling" of the adjudicator would in any event suffice for a requirement to state the intention to refer it to the tribunal.

As such, the arbitrator either did not reach the correct conclusion as to what the clauses required or, if he did, the correct analysis of the facts in the case should have caused him to conclude that the Notice of Dissatisfaction was valid. As he arrived at the opposite conclusion, he cannot have properly understood the principles which he stated;

(4) the wording of the notice did not only indicate a challenge to the adjudicator's jurisdiction but also indicated a challenge to the underlying decision - the wording used was such that the only possible conclusion was that the Claimant did not accept the adjudicator's decision on any basis, including on the merits;

(5) if there was any doubt about the proper construction of the notice, the arbitrator failed to apply *The Pera* properly because the effect of his decision permitted the stifling of an otherwise legitimate claim.

43. The Claimant argued further that in any event, the question was one of general public importance and the decision was at least open to serious doubt. Because the clauses are part of a standard form contract, the question of their interpretation and construction is one of general public importance. Public interest lies here because adjudications under NEC3 contracts are frequent in practice and what is required would assist the construction industry going forward. The arguments as to serious doubt are the same as those raised in respect of the judgment being obviously wrong.

44. The Defendant's arguments were again similar to those deployed before the arbitrator. It was argued that as a matter of principle, the interpretation of whether a particular document constitutes a contractual notice is a question of fact or alternatively of mixed fact and law.

45. The arbitrator was not obviously wrong nor was his award open to serious doubt. The threshold of being obviously wrong is a high one and the Claimant's argument essentially rests on an erroneous interpretation of the decision of O'Farrell J in *Transport for Greater Manchester*. The correct test for this case is that adopted and applied correctly by the arbitrator, namely:

(1) that the notice requires the identification of the matter which the party disputes and that he intends to refer the matter to the tribunal;

(2) it was not sufficient simply to notify the other party that you do not accept that the adjudication decision is final and binding;

(3) the wording used by the Claimant in the email was not sufficient, objectively read, either to identify the matter about which the Claimant was dissatisfied as including a dispute on the merits nor that there was an intention to refer the matter to the tribunal.

46. The question is not in any event one of general public importance because the particular words which a party chooses to use in a Notice of Dissatisfaction are inevitably one off events and do not assist in the interpretation of the notice provisions of the contract itself.

47. Against the background of the other emails exchanged between the Claimant and the adjudicator about his decision, the only possible interpretation of the correspondence as a whole was that the email at 13:05 was only referring to a challenge as to the adjudicator's jurisdiction for the reasons identified by the arbitrator. There was no ambiguity in the wording. Although the Claimant communicated in the email that it did not accept the adjudicator's decision as being "final and binding", there was nothing in the wording of the email from which a reasonable reader could deduce an intention to refer a substantive dispute on the merits to arbitration. There is a difference between the purpose of a notice and satisfaction of the requirements of a contractual clause in order for valid notice to be given.

48. For the court to allow permission to appeal would not be just in all the circumstances in any event, as the defects which were the subject to the adjudication decision were originally notified as long ago as 2011 and the adjudication decision was in April 2021 but the Claimant has paid nothing, despite default judgment being entered in enforcement proceedings.

Decision

Will the determination of the validity of the Notice of Dissatisfaction substantially affect the rights of the Claimant / Defendant?

49. I accept that determination of the validity of the Notice of Dissatisfaction would substantially affect the rights of the Claimant or the Defendant. If permission to appeal is not granted, the Claimant has no possibility of disputing the merits of the adjudicator's decision. If permission to appeal is granted, the Defendant may lose the benefit of the adjudicator's decision and the arbitrator's award if the appeal succeeds.

Was the decision on a point of law 'obviously wrong'?

50. I will deal with the disputes on the law while considering all the issues in the case. As to the interpretation of the *Transport for Greater Manchester* case, I accept the submissions of the Defendant. I do not accept the submissions of the Claimant that the correct interpretation of the judgment of O'Farrell J is that despite the clear words of the relevant clauses, it is sufficient only to make clear in the Notice of Dissatisfaction that a party does not accept the adjudicator's decision as final and binding, so if that is clear, nothing further is required.

51. Having made that decision, I consider the arbitrator's award and his reasoning. The arbitrator set out in his award what he decided the relevant clauses required for the Notice of Dissatisfaction to be valid. He also set out clearly his analysis and what he considered to be the correct interpretation of the *Transport for Greater Manchester* case in paragraphs 58 to 67 of his award. I do not propose to set out those paragraphs in the course of this judgment.

52. I do not accept that the arbitrator was obviously wrong in his interpretation of the *Transport for Greater Manchester* case. Although O'Farrell J stated at paragraph 43 of her judgment that "the purpose of the notice was to inform the other Party within a specified, limited period of time that the adjudication decision was not accepted as final and binding" and that "a valid notice would have to be clear and unambiguous so as to put the other Party on notice that the decision was disputed", she also made it

clear in her judgment that she was considering the two separate requirements contained within clause W2.4(2).

53. The arbitrator set out cogent reasons in his award, after plainly careful consideration of the evidence and submissions made by both parties, as to why he had come to the conclusion he did. He explained why he decided that the only reasonable reading of the email was that the complaint made by the Claimant related solely to the jurisdiction of the adjudicator and that in any event, the notice did not comply with the two requirements of the clause. Having analysed the wording of the two relevant clauses and the email, he came to the conclusion that the Claimant's analysis elided grounds with matter. The reasons he gave included:
    (1) evaluation of the wording of the 13:05 email itself,
    (2) evaluation of the wording of the other emails sent by and to the adjudicator after he communicated his decision by email,
    (3) the significant differences between the wording used in the notices in the *Transport for Greater Manchester* case and in this case,
    (4) that a reference to the Housing Grants Construction and Regeneration Act 1996 could only be referable to a jurisdictional challenge and not to a challenge to the correctness of the decision itself,
    (5) the fact that the alleged notice was an email sent to the adjudicator rather than to the other party (although the other party and their solicitors were copied in to the email) as required by the clause would militate against the email being a notice of dissatisfaction, and
    (6) a challenge to the jurisdiction of the adjudicator is very different to a challenge as to the merits of his decision on the underlying dispute.

54. In those circumstances, in my judgment, the interpretation of the law by the arbitrator and his application of it in relation to the email cannot be said to be either obviously wrong nor open to any serious doubt.

55. As to the interpretation of *The Pera*, like the arbitrator I am also unpersuaded by the submissions of the Claimant. In any event, I accept the submissions of the Defendant that the case could be distinguished in any event because it concerned the

interpretation of a clause rather than the validity of a notice given pursuant to a clause. In addition I also accept the submission that there is no ambiguity in the wording of the email sent by the Claimant in this case. There may be difficulty with construction of it but, in my judgment, the words used were not ambiguous.

56. As the arbitrator said in paragraph 68 of his award,

"Ravestein submits on the basis of The Pera that "if there is residual doubt as to whether Ravestein had complied with the clause, the ambiguity should be resolved in such a way as not to prevent an otherwise legitimate claim being pursued". Leaving aside whether that is a correct interpretation of The Pera, in my view, there is no doubt and no ambiguity. In my experience, true ambiguity when the words are capable of more than one meaning is rare. Ambiguity does not arise simply because Parties advance rival interpretations of a document: to use the words of Lord Wilberforce in Schuler (L) AGV Wickman Machine Tool Sales Ltd:

> "… Ambiguity … is not to be equated with difficulty of construction, even difficulty to a point where judicial opinion as the meaning has differed",

and Lord Wright in Scammell v Ouston:

> "Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted"."

57. Whilst it is not necessary for me to agree with the analysis and findings of the arbitrator in considering whether or not to grant permission to appeal, I would in fact agree with and adopt both his analysis and findings as set out in his award in deciding that his decision is not obviously wrong.

Alternatively is the question one of general public importance and is the decision at least open to 'serious doubt'?

58. I do not accept that the question posed by this application for permission to appeal is one of general public importance. Although the interpretation of standard clauses could be of general public importance, O'Farrell J has already considered the interpretation of these standard clauses in the *Transport for Greater Manchester* case.

59. The question in this case does not require a separate consideration of the meaning of the clauses themselves but rather an interpretation of the decision of O'Farrell J as to the requirements for a valid Notice of Dissatisfaction under the clauses and thereafter consideration of the email to decide whether it was valid notice or not. In short, I do

not accept that the interpretation of wording in an individual email said to constitute a valid Notice of Dissatisfaction is a question of public importance.

60. In addition, for the same reasons as given above in relation to whether or not the arbitrator's decision was obviously wrong, I do not find that the arbitrator's decision is open to serious doubt.

Despite the agreement of the parties to resolve the matter by arbitration, is it just and proper in all the circumstances for the court to determine the question?

61. I do not accept that it is just and proper in all the circumstances for the court to determine this question. It is relevant in my judgment that the Claimant has chosen not to pay, despite apparently consenting to judgment in default being entered in enforcement proceedings, which action I accept goes against the "pay now, argue later" objective of the Housing Grants, Construction and Regeneration Act 1996.

Conclusion

62. For the reasons set out above, permission to appeal is refused and the other orders sought by the Claimant are refused.

63. At the end of the hearing, the parties agreed that I should deal with costs on paper, as both parties had submitted costs statements. The Claimant shall pay the Defendant's costs summarily assessed as claimed in the sum of £20,222.37. Brief reasons for the costs assessed are that the items of work done by both the solicitors and counsel were reasonably incurred. The amounts charged for the work were reasonable and proportionate to the issues involved and to the amount at stake.

64. I am grateful to counsel for their very able assistance in this matter.