Neutral Citation Number: [2019] EWHC 1152 (TCC)

Case No: HT-2018-000371

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2019

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

J J RHATIGAN & CO (UK) LIMITED	**Claimant**
- and –	
ROSEMARY LODGE DEVELOPMENTS LIMITED	**Defendant**

- -
- -

David Pliener (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant**
Andrew Kearney (instructed under the **Direct Access Scheme**) for the **Defendant**

Hearing date: 12 April 2019

- -

Approved Judgment

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

.....

MRS JUSTICE JEFFORD

Mrs Justice Jefford:

Introduction

1. On 12 April 2019, I heard this application for summary judgment to enforce the decision of the adjudicator, Paul Jensen, made on 22 November 2018 and amended on 27 November 2018. The application had been adjourned on two previous occasion - at the request of both parties and by consent - to enable them to conduct commercial negotiations. Those negotiations did not result in a settlement and this application was relisted. In the circumstances, I gave my decision, which was that summary judgment should be entered for the claimant, at the conclusion of the hearing and gave brief reasons. I undertook to provide the parties with full written reasons in due course and these are those reasons.

2. I start by explaining that the amendment to the decision was made to correct an obvious and commonplace error of getting the parties the wrong way round and nothing turns on it. Mr Jensen's decision was that the Respondent (JJ Rhatigan and Co. (UK) Ltd., the claimant in these proceedings) was entitled to be paid the sum of £8.6 million subject to retention and previous payments in full and final settlement of all claims and counterclaims.

3. It is common ground that resulted in a payment of £1,693,659.69 plus VAT due from the defendant, Rosemary Lodge Developments Ltd ("RDL") to JJ Rhatigan and Co. ("Rhatigan").

4. RDL sought to resist enforcement by way of summary judgment on the basis that Mr Jensen's decision was reached in breach of natural justice.

Principles

5. In short, it is well established that an adjudicator's decision will normally be enforced by summary judgment and that the court is not concerned with the merits of the decision. There are limited bases on which a defendant may resist enforcement including lack of jurisdiction and a material breach of natural justice.

6. I can do no better than cite the well-known passages from the decision of the Court of Appeal in *Carillion Construction Ltd. v Devonport Royal Dockyard* [2005] EWCA Civ 1358 (per Chadwick LJ):

> *"85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he had decided was not the question referred to him or the manner in which he had gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of the adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case, which ..... may, indeed, aptly be described as "simply scrabbling around to find some argument, however, tenuous, to resist payment".*
>
> *86. 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". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely*

(if not more likely) to lie in other disciplines. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractor and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. .....

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waster of time and expense ...."

7. Further, as Akenhead J said in *Cantillon Ltd. v Urvasco Ltd.* [2008] EWHC 282 (TCC) at [57]:
"…. I conclude as follows in relation to breaches of natural justice in adjudication cases: (a) it must first be established that the adjudicator failed to apply the rules of natural justice; (b) any breach of the rules must be more than peripheral; they must be material breaches; (c) breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant ....."

8. It is fair to say that the issues in relation to which RDL, in this case, says that the adjudicator has failed to act fairly are not particularly complex ones. It is not the paradigm case the Court of Appeal had in mind in *Carillion*. But the same principles apply and it is important to have in mind the distinction between matters on which the defendant says the adjudicator has reached the wrong decision and those in respect of which he has acted unfairly in reaching his decision. Further, save in one respect, the complaint made by RDL is not about the failure to draw to the attention of the parties a point or issue on which they ought to have been given an opportunity to comment. Nonetheless, it is obvious that the breach still needs to be material and the characterisation of a material issue as one which is decisive or of considerable potential importance is equally applicable.

9. In order to resist enforcement of the adjudicator's decision, RDL, therefore, needed to establish that there was some plain breach of the rules of natural justice; that that breach was material to the outcome of the adjudication; and that that material breach was such that it would be unfair to the enforce the decision. Mr Kearney submitted that on a summary judgment application, he only had to show that he had a real prospect of success of resisting enforcement on this basis, whilst accepting that that was, at least on the facts of this case, probably a distinction without a difference.

The history of the adjudication

10. In January 2016, RDL (as Employer) and Rhatigan (as Contractor) entered into a contract for the construction of 6 new build residential units and the refurbishment of Rosemary Lodge in Wimbledon. The contract was made on the JCT standard form D&B contract 2011 edition and the contract sum was £6,197,568.

11. In the adjudication, it was Rhatigan's primary case that, in May 2018, the parties reached an agreement of the final account encompassing all claims and counterclaims.

12. On 5 September 2018, Rhatigan made an application for payment reflecting that amount. RDL disputed that such an agreement had been reached and on 5 October 2018, Rhatigan made an application for payment as if there were no such agreement in the far greater sum of approximately £12.4 million.

13. RDL referred to adjudication the dispute as to the value of the payment application in that amount.

14. In Rhatigan's Response dated 1 November 2018, Rhatigan's primary case was that there was an agreement of the amount due in the sum of £8.6 million. In the alternative, Rhatigan's position was that the greater sum previously applied for was due. The Response was supported by a number of witness statements including the first statement of Mr Tom Neylon. So far as the alleged agreement was concerned, the starting point in Mr Neylon's statement was a letter dated 18 May 2018 from Mr Ger Ronayne (Rhatigan) to Mr Bruce McGlew (RDL but addressed to him at Coronado Property Developments). I was told at the hearing that McGlew is the sole director of RDL. After an introductory paragraph about under valuation, the letter continued:

"I understand the reason given for the under valuation is that you are currently re-financing the project and are not in a position to pay the larger amount. Obviously, this is an entirely unsatisfactory and unacceptable position from our perspective and is a clear breach of Contract on your part.

…

I confirm agreeing the following with Iestyn [Mr Lewis of Iesis], (which he in turn confirmed agreeing with you):

1. We would meet with you in London on the 30th May 2018. The attendees of the meeting are to include:
   a. Bruce McGlew
   b. Iestyn Lewis
   c. Ger Ronayne
   d. Tom Neylon

   ….

3. The purpose of the meeting is to try and agree the following:
   a. Value of work as executed to date including design work.
   b. Value of changes
   c. Value of Loss and Expense.

   Alternatively, and preferably we are to try and agree an overall Final Account for the project.

4. Once we agree the amounts due we can then discuss and agree a payment plan in relation to them, that works for both of us. Obviously as part of this discussion,

you will need to inform us of your proposed arrangements for financing the project etc. and we will need to be satisfied in that regard.

….

6. The basis on which we are agreeing to meet is that you are to attend the meeting, fully informed and in a position to conclude an agreement in relation to the matters outlined above.

…"

15. As Mr Pliener submitted, that letter set the context for the meeting. It set out not only the matters to be discussed but also Rhatigan's expectation that RDL would attend the meeting ready to reach an agreement. It recognised that RDL had financing issues and was in the process of refinancing, and that that was relevant to any payment plan.

16. Mr Neylon said that he had attended that meeting with Ger Ronayne and that Mr McGlew and Mr Iestyn Lewis (of Iesis, who were the Employer's Agent under the contract) had attended on behalf of Rosemary Lodge. He identified a number of others in attendance at the meeting including Mr Huw Morgan of Coronado Developments. It is fair to say that the way in which this was put in Mr Neylon's statement portrayed Mr McGlew and Mr Lewis as the key players and placed the other attendees, including Mr Morgan, in something of a supporting role.

17. Mr Neylon's evidence was that an agreement as to the final account amount had been reached at that meeting along with other matters including the omission of parts of the works. The one matter that remained to be agreed was the payment terms and, if they could not be agreed, the parties would revert to the contract terms. He had subsequently sent a draft Deed of Variation to Mr McGlew on 4 June which he exhibited. The covering e-mail was addressed to Mr McGlew and Mr Morgan and copied to Mr Lewis and Mr Ronayne. It asked for the document to be printed and signed so that it could be collected the following day. Mr McGlew's reply the same day said: *"... we may well have comments before a final draft can be circulated so it's unlikely to be ready for collection tomorrow."* Mr McGlew then e-mailed Mr Ronayne on 6 June 2018. That e-mail (also exhibited) was in the following terms:

"I refer to our earlier discussion and confirm that the draft deed which deals with:
1. Revised scope of works – envelope, shell & core and no external works to plots 1&2,
2. Final account for project agreed at 8.6m in full and final settlement, including all contractor and employer claims and counterclaims, and
3. Payment plan (proposed by employer for agreement by contractor, if not agreed contract payment terms remain),
is being reviewed by our lawyers whom I have just chased and should have their comments back shortly to send on to you. It appears that we are both pulling in the same direction, but since it must be set out in a deed I'm sure you appreciate that I must run it past our solicitors, allowing them a reasonable time to get back to us.
Please confirm that you will remove the items relating to the draft deed of variations from your latest contractor's report as it is premature and possibly misleading until the finalisation and execution of a variation deed. It would be counter-productive and serve neither of us if the funders and their monitoring surveyor see the report out of context and decide to pull out of the refinancing."

18. Mr Neylon also said that, pursuant to the agreement, RDL did give parts of the works to alternative contractors. He went further in saying that Mr McGlew led Rhatigan to believe that there was funding in place once the project had been refinanced.

19. In the Response itself, Rhatigan referred to Mr Neylon's statement and then to the e-mail of 6 June 2018 asserting that it set out Mr McGlew's unequivocal agreement to points 1 to 3 in the e-mail and contended that Mr McGlew's conduct in giving effect to point 1, by appointing alternative contactors to carry out such works, put the question beyond doubt. It was submitted to me that that was a partial reading or a misreading of the e-mail of 6 June and that the evidence was clear that works had been omitted under the contract and not in pursuance of an agreement reached on 30 May 2018. Whether or not there is anything in those submissions, how Rhatigan's case was put was clear from the Response.

20. RDL's Reply was dated 8 November 2018. In that Reply, they denied that such an agreement had been reached. In the body of the Reply, the following points were taken:

    (i) The first was that Rhatigan's assertion that there was a binding agreement was inconsistent with the application for payment and claim for £12.4 million.
    (ii) Secondly, RDL took issue with the interpretation of the e-mail of 6 June 2018 and argued that it was only partly quoted in the Response. It was RDL's position that, when the e-mail was looked at in its entirety, Mr McGlew was only referring to the content of the draft document and making it clear that he was seeking legal advice so that it was plain that there was no agreement.
    (iii) Lastly, RDL contended that without prejudice documentation had been provided to the adjudicator.

21. The Reply was accompanied by a statement of Mr Huw Morgan of Coronado Developments who described his role as having been to oversee all construction operations. He said nothing about the meeting on 30 May 2018 or about the alleged agreement.

22. On 16 November 2018 Rhatigan served a Rejoinder. That repeated the case as to the agreement and was accompanied by a statement of Mr Ronayne which related to the agreement and supported Mr Neylon's account and largely repeated it in identical terms. Mr Ronayne's statement also identified who was in attendance at the meeting on 30 May 2018 including Mr Morgan. There was a further statement of Mr Neylon but not on this topic.

23. On 17 November 2018 RDL served a Surrejoinder which was accompanied by 3 witness statements. One of the topics covered in each of these statements was the May agreement. This was the first time RDL had submitted to the adjudicator any substantive evidence about the meeting on 30 May 2018.

24. In the body of the Surrejoinder, RDL said this:

    "17. As JJR has not sensibly abandoned its argument regarding there being an agreement and has produced further witness statement with "supporting" evidence, Rosemary Lodge include a witness statement from Bruce McGlew (Tab A) to explain the nature of the without prejudice discussions between the parties and the fact that no

agreement has been reached. This is corroborated by the witness evidence of Iestyn Lewis (Tab B) and Huw Morgan (Tab C)."

25. RDL relied on the reference to a draft deed and the final paragraph of the e-mail of 6 June 2018 (as quoted above) as supporting the case that no agreement had been reached. RDL cited an e-mail on 18 July 2018 from Waqar Majid at Iesis saying that an instruction was being issued to omit works in the interim, while negotiations were ongoing and no agreement had been reached.

26. The Surrejoinder continued:

> *"22. The fact that there was a draft Deed of Variation demonstrates that there was no agreement, until such time that it was executed. If an agreement had been reached by discussion at a meeting there would have been no emphasis on following it up with a Deed of Variation. There would be no draft Deed of Variation at all. This would have been explained to JJR when it sought legal advice on the drafting of the deed.*
> *23. The parties are both commercial business who realised the importance of recording the terms of any agreement to be reached in a formal and binding way (with the benefit of legal advice). The parties therefore embarked upon a process of drafting and negotiating a Deed of Variation, which was never finalised or executed.*
> *24. It was plainly the parties' intention that if there was no executed Deed of Variation, there was no binding agreement to vary the Contract.*
> *25. This is completely in line with the parties' agreement that "nothing is agreed until everything is agreed" as outlined in Bruce McGlew's witness statement at Tab A (as supported by Huw Morgan (Tab C) and Iestyn Lewis (Tab B)). Some of the principles were agreed but others were not, and that is what prevented the execution of the Deed of Variation."*

27. Turning to the evidence, in his statement Mr McGlew said that, at the meeting there was without prejudice discussion of key heads of terms. He made the point that Mr Ronayne had said "nothing is agreed until everything is agreed". He agreed that the £8.6m figure was discussed as part of the Deed of Variation but he said that they could not agree any terms without having their funders approve them. He asserted that *"everyone knew that we needed agreement from our funders before we could commit to anything"*.

28. Mr Lewis said that regarding the meeting on 30 May 2018, he simply wished to record that during the meeting Mr Ronayne had said "nothing is agreed until everything is agreed". He asserted that both parties agreed that a Deed of Variations would be needed to set out the exact terms and formalise any agreement.

29. Mr Morgan, the bulk of whose second statement was concerned with other matters, agreed with Mr McGlew's statement and confirmed that Mr Ronayne had used the words "nothing is agreed until everything is agreed". He then said:

> *"I also recollect that we made it clear that our hands were tied by what our funders would sign off on and so we could only really deal with principles. Any terms would need to be run passed (sic) the funders and lawyers. Its (sic) why JJR provided a draft*

Deed of Variation shortly after the meeting without us prompting: they knew they meeting was the first step in the process of reaching any formal agreement."

30. As Mr Pliener submitted, and it is relevant to what I discuss below, there was, therefore, reference to the role of the funders in both Mr McGlew and Mr Morgan's statements but there was nothing about this in the submissions themselves. Both RDL's Reply and Surrejoinder contended that there was no concluded agreement on 30 May 2018 and placed emphasis on the Deed of Variation as evidencing either the fact of continued negotiations or the parties' intention that there would be no binding agreement until the Deed of Variation was finalised and executed.

31. Rhatigan served a Rebutter on 20 November 2018 together with a further statement of Mr Neylon addressing the agreement. That statement denied that Mr Ronayne had said that "nothing was agreed until everything is agreed" and reasserted that everything was agreed at the meeting on 30 May 2018 apart from the payment terms.

The adjudicator's decision

32. In his decision, Mr Jensen at paragraph 7 made this statement under the heading "General":

"I have confined by explanations to the essentials only but nevertheless I have carefully considered all the evidence and submissions although not specifically referred to in this Decision."

33. He then turned to the alleged agreement. He recited the letter dated 18 May 2018 which I have referred to above, and which listed the proposed attendees at the meeting on 30 May 2018 as Mr McGlew, Mr Lewis, Mr Ronayne and Mr Neylon. He then said that he had witness statements "from four of the persons who attended" and he listed the same four people. He, therefore, did not make any reference to Mr Morgan's second statement.

34. The adjudicator summarised the evidence which each of these four witnesses had given. In doing so, he expressly referred to the entirety of the e-mail of 6 June 2018 and to the e-mail of 18 July 2018.

35. His summary of Mr McGlew's evidence was as follows:

"Mr Bruce McGlew did not deny that agreement was reached. He has said in his statement that the figure of £8.6m was discussed and that there were other key terms which needed agreement such as payment terms and that the Claimant [RDL] could not unilaterally agree any terms without having the funders approve them. He has been careful not to deny that agreement was reached as to the figure. He also said that during the meeting Mr Ronayne stated that "nothing is agreed until everything is agreed."

36. He then referred to Mr Lewis's evidence and, at paragraph 20, said this:

"It may be considered surprising that both Mr McGlew and Mr Lewis could recollect and state the exact words which they say were used by Mr Ronayne at a meeting held approximately six months prior to providing their witness statements, which suggests that these two witnesses collaborated when writing their statements. Mr Neylon in a subsequent Witness Statement has denied that such a statement was made, but I find that that part of the evidence is irrelevant anyway. Both of the Claimant's witnesses had said

that the statement was made during the meeting, and therefore it is not inconsistent with the Respondent's allegation that by the end of the meeting everything was agreed."

37. The adjudicator then set out his findings which, for the reasons that appear below, I quote almost in full:

*"**My Findings as to the Agreement***

22. I have considered all the evidence including that of the four witnesses who attended the meeting on 30th May 2018 and particularly the evidence of the Respondent's witnesses that was denied by the Claimant's witnesses, the subsequent conduct of the Parties in having the fit-out of plots 1 &2 carried out by others, and the email from Mr McGlew of 6th June 2018, repeated above, which confirmed at paragraph no. 2 that the final account was agreed at £8.6M in full and final settlement, including all Contractor and Employer's claims and counterclaims, and I conclude that the agreement was made as alleged by the Respondent.

23. The Claimant has relied on the fact that the Deed of Variation was not executed but I find that that is irrelevant. It is quite usual for parties who have made a binding oral agreement to record that agreement in writing, and if as is the case here the Deed was not finally executed that does not detract from the legal standing and binding nature of the oral agreement.

24. In fact it would appear that the Deed of Variation was agreed with the exception of the Payment Terms as confirmed in the email from Mr Neylon to Mr McGlew of 28th August 2018 as repeated below.

Email from Tom Neylon to Bruce McGlew – 28th August 2018 12.55

"Bruce

As discussed this morning on the phone the only outstanding item on the deed is the payment terms as you have stated you "cannot agree these with the financiers until PC has been achieved".

All other conditions of the Deed of Variation are agreed

…."

Conclusions

25. I conclude therefore that a binding agreement was reached for the Respondent to be paid the gross sum of £8.6M subject to retention and previous payments in full and final settlement including all Respondent's and Claimant's claims and counterclaims as stated by Mr McGlew in his e-mail of 6th June 2018 as repeated above."

RDL's defence

38. With that background, I turn to RDL's case. I should preface what I say below by observing that RDL was represented in the adjudication by Quadrant Resolution Ltd. ("Quadrant") and not by solicitors or counsel. When RDL first responded to this application, they relied on a witness statement of Mr Preece of Quadrant Resolution. Quite properly he said that Quadrant did not have conduct of the proceedings and that RDL would be instructing counsel on a direct access basis. He nonetheless set out what he understood would be RDL's case that there was a breach of natural justice and he gave evidence on two matters which he said went to the fairness of the decision. There was some argument before me as to the differences between the case now advanced by RDL with the benefit of Mr Kearney's representation and the case as previously advanced, or at least the emphasis on particular aspects of that case. None of this seems to me material.

39. In Mr Preece's statement, the first point relied upon was that RDL contended that there was a breach of natural justice arising out of paragraph 20 and the comment that the recollection of the identical words said to have been used by Mr Ronayne suggested that RDL's witnesses (Mr McGlew and Mr Lewis) had collaborated. That was construed as a finding of dishonesty and, as I understand it, the contention would have been that that was unfair (and sufficiently so that I should not enforce this decision) because the allegation of dishonesty was never put to Mr McGlew or Mr Lewis.

40. Mr Kearney did not pursue that argument, not because it was misconceived, but because, in paragraph 20 of the decision, the adjudicator said expressly that the evidence about "nothing is agreed until everything is agreed" was irrelevant. It followed that any breach of natural justice could not be a material breach. RDL continued, however, to place some reliance on this point as part of the background and as going to the fairness of the adjudicator's approach to their evidence.

41. In my judgment, there is nothing in this point. Mr Jensen's remarks do not amount to a finding of dishonesty or fabrication of evidence. It is not uncommon that witnesses discuss their evidence. One of the issues that then arises is that witnesses can influence each other's evidence and, intentionally or otherwise, one persuades the other that he remembers something or remembers it a particular way. Mr Jensen's observation goes no further than to cast doubt on such evidence and to give a reason why, had be considered it relevant, he might have placed less weight on it or preferred the evidence of Mr Neylon.

42. I should make it clear that I am by no means deciding that if Mr Jensen had made a finding of dishonesty that would, in any event, have amounted to a breach of natural justice or a material breach. The nature of the argument would be that the adjudicator has decided the case on a basis that has not been put to a party and that that party has not had an opportunity to respond. So whether there is a breach of natural justice must depend on the circumstances of the case and there is no single point of principle to be stated.

43. The main complaint now is that, as Mr Kearney put it in his written submissions, the adjudicator has failed to deal with a potentially determinative matter and as a result the process was materially unfair and in breach of natural justice

44. It seemed to me that what the potentially determinative matter was said to be developed in the course of the argument but, as I have already indicated, I attach no particular significance to that in this case. In Mr Preece's statement what was relied on was that the adjudicator appeared to have overlooked Mr Morgan's second statement. Mr Kearney continued to rely on that argument (which I shall return to below) but as an element of the argument that the adjudicator had failed to deal with a key defence, namely that there was no intention to create legal relations at the meeting on 30 May 2018 – and that was an issue on which Mr Morgan's evidence, it was submitted, was itself potentially determinative.

Failure to deal with an issue: principles

45. The issue of whether an adjudicator's failure to deal with an issue amounts to a breach of natural justice, and a material breach, such that it would be unfair to enforce the

decision is by no means an easy one. In Coulson on Construction Adjudication, 4th edition, from paragraph 13.39, a number of cases are cited where the court has declined to give summary judgment because an adjudicator has failed to deal, in particular, with a significant defence and has done so deliberately, for example, because he has regarded the matter as outside his jurisdiction. In the result, the adjudicator has either failed to deal with the dispute referred to him or has been regarded as acting in breach of the rules of natural justice. Paragraph 13.51 continues:

"So far so good: it is relatively easy to see why a deliberate failure to consider an issue (particularly a defence) which the adjudicator should have considered might well amount to a breach of natural justice. But the Scottish case of Whyte and Mackay Ltd v Blyth and Blyth Consulting Engineers Ltd. took the matter considerably further. There, the adjudicator failed to consider a submission raised by the defenders to the effect that, even if they had advised that piling work was necessary, the employer would not have taken that advice. The judge found that the adjudicator had addressed the question of causation but for whatever reason, did not mention the defenders' submission on the issue that the pursuers would not have paid for the piling work in any event. It appears, therefore that the adjudicator's error was inadvertent; it certainly did not appear deliberate. Lord Malcolm concluded that this was a very significant omission in the adjudicator's decision and reasoning and his failure to deal with what was potentially a complete answer to the claim amounted to a breach of natural justice. Whilst this decision is perfectly understandable on its own facts, it might be regarded as something of an inroad into the general principle that an adjudicator can make errors or law and fact without affecting the validity of his decision. ..... It is respectfully submitted that, at least on this aspect of the case, Whyte and MacKay should be regarded as a case on its own facts, in particular because the point raised by the defenders was so important, and the adjudicator's failure to deal with it was so complete that, in those unusual circumstances, a breach of natural justice was made out. ...."

46. Mr Kearney relied on the decision in *Whyte and Mackay* [2013] CSOH 54 and, whilst properly drawing to my attention the reservations expressed by Coulson LJ in his capacity as the author of Construction Adjudication, submitted that this was a case in which the adjudicator's failure to deal with an issue which would amount a total defence was so complete that a breach of natural justice was made out.

47. For the reasons I explain below, it is unnecessary for me to decide whether to follow *Whyte and MacKay* and whether there are (unusual) cases were an inadvertent failure to deal with a key defence might amount to a breach of natural justice. In my view, such an inadvertent failure is far more likely to be an error within the adjudicator's jurisdiction and not a matter that amounts to a breach of natural justice. A comparison may be made with the position where a judge makes such an error. That might be a ground of appeal but it would not normally amount to a breach of natural justice in the conduct of the proceedings. It is, however, unnecessary to determine the point of principle because this is not a case in which the adjudicator has made such an error.

The alleged failure to deal with an issue in this case

48. RDL's Reply clearly set out a case that there was no agreement reached at the meeting on 30 May 2018. Some reliance was placed on the fact that there was only a draft deed of variation. In the Surrejoinder, the position was very clearly adopted by RDL that there could be no binding agreement until a Deed of Variation was finalised and executed. In

terms of legal analysis, that was a case that there was no intention to create legal relations until a Deed of Variation was signed. The particular expression "no intention to create legal relations" was not, however, used. The further evidence, including that of Mr McGlew and Mr Lewis, served with the Surrejoinder, advanced variations on the same cases, namely that there was no agreement and that there could be no agreement until the Deed of Variation was signed. Mr McGlew provided the further explanation for why that was the position, namely the need to obtain the approval of funders and lawyers.

49. Mr Kearney's primary submission, as I have said, is that the adjudicator failed to address at all the defence that there was no intention to create legal relations. Although that expression was not used by the parties, and is similarly not used in his decision, it is entirely clear that it was an issue which the adjudicator had in mind and addressed.

50. As set out above, the adjudicator recited in his decision the whole of the e-mail of 6 June 2018 – he clearly had it in mind. He may have reached a conclusion as to its meaning that RDL disputes but that is a matter for him. He similarly and clearly had in mind the evidence of both Mr McGlew and Mr Lewis which supported the argument that was front and centre of the Surrejoinder that there could be no binding agreement without the executed Deed of Variation. At paragraph 23, he expressly concluded that the fact that the Deed was not executed was irrelevant and he found that there was nonetheless "a binding oral agreement". He referred again in paragraph 25 to a binding agreement. It seems to me that that use of the word "binding" also makes it plain that he had in mind, and rejected, the argument that there might be an agreement in principle but one that was not binding.

51. RDL is, therefore, left with the contention that it can be inferred that the adjudicator did not have regard to this key defence because he did not refer to the evidence of Mr Morgan to the effect that Rhatigan had been told at the meeting that *"our [RDL's] hands were tied by what our funders would sign off on and so we could only really deal with principles. Any terms would need to be run passed the funders and lawyers."*

52. I am prepared to accept that RDL would have a real prospect of success on the argument that the adjudicator overlooked Mr Morgan's second statement on this issue. He may have been distracted by the proposed list of attendees at the meeting on the 30 May 2018 which corresponded with four of the witness statements submitted to him. But he clearly refers to witness statements from four of the persons that attended and to the four witnesses that attended and not to "four of the statements" or "four of the witnesses". Further, although Mr Morgan also asserts that Mr Ronayne used the expression "nothing is agreed until everything is agreed", the adjudicator does not mention Mr Morgan in the context of his comments about collaboration of witnesses. It appears from all of that that the adjudicator thought that he had statements from those four people, material to the meeting, and not, as Mr Pliener suggested, that he paid little attention to Mr Morgan's second statement because it was said simply to corroborate the statement of Mr McGlew and added nothing. Indeed that was also true of Mr Lewis' statement to which the adjudicator nonetheless expressly referred.

53. Rhatigan further relied on the paragraph of Mr Jensen's decision in which he said that he had had regard to all the material before him but had confined his explanations to the essentials. Mr Kearney submitted that that was a pro forma statement in Mr Jensen's decisions which could not be taken at face value and, in this case, was obviously wrong.

54. There was no dispute that it appeared to be a "pro forma" paragraph in the adjudicator's decisions and I was referred to three reported decisions in which reference was made to the same pro forma paragraph in this adjudicator's decisions: *Balfour Beatty Construction Northern Ltd. v Modus Corovest (Blackpool) Ltd.* [2008] EWHC 3029 (TCC); *Jacques v Ensign Contractors Ltd.* [2009] EWHC 3383 (TCC); *Axis M&E UK Ltd. v Multiplex Construction Europe Ltd.* [2019] EWHC 169 (TCC). In the *Balfour Beatty* case, at [47] to [48], Coulson J (as he then was) said this:

> *"47. .... [The adjudicator] was not obliged to set out in extenso his response to every last element of Modus' case; nor was be obliged to give detailed reasons for every part of his conclusion.*
>
> *48. Further, for the reasons I have already indicated, the Adjudicator took all of these matters into account. I have already referred to paragraph 8 of his decision* [in the present case paragraph 7] *... That makes plain that the Adjudicator considered every point raised by the parties, whether or not he had dealt with these points expressly in his decision. There is nothing to suggest that the adjudicator did not do what he said he had done in paragraph 8 of his decision ..... It seems to me that the adjudicator took into account all the relevant points, including this secondary argument."*

55. In other words, the fact that a paragraph is a standard paragraph does not mean that it is not true and accurate. However, Mr Kearney submits that this is a case in which there is reason to suggest that the adjudicator had not done what he said he had done. He relies on the very clear references to the four witness statements but also to the fact that there was a vast volume of material before the adjudicator relating to the final account claim which he could not possibly have had regard to during the period of the adjudication.

56. Those submissions seem to me to be well founded and, if the issue before me was simply whether there was a real prospect of success on the argument that Mr Jensen had overlooked a witness statement then I would have been in Mr Kearney's favour. However that is not the relevant issue. Rather the question is whether there is a real prospect of defending the claim to enforce the adjudicator's decision and that turns on whether the adjudicator has failed, inadvertently in this case, to address a key defence to the extent that that amounts to a breach of natural justice. The apparent omission of any consideration of Mr Morgan's second statement is, therefore, only relevant in so far as it goes to whether there is a real prospect of success on the argument that the adjudicator has failed to address a key defence.

57. I have already set out above why I do not consider that argument to have any real prospect of success and the particular reliance placed on the omission of any reference to Mr Morgan's evidence does not take the matter any further.

58. Firstly, the point that RDL makes that it could not enter into a binding agreement until it had funder approval is, it seems to me, an explanation for, or an element of the evidence as to, why it had no intention to create legal relations. I note that the e-mails in June 2018 mentioned referring the terms of the Deed of Variation to the lawyers but not to the funders. The adjudicator may well have had this point about funder approval in mind but rejected it because it was not consistent with the contemporaneous e-mails or simply because he did not accept the evidence of Mr McGlew. That was a matter for him.

59. Even if the adjudicator did not have this explanation or element of the evidence in mind, that would amount to no more than failing to take into account an element of the evidence rather than a crucial defence.

60. A similar point was made by Jackson J as he then was in the first instance decision in *Carillion Construction Ltd. v Devonport Royal Dockyard Ltd.* [2005] EWHC 778 (TCC) at [81] cited with approval by Akenhead J in *Jacques v Ensign Contractors Ltd.* [2009] EWHC 3383 (TCC) at [22]:

"If an adjudicator declines to consider evidence which, on his analysis of the facts or the law is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on Wednesbury grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision ....."

It seems to me that the position must be the same where the adjudicator in error overlooks some aspect of the evidence. It would be perverse if deliberately, but erroneously, disregarding evidence was not a breach of natural justice but inadvertently doing so was.

61. Secondly, the specific case that there could be no binding agreement without funder approval was not, on any view, a key defence. The point did not feature in the Reply or the body of the Surrejoinder where the emphasis was on the need for the Deed of Variation, rather than on the reasons why it could not, on RDL's case, be finalised and executed.

62. Thirdly, Mr Morgan's evidence in reality added nothing to the evidence of McGlew which was expressly referred to in the decision. Mr Kearney drew a very particular distinction between the content of Mr McGlew's evidence and that of Mr Morgan. He submitted that Mr McGlew did not expressly say that Rhatigan had been told at the meeting on the 30th May that funder approval was required and that no binding agreement could be reached without that. That he says is the importance of Mr Morgan's evidence which contains the only express reference to that communication to Rhatigan. Persuasively though that point was put, it seems to me to involve a level of textual analysis which is unrealistic. Taken as a whole, Mr McGlew's evidence was obviously intended to convey that the need for funding approval was communicated to Rhatigan at the meeting and that everybody knew at the meeting and/or at the conclusion of the meeting that funder approval was required (because that point had been communicated). Whilst it is right that Mr Morgan's statement is the only one that expressly says that Rhatigan was told that, in reality it added nothing to the evidence already given by Mr McGlew and Mr Lewis.

63. To the extent that RDL's case was that the adjudicator had simply failed to take into account an aspect of the evidence, I cannot see that that could amount to a breach of natural justice in itself. It would simply be an error but not one with which the court is concerned.

64. Even if it could amount to a breach of natural justice, it would not, in this case, be a material breach because Mr Morgan's evidence was not in any sense crucial.

65. For completeness I should add that some emphasis was also placed on the fact that Mr Neylon's final statement disputed that the expression "nothing is agreed until everything is agreed" but made no reference to the evidence of Mr Morgan (or indeed Mr McGlew) about the need for funder approval and, thus, it was submitted, did not deny that Rhatigan had been told that RDL's hands were tied, that they could only deal in principles, and that any terms would have to be run past the funders and lawyers. RDL's argument was that that evidence (from Mr Morgan) was, therefore, undisputed and that by overlooking that evidence the adjudicator had failed to deal with determinative evidence. That argument, however, adds nothing. It is simply another way of putting the argument that the adjudicator failed to address a key defence (and an element of the evidence going to that defence). For the reasons I have given Mr Morgan's evidence, in reality, added nothing to that of Mr McGlew which the adjudicator plainly took into account. By the time of Mr Neylon's last statement, the arguments had been fully ventilated and the absence of a denial in Mr Neylon's statement of every statement in Mr McGlew's could not sensibly be regarded as an admission of Mr McGlew's evidence. If the adjudicator erred in his assessment of that evidence, as RDL contends, that is not a breach of natural justice or a reason not to enforce the decision.

66. For these reasons, I gave judgment in favour of the Claimant.