FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 18
CA98/22 and CA101/22

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motions

in the causes of

ATALIAN SERVEST AMK LIMITED

Reclaimers

against

B W (ELECTRICAL CONTRACTORS) LIMITED

Respondents

et vice versa

Reclaimers (AMK): Barne KC; Brodies LLP
Respondents (BWE): Moynihan KC, Broome; MacRoberts LLP

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18 April 2023

Introduction

[1] In 2020 AMK carried out electrical sub-contract work on the Edrich and Compton stands at Lord's cricket ground, London. They engaged BWE as sub-sub-contractors for certain elements of the project. References to a contract (below) are to that sub-sub contract. Once the work was completed, the parties followed the contractual procedure to determine

the final amount due to BWE. They were some distance apart. BWE referred the matter to adjudication. After the first adjudicator resigned, a second adjudicator determined that AMK should pay BWE £1.4 million (all sums have been rounded up).

[2] BWE have raised two actions; one to enforce the adjudicator's award and the other to make a final determination. AMK wish the award to be set aside *ope exceptionis* in BWE's enforcement action. AMK have also raised a separate action seeking payment of the amount which they say is due to them (£1.04 million) in terms of their "Final Account Statement", which they maintain is both valid and binding.

[3] Little has happened in BWE's substantive action to determine the amount due. The commercial judge dealt only with the two satellite actions. He found that AMK's FAS was valid, but it was not binding because, in terms of the contract, it had been timeously challenged by BWE. To grant decree for payment in favour of AMK would undermine the adjudicator's award. In BWE's action, the judge granted decree enforcing the adjudicator's award pending final resolution of the dispute. The question is, essentially, whether he was correct to do so.

The Contract and the Final Account

[4] The contract was for a "fixed price lump sum" (clause 25), with BWE applying for monthly interim payments based upon valuations of the works in accordance with specified rates and prices (clause 27). The works were not defined in the contract beyond being the supply and installation of electrical services and "free issue main equipment". The scope of the works was set out in drawings which the court has not seen. The contract sum was to include all things necessary to execute the works (clause 16), including the provision of all necessary labour and materials. AMK were entitled to issue instructions for variations of the

works (clause 17), including additions and omissions. These were to be valued in terms of clause 19 on:

> "1. … a fair and reasonable basis with reference to the relevant rates and prices in … the subcontract (where applicable) and/or in accordance with the following rules …".

These rules provided that, if the price was not prescribed by the contract, AMK could value the variations on a "fair and reasonable basis with reference to current rates within the marketplace". The prices in the bills of quantities were to determine the valuation of work of similar character executed under similar conditions as work priced therein. Only if a valuation could not be determined according to the rules would it be valued on a daywork basis (clause 21). There was provision for extensions of time (clause 22) beyond the scheduled 31 week contract period ending in April 2021.

[5] Clause 33 of the contract deals with the "Final Account". First, AMK required to set a completion date. On 11 February 2022 they gave notice that it was 17 September 2021. Secondly, within 2 months of notification of the date, BWE had to submit a detailed "Final Account" to AMK. They did this on 8 April. It took the form of a 70 page submission from a chartered quantity surveyor. It can be summarised as follows:

	£
Contract Sum	715,000.00
Signed Dayworks	283,310.86
Agreed	4,759.20
Dmob & Remob	1,000.68
Stand down time	8,747.05
Supply of materials	2,277.08
Late working match attendance	186,254.24
Weekend working	361,898.15
Loss & Expense claim	802,009.88

£1000 and under	10,379.80
Add & Omit	508,912.79
VO 001	170,940.30
Access & Plant for VO 001	43,860.56
TOTAL	**3,099,350.60**

[6] The add and omit figure referred to variations as the work progressed. These all related to specific emails or drawings. The late and weekend working figures were derived from daywork sheets. The loss and expenses claim includes amounts attributable to extensions of time. The surveyor applied the contractual rates to specific items of work. Where there was none, he selected an hourly rate of £30 per operative. The gross valuation of about £3.1 million meant that AMK would be due to pay BWE £1.9 million.

[7] Thirdly, within 28 days, AMK were to produce a Final Account Statement of "the amount … due to [BWE]". AMK did this on 6 May 2022. This FAS brought out a sum of £1 million due by BWE to AMK. It was a remarkably short document which contained the following table:

Valuation Summary	£
1 Subcontract Works …	715,000.00
2. Variations	306,198.74
3. Contra changes	-243.676.56
4. Non provision of electrical materials	-595,965.79
5. Liquidated Damages	-178,750.00
…. Sub total	2,806.39
…. Retention	70.16
Sub total	2,736.23
…. [Deduct] previously not certified	1,042,174.37
Net amount considered due	-1,039,438.14

There was no attempt to respond to the detail of BWE's submission.

[8] Fourthly (clause 33.4), the FAS was stated to be "final and binding on the subcontractor [BWE]" unless the parties agreed to modify it or BWE commenced an adjudication or court proceedings within 20 working days.

The Adjudication

[9] On 19 May 2022, BWE notified their intention to refer the matter to adjudication. On 26 May, they did so. They claimed the sum calculated in their detailed Final Account. The dispute was said to concern "the terms of the Final Account Statement issued by [AMK] and the sums properly due (to BWE by AMK)." The referral pointed to the differences in the valuation of the variations; £2.384 million as against £306,000. AMK had applied contra charges, deducted a large sum for non-provision of electrical materials, and included a figure for liquidate damages. On 27 May, BWE commenced court proceedings in which they repeated their claims.

[10] On 15 June, the first adjudicator resigned because he concluded that the dispute was "absolutely incapable of proper resolution in the timescales set by the Construction Act". He had received 9 packing cases of files. On 8 September (ie outwith the 20 days) BWE served a new Notice of Adjudication, with a referral following on 15 September. The referral was accompanied by 26,000 pages of material to which AMK responded; this time in detail. The referral again summarised the dispute as concerning the sums properly due to BWE by AMK. It set out the issues under reference to the figures in BWE's table, but by this time AMK had intimated an extra-contractual "Final Payment Notice". This altered the differences in the sums claimed by the parties to a relatively minor extent. Reference to the FAS was omitted from the question asked of the adjudicator. He was still required to

determine the sum properly due. BWE had added an extension of time claim. The total sum claimed was unaltered.

[11] The response to the referral was some 50 pages long with 20 appendices, incorporating an opinion of senior counsel and several witness statements. It is a somewhat tendentious document which contains a substantial number of legal submissions about the burden of proof and the law of evidence. It does make it clear that AMK maintained that BWE's surveyor had not valued the works in accordance with the contract, although AMK accepted that it set out a £30 hourly rate for unpriced items. AMK contended that: (i) the FAS was final and binding; (ii) the adjudicator therefore had no jurisdiction; and (iii) there had been a breach of natural justice given the limited time which they had been afforded to make an adequate response.

[12] In fact, AMK had been able to produce a schedule which responded to each of the many claimed variations. They challenged the validity of BWE's valuations in three specific areas: conduits; daywork rates; and an unexplained increase in valuations when set against previous applications for payment. AMK also took issue with BWE's claims for losses in relation to overheads and profit, preliminaries and delay. They detailed contra charges and founded upon the provisions whereby materials were included in the contract sum. They set out a claim for liquidate damages. The response was met with a 38 page "reply", which was followed by a "rejoinder" with 19 appendices.

[13] On 26 October 2022, the adjudicator wrote to the parties observing that the scope of the original works "has long since been drowned out by … a 'Beck and Call Contract'". He doubted whether the charges amounted to variations and invited comment on how to evaluate the work done. BWE replied on the same day; agreeing that the contract had developed into a beck and call arrangement, but referred to detailed costings in line with the

contractual valuation provisions. On the following day, they sent the adjudicator a figure of 62,156.50 for the total man hours worked. AMK responded on 31 October complaining that neither party had suggested that a new beck and call contract had been formed. They claimed that this was another breach of natural justice, that the number of hours worked was irrelevant, and that they did not have time to respond to BWE's figures. AMK reiterated that the contract terms required to be applied; ie that the detailed rates for individual items had to be applied and then only if each variation were proved.

[14] BWE accepted that the adjudicator was free to decide how to resolve the dispute (Scheme for Construction Contracts (Scotland) Regulations 1998, sch para 13). On 2 November, they sent the adjudicator vouching for the hours worked. On the same day AMK responded in some detail on the reliability of the man hours figure, while stressing the need to adhere to the contractual terms. The adjudicator took note of AMK's representation but explained that his overarching task was to determine the "true value" of the "account". On 8 November, AMK again repeated their position; referring to earlier documents and commenting on the man hours figure advanced by BWE. This was responded to in kind by BWE. On 9 November the adjudicator agreed that there was no new contract; "The contract is varied. AMK piled on the work and BW piled on the men … My award is coming to you on Friday. Now is the time to stop commentary."

[15] AMK continued to maintain that the finality of the FAS was a preliminary point. The adjudicator rejected this approach. He considered it to be a potential defence in the substantive action. He also agreed with BWE that: (a) the FAS was invalid because of its lack of specification (Housing Grants, Construction and Regeneration Act 1996, s 110A(2)(b)); and (b) the adjudication had been raised timeously. The resignation of the first adjudicator was of no moment in this context.

[16] On 11 November, the adjudicator issued his decision on the true value of the final account. He aimed to do "broad justice at high speed". That was inevitable because he had to issue his determination by 13 October 2022 (Scheme, para 19(1)); later extended by the parties to 11 November. The adjudicator disagreed with AMK's agents' "enthusiastic arguing" in their lengthy submissions. He adopted the £30 per hour rate for normal working plus non-productive overtime. He explained that this had originally been an 8 month labour only contract for a fixed sum of £715,000. It ought to have been completed by April 2021. It had changed out of all recognition.

[17] The adjudicator continued:

> "AMK kept instructing more and more work and [BWE] found more and more men. Instead of the anticipated c20,000 hours of electrical Works, it became c62,000 hours of work. Instead of 8-months on site, [BWE] spent 17-months on site. They got all done 11 February 2022 (*sic*). And in that time, acting on the 'beck and call' of AMK, [BWE] brought in not only more men but also more and more management staff, more and more plant and equipment.
>
> These circumstances were so disruptive, changes so extensive that they are outwith the classification of Variations per Clause 17 of the Contract Document. More accurate to characterise these events as a Varied Contract. Nothing in Clause 17 provides power to AMK to demand more men and instruct more work faces (*sic*) and prolong the work in a haphazard unplanned way. But, if I am wrong, and if this altered work does amount to Variations, it appears that [BWE] tried to operate the machinery while AMK required [BWE] to get the work done in any case. And, if that requires Clause 19 evaluation, then it shall be done on a fair and reasonable basis. In any event that fair and reasonable approach is taken below regardless of Clause 17, 18 and/or 19."

[18] In reaching his evaluation, the adjudicator posed certain questions: (1) "Whether [BWE] has demonstrated that it is to be paid for 62,156 hours and on a 'fair and reasonable' basis for the whole works?"; (2) "Whether [BWE] has demonstrated that its management … input time of 1,911 days is reasonable on a 'fair and reasonable' rate (*sic*) ?"; (3) Whether [BWE] is correct to claim £141,532 for plant and equipment?"; (4) Whether … [BWE] is

entitled to be onsite to the date it actually completed its works (ie 11 February 2022)?"; (5) "Whether the prolonged stay onsite of [BWE] and any associated expense is compensated by the operative man-hours income?". He answered all of these questions in the affirmative.

[19] The adjudicator determined that BWE had demonstrated that they should be paid for 62,156 hours of work on a fair and reasonable basis (ie at £30 per hour). This totalled £1.87 million to which Non Productive Overtime hours were added to produce £2.02 million. Management input was valued at £464k (1,911 days) and plant and equipment set at £142k. The adjudicator produced a breakdown of all these figures. AMK were not entitled to any contra claim for the supply of materials, beyond about £1.8k. AMK were not entitled to withhold the sums due. The adjudicator concluded that the gross Final Account ought to have totalled £2.5 million; producing a net sum payable to BWE of £1.4 million plus interest, fees and expenses.

The Commercial Judge

BWE* v *AMK

[20] In the action by BWE to enforce the adjudicator's award, the commercial judge acknowledged the need to promote the statutory scheme for adjudication; to provide parties with a simple and rapid means of determining their rights on an interim basis. The question for the adjudicator had been wide in scope, *viz*: what sum (if any) was due to BWE by AMK under the contract? AMK's argument was that the adjudicator had strayed from that question by introducing unjustified enrichment to determine whether extra-contractual sums were due *quantum meruit (sic)*. The contract had allowed for additional works to be paid for on a "fair and reasonable" basis, as did the general law when no valuation mechanism was provided. Although the adjudicator may have complicated matters by

referring to a "beck and call" contract, neither party had suggested that a new contract had been entered into. It may be that the adjudicator's approach to valuation was incorrect, but that was not the issue. The valuation which had been carried out could not be described as a "frolic" as opposed to a genuine attempt to answer the question posed.

[21] The adjudicator held that the FAS was invalid, although this had not been raised by the parties. The commercial judge held that the adjudicator had been entitled to raise this issue under the Scheme. The parties had had ample opportunity, which they took, to address the adjudicator on this and the other matters complained of by AMK. Their complaints of a breach of natural justice and a failure to deal with their submissions were rejected. Although the adjudicator might have expressed his reasoning in a more comprehensive form, that reasoning was adequate. Accordingly, BWE were entitled to enforce the award.

AMK* v *BWE

[22] AMK's action sought declarator that the FAS was valid and binding on BWE and the adjudicator. If that were granted, decree for payment in favour of AMK ought also to be granted. The effect of that, reasoned the commercial judge, would be that AMK could set off the sum in the decree against that determined by the adjudicator, thus depriving the adjudicator's award of its binding quality until final determination of the dispute. The judge would have regarded the conclusion for payment to AMK as incompetent but, as that had not been pled, he would dismiss that conclusion (*sic*) as irrelevant, although that may not have been reflected in the interlocutor.

[23] The contract had stipulated that AMK had to produce the FAS within 28 days of the Final Account. They had done this. Nothing more had been required in terms of the

contract, although section 110A of the 1996 Act applied whereby the FAS had to state not only the sum due but also the basis of the calculation. The FAS could be valid in terms of the contract (which is what the declarator sought) but invalid in terms of the Act. This FAS complied with both. It provided sufficient information. It had set out the sub-contract lump sum and then valuations of the variations, claims for contra charges, supply of materials and liquidate damages. The commercial judge granted declarator that the FAS was valid.

[24] For the FAS to be binding, the commercial judge reasoned that that would require clause 33.4 to state in addition that it was only in the relative adjudication or court proceedings that the FAS could be subject to challenge. The clause differed from those in the standard forms which had been used in *D McLaughlin & Sons* v *East Ayrshire Council* 2022 SLT 1245 and *Trustees of the Marc Gilbards 2009 Settlement Trust* v *OD Developments and Projects* [2015] BLR 213. Here, the FAS was only binding on BWE. The natural construction of the clause was that the FAS was binding unless relevant proceedings were timeously raised; in which case it was not binding. Proceedings had been raised timeously. The judge "dismissed" the conclusion which sought declarator of the binding nature of the FAS.

Submissions

AMK

[25] The adjudicator had gone off on a frolic of his own in considering that the contract had been superseded by a new "beck and call" variety. The valuation of the works had to be carried out in terms of the contract, notably the provisions for variations and their valuation (clauses 17 to 19). The adjudicator exceeded his jurisdiction. He failed to distinguish between the original works and the variations. He failed to exhaust his jurisdiction in not considering several defences to BWE's claims. These claims had been advanced by BWE on

the basis of the rates for pieces of work which had been set out in the contract. Both parties had approached the issue from that angle. The adjudicator had not answered the question posed, thus rendering his award unenforceable (*McAlpine PPS Pipeline Systems* v *Transco* [2004] 96 Con LR 69 at para 129-134; *Van Oord* v *Dragados* 2022 SLT 521 at para [18]; *NKT Cables* v *SP Power Systems* 2017 SLT 494 at paras [110] and [114]). Instead, he had posed and answered a number of questions (para [18] above) which had not been presented by the parties. It was necessary to look not only at the referral notice and the response, but also the circumstances giving rise to the adjudication; how the matter had crystallised.

[26] An adjudicator had to act in accordance with the principles of natural justice. If an adjudicator intended to introduce a new issue, he had to do so at an early stage. In this adjudication there had been many days of pleadings in which the issues had been set out by both parties along similar lines to each other. The adjudicator had only set out what he intended to do at a late stage, contrary to natural justice (*Costain* v *Strathclyde Builders* 2004 SLT 102 at para [20]; *SGL Carbon Fibres* v *RBG* 2011 SLT 417 at paras [30]-[34]).

[27] The commercial judge erred in failing to hold that clause 33.4 should be construed as providing that the FAS was only open to challenge in timeously commenced adjudication or court proceedings. It should not be read as providing that any timeously commenced adjudication or court proceedings provided a "foot in the door" whereby the FAS was not binding in proceedings brought outwith the specified period.

[28] The commercial judge failed to give sufficient weight to the underlying policy concerns identified and applied in *D McLaughlin & Sons* v *East Ayrshire Council*; that it would be undesirable for proceedings brought timeously to provide such a "foot in the door". The contractual provisions in *D McLaughlin & Sons* (and in *Trustees of the Marc Gilbards 2009 Settlement Trust*) were not identical to clause 33.4. The policy was not to allow the foot in the

door. Rather, parties had the ability to choose how they wanted to bring their challenge and they should have done so within the specified timeframe. Once a choice was made, it was through the chosen proceedings alone that the FAS could be challenged.

[29] *BWE* opted to bring their challenge by way of proceedings in the Court of Session (the first adjudication having failed). Applying *D McLaughlin & Sons*, those court proceedings were the sole vehicle within which the final account dispute fell to be addressed. Unless and until it was determined otherwise, the FAS was final and binding on the parties in proceedings raised outwith the time limit. The second adjudication was too late. The FAS was binding on the parties and the adjudicator should have refused to grant an order for payment in favour of BWE. The dispute referred in the second adjudication was separate from that referred in the first adjudication. The Notices in each adjudication were different in respect of: (a) the FAS; (b) a claim for an Extension of Time; and (c) the calculation of the sums making up the Final Account. In *Bennett* v *FMK Construction* [2005] 101 Con LR 92 and *Brighton University* v *Dovehouse Interiors* [2014] 153 Con LR 147 the dispute being addressed before and after the adjudicator's resignation: (i) was identical; and (ii) followed immediately upon one another. Neither of these factors applied. The second adjudication was not a continuation of a prior adjudication, but a fresh one.

BWE

[30] There was no merit in the complaint that the adjudicator had not answered the question referred to him and instead assessed what he regarded as a fair price to be paid under a new contract. The multiplicity of challenges pled by AMK obscured the simplicity of the contract and the dispute. BWE were essentially supplying labour. They were initially scheduled to supply labour for 31 weeks. The duration more than doubled. The adjudicator

accepted that BWE had been bullied. As a result of variations, they had worked in excess of 62,000 instead of 20,000 hours. The adjudicator accepted that the variations caused them to incur additional cost on plant and that BWE had been entitled to an extension of time. The commercial judge correctly concluded that the adjudicator's approach to valuation was a genuine attempt to deal with the question posed of him.

[31] There was no basis for the proposition that the adjudicator failed to give AMK a fair crack of the whip. All issues, including those that the adjudicator was entitled to raise on his own initiative, were extensively canvassed in a series of formal pleadings and in email correspondence. AMK contested BWE's claim on practically every conceivable basis and were afforded ample opportunity to articulate their grounds of objection. The motto "pay now argue later" (*Bresco Electrical Services* v *Michael J Lonsdale (Electrical)* [2020] Bus LR 1140, at para 12) applied. The commercial judge correctly granted enforcement. If AMK were dissatisfied they could seek a final determination in the substantive process.

[32] The adjudication had been timeously commenced. The first adjudicator resigned. BWE "began" the new adjudication after abortive settlement negotiations and the expiry of the 20 day period. Paragraph 9(3)(a) of the Scheme provided for service of a "fresh notice" after an adjudicator resigns. In the two notices the same aggregate payment was sought. In both adjudications, BWE's claims included payment of loss and expense occasioned by variations.

[33] A declarator that the FAS was binding for the purposes of the adjudication could have no purpose other than to circumvent the grounds on which enforcement of an adjudicator's award could be opposed. That was contrary to section 108(3) of the 1996 Act. It was therefore incompetent to seek "final determination" of one constituent issue (such as the status of the FAS) if that did not achieve final determination of the dispute

(*D McLaughlin & Sons* v *East Ayrshire Council* 2021 SLT 1427 at para [30]). *D McLaughlin & Sons* was distinguishable. The clause here was simply framed. BWE only had to have "commenced adjudication or court proceedings within 20 working days". An action had been timeously commenced and therefore one of the two brakes had been applied. In *D McLaughlin* no adjudication proceedings had been commenced within the contractual period. A finality clause did not apply in comparable circumstances (*Bennett* v *FMK Construction* and *Brighton University* v *Dovehouse Interiors)*. An adjudication having been commenced timeously, clause 33.4 provided that the FAS was not binding. When the first adjudication ended due to resignation, BWE had to appoint a replacement adjudicator. Clause 33.4 did not provide that the FAS was final and binding until court proceedings were determined.

Decision

[34] Clause 33.4 provides that the Final Account Statement is final and binding on BWE, unless the parties agreed to modify it or BWE commenced an adjudication or court proceedings within 20 working days. This is significantly different from a Final Certificate in the standard form contract which applied in *D McLaughlin & Sons* v *East Ayrshire Council* 2022 SLT 1245 (see LP (Carloway) at para [20]). The clause here is clear. If BWE either institute an adjudication, or raise court proceedings, within the specified period, the FAS is not binding. BWE did institute an adjudication. The first adjudicator resigned. That did not bring the adjudication to an end. BWE followed the procedure set out in paragraph 9(3) of the 1998 Scheme and served a fresh notice. The two referrals are very similar, other than the reduction in AMK's figures and the addition of BWE's extension of time claim. The fundamental question remained the same: what sum was properly due? The adjudication

continued notwithstanding the fresh notice. The resignation of the first adjudicator did not terminate BWE's right to challenge the FAS. BWE have their foot firmly in the door, as permitted by clause 33.4, by virtue of both the adjudication and the timeous, and still pending, litigation. The challenge to the adjudicator's decision on this ground fails. It is not necessary, in these circumstances to go on to consider whether it was competent to determine whether the FAS was binding on the adjudicator as a discrete issue in parallel with the enforcement proceedings. The court reserves its opinion on that matter.

[35] In *Bresco Electrical Services* v *Michael J Lonsdale (Electrical)* [2020] Bus LR 1140, Lord Briggs stated:

> "12. A very important underlying objective … of adjudication was the improvement of cashflow to fund ongoing works on construction projects. A particular concern was that a dispute between (say) a sub-contractor and a sub-sub-contractor which could only be resolved by litigation or arbitration could in the meantime disrupt the entire project while a refusal of interim payment led to the cessation of significant works. The motto which has come to summarise the recommended approach is 'pay now, argue later'. Adjudication was one of five reforms … designed to facilitate the realisation of the cash flow aspiration behind that motto. … It is achieved by rigorous time limits for the conduct of the adjudication, the provisionally binding nature of the adjudicator's decision and the readiness of the courts … to grant speedy summary judgment by way of enforcement, leaving any continuing disagreement about the merits of the underlying dispute to be resolved at a later date by arbitration, litigation or settlement agreement.".

The court agrees with this dictum

[36] In *J & A Construction (Scotland)* v *Windex* [2013] CSOH 170, Lord Malcolm adopted (at para [7]) a passage from *Absolute Rentals* v *Gencor Enterprises*, unreported, 16 July 2000, HHJ Wilcox in the Technology and Construction Court (at para 6), as follows:

> "The purpose of the Scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional basis and, by requiring decisions by adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether these decisions are wrong in point of law or fact, if within the terms of reference. It is a robust and summary procedure and there may

> be casualties although the determinations are provisional and not final. [See *Bouygues UK* v *Dahl-Jensen UK* [(2000) 2 RCLR 308, Dyson J at para 35]]".

The court agrees also with that analysis. It is thus reluctant to interfere with an adjudicator's award unless the adjudicator has acted *ultra vires* by, for example, failing to answer the questions posed to him or if he has acted in a manner contrary to natural justice (the principle of fairness).

[37] On fairness, the primary complaint concerns the adjudicator's introduction, at what is said to be a late stage, of the notion of the beck and call contract; notably in relation to the man hours worked. There was no unfairness. In his email of 26 October 2022, the adjudicator gave parties due notice of his line of thinking. He invited comment. AMK took advantage of this and set out in detail, and repeatedly, why they submitted that all of the variations had to be valued in terms of the contract and why the number of man hours was: (a) irrelevant; and (b) unreliable. The adjudicator did not have to accept AMK's submissions. It is clear that he rejected them.

[38] The adjudicator took on a nigh impossible task. The volume of written materials was enormous. It was redolent of what was described in *Re Fundao Dam Disaster* [2020] EWHC 2471(Turner J at para 11) as amounting to " a fractal pattern of progressively complex and ever-finer recursive detail of sharply declining significance" (cf [2022] 1WLR 4691). It would have required a super-human effort to carry out a precise valuation exercise before the 11 November 2022 deadline. If the parties had wished to convert the adjudication into an arbitration, no doubt that could have been arranged in practical terms by extending that deadline. However, by invoking the adjudication provisions of section 108 of the Housing Grants, Construction and Regeneration Act 1996, BWE were entitled to a decision within the short timescale prescribed by the statute, in the absence of a further extension. That decision

was bound to be one involving "broad justice at high speed". The presentation of an excessive amount of material, as both parties did, and the tabling of a wide range of legal and factual issues, could not be allowed to derail the robust and summary adjudication process. That process is not intended to resolve disputes by reference to innumerable rounds of pleadings and submissions (*Amec Group Limited v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC), Coulson J at para 65).

[39] The adjudicator's determination is, when set against that background, an exemplary piece of work. He cut the issue down to a straightforward one of assessing roughly what he considered to be payable by AMK to BWE. That was the question which he was asked to answer. He answered it in a clear and succinct way. The several questions that he posed for himself were merely stations on the road to the overall valuation. They were not issues separate from the main question.

[40] The adjudicator did not ignore the terms of the contract. On the contrary, he recognised that it was initially for a fixed sum of £715,000 and ought to have been performed within a limited timescale. He was well aware of what were intended to be original works, as distinct from the variations. He specifically referred to clauses 17 to 19. He selected a rate from within the contractual documents (£30 per hour per operative) and applied it to the hours which he found to have been worked. He agreed with BWE that this was supposed to be a labour only contract. What occurred had gone substantially beyond what would normally be instructed as a variation and, as he put it, became a "beck and call" contract. AMK asked BWE to carry out work well outside the anticipated scope of the original works. Nevertheless, he intimated in advance of his determination that there was no new contract, but a varied one.

[41] The adjudicator's figures may prove to be in error, if and when the substantive action is determined. However, his efforts were not a frolic of his own but, as the commercial judge determined, a reasoned attempt to value the work which BWE had carried out and for which they were entitled to be paid either in terms of the fair and reasonable equation set out in the contract or under the general law. Having cut to the chase, the adjudicator used a broad axe with a blunt edge to reach a robust and summary conclusion. The challenge to the award fails.

[42] The court will adhere to the interlocutor of 16 February 2023 in the BWE v AMK enforcement action. It will, in effect, adhere also to the interlocutor of the same date in the AMK v BWE action, but correct that by dismissing that action in so far as relating to the second and third conclusions.