Neutral Citation Number: [2025] EWHC 2173 (TCC)

Case No: HT-2025-LDS-000006

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

The Business and Property Courts in Leeds
Westgate House
6 Grace Street
Leeds
LS1 2RP

Before :

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

- -

Between :

CLEGG FOOD PROJECTS LIMITED	**Claimant**
- and -	
PRESTIGE CAR DIRECT PROPERTIES LIMITED	
	Defendant

- -
- -

Ms Jess Connors (instructed by **Browne Jacobson LLP**) for the **Claimant**
Mr Thomas Lazur (instructed by **Addleshaw Goddard**) for the **Defendant**

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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 10:30am on 19 August 2025.

Her Honour Judge Kelly

1. This judgment follows the hearing of the Claimant's application for summary judgment to enforce the adjudication decision made by Mr Kevin Shilcock dated 17 January 2025.

2. I had the benefit of hearing counsel Ms Jess Connors for the Claimant and Mr Thomas Lazur for the Defendant, both of whom had provided very helpful skeleton arguments for the hearing.

Background

3. The Claimant was the contractor and the Defendant the employer under an amended JCT Design and Build contract dated 10 November 2022 for the construction of a leisure and retail centre in Bishop Auckland. Practical completion was achieved and a dispute arose between the parties in respect of the valuation of the Claimant's application for payment ("Application 37"). Application 37 was made on 27 August 2024. The Defendant served a payment notice in respect of it on 30 August 2024.

4. At that stage, the issues between the parties included the value of eight variations, which were agreed to be changes, but whose valuation in accordance with clause 5 of the contract was not agreed ("the Relevant Changes"), and the Claimant's entitlement to extensions of time ("EOTs") and prolongation costs.

5. Thereafter, in September and October 2024, the employer's agent notified the Claimant that the Defendant claimed liquidated damages in respect of delays ("LADs"). The Claimant disputed that the Defendant was entitled to the LADs as a result of the EOTs to which the Claimant asserted it was entitled.

6. The following chronology is of assistance:

Date	Document / Event
15/10/2024	Notice of adjudication.
17/10/2024	The Claimant applied to the Royal Institute of Chartered Surveyors ("RICS") for the nomination of an adjudicator.
18/10/2024	RICS nominated Mr Michael Shilcock as the adjudicator.

<table>
<tr><td>19/10/2024</td><td>Mr Shilcock accepted nomination setting out a provisional 28 day timetable. The adjudication decision was given 87 days from referral.</td></tr>
<tr><td>22/10/2024</td><td>Referral
The referral included a request for a number of declarations, including that the gross valuation of the Application 37 was £23,502,636.65 plus VAT or “such other sum as the adjudicator may decide”. The referral included submissions about retention from the gross valuation and sums which should be deducted from it including an assessment of EOTs and LADs.

The referral included a table summarising the eight items where, in respect of eight Employers Agent Instructions (“EAIs”), the principle of the change was agreed but the quantum of the each change was in dispute (“the Relevant Changes”) as follows:
<table>
<tr><th>Number</th><th>Description</th><th>Clegg’s Valuation</th><th>EA’s Valuation</th><th>Difference</th></tr>
<tr><td>1.</td><td>EAI No. 2 – Drive Thru Changes</td><td>£825,837.61</td><td>£502,108.20</td><td>£323,729.61</td></tr>
<tr><td>2.</td><td>EAI No. 7 – Range sprinkler base and associated works</td><td>£64,402.35</td><td>£44,383.64</td><td>£20,018.71</td></tr>
<tr><td>3.</td><td>EAI No. 22 – Wickes specification</td><td>£75,012.51</td><td>£43,952.24</td><td>£31,060.27</td></tr>
<tr><td>4.</td><td>EAI No. 27 – Statutory Authority, Provisional Sum</td><td>£666,699.26</td><td>£463,238.35</td><td>£203,460.91</td></tr>
<tr><td>5.</td><td>EAI No. 29A – Landscaping materials, paving</td><td>£146,919.11</td><td>£46,361.43</td><td>£100,557.68</td></tr>
<tr><td>6.</td><td>EAI No.45 – Updated landscaping drawings</td><td>£8,333.10</td><td>£1,890.11</td><td>£6,442.99</td></tr>
<tr><td>7.</td><td>EAI No. 68B – Units 18-20 Home Bargains Alterations</td><td>£219,330.59</td><td>£167,181.30</td><td>£52,149.29</td></tr>
<tr><td>8.</td><td>EAI No. 81 – Energetics additional works</td><td>£4,713.58</td><td>£3,663.58</td><td>£1,050</td></tr>
<tr><td colspan="4">Total:</td><td>£738,469.26</td></tr>
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05/11/2024	Response The response of the Defendant included the figure it asserted should be the gross valuation sum "or such other sum as the adjudicator may decide". The Defendant also responded concerning the retention rate and other possible deductions.
26/11/2024	Reply.
06/12/2024	Rejoinder.
12/12/2024	Surrejoinder.
09/01/2025	The adjudicator invited for further submissions in respect of item 4 EAI 27.
14/01/2025	The Claimant provided further submissions on EAI 27.
14/01/2025	The Defendant provided further submissions on EAI 27.
17/01/2025	Decision The adjudicator gave his decision (running to 88 pages) on 17 January 2025. He decided: (a) the Defendant's payment notice had undervalued the amount due to the Claimant in respect of the eight Relevant Changes, (b) the Claimant was entitled to EOTs, (c) as a result of the entitlement to the EOTs, the Defendant's entitlement to LADs was reduced, and (d) the Claimant was entitled to suspension costs and to thickening costs. After deduction of the LADs, the Defendant was ordered to pay the Claimant £541,880.12 plus VAT in respect of Application 37, interest

	at the contractual rate of 10% from the final date of payment and his adjudicator's fees, if they had been paid by the Claimant. It is not necessary for the purposes of this judgment to set out any of the individual figures adjudicated. However, it is necessary to set out certain matters considered by the adjudicator. His decision ran to 88 pages. He set out clearly the dispute which had been referred to him in respect of Application 37. He also set out: (1) details of the determinations sought by both parties in respect of the gross valuation of application 37; (2) details of the submissions in relation to what should be retained and the sums and period sought in respect of LADs and EOTs, knowing that he had to provide reasons; (3) the timetable of the adjudication; and (4) the details of the submission and correspondence from both parties. In his decision, the adjudicator gave reasons for his decision in respect of the EOTs and the LADs for the works contained within the dispute referred. Those reasons set out broadly the submissions made by both parties before coming to his decision. The adjudicator then went on to consider the value of the Relevant Changes, again setting out the submissions of the parties in respect of each Relevant Change before giving his reasons for the amount he decided were due. Where the adjudicator decided to use his own "fair and reasonable" rate, after setting out the positions of each party, he explained that he had considered the work involved in respect of each of these disputed values, using his own "first principles view" of the work involved.

	Then he considered the valuation rules in clause 5 of the Contract and set out the rate. In relation to the single remeasurement, he explained his reasons for the remeasurement and why he thought that the calculation of Mr Webb was wrong.
20/01/2025	The Defendant emailed the adjudicator seeking clarification of the decision. In respect of five of the Relevant Changes, (EAI numbers 7, 22, 27, 29A and 68B), the Defendant identified the rates which the adjudicator had decided were "fair and reasonable" to value those Relevant Changes. The adjudicator was asked to explain "the basis for" the using those rates. There was also a request for the adjudicator to provide his workings.
20/01/2025	The adjudicator responded by email to the parties and provided his workings. He also responded to the specific questions asked, acknowledging that he had decided some new rates, determining them as a "fair valuation" pursuant to clause 5.4.2 of the contract. He stated that the parties had invited him to use his discretion to determine the value of various items. They provided him with the contract so that he knew the valuation rules to apply. In addition, they provided details of their measurements and drawings to enable the adjudicator to understand how the structure was affected. Having been provided with that information, he did not believe that reference back to the parties for their observations in respect of new rates was required.
20/01/2025	The Defendant sent a further email which asserted that the adjudicator was in breach of natural justice and the decision should not be enforced because he had used new rates and also appeared to have used different measurements in order to reach his valuations for some of the Relevant Changes.

21/01.2025	The adjudicator responded by email, disputing that he had in some way breached the principles of natural justice, noting that he was asked to provide a gross valuation on the value of Application 37 by both parties at the figure they contended for, or "such other sum as the adjudicator may decide". The adjudicator stated: "During the course of the Adjudication, the Parties made their submissions on measure and value and provided me with a copy of the Contract enabling me to see the valuation rules to apply, the CSA to allow me to determine analogous rates, and also the ability to make a 'fair valuation' where the rates did not apply. The latter is a wide discretion normally afforded to the Employer's Agent but substituted in an Adjudication to the Adjudicator. The Parties also provided me with details of their measurements, as well as drawings referring me to the changes to the structure to inform me of how they were affected and invited me to use those details in my determination." "The Parties invited me to use my discretion to determine the values of the various items. The Act provides that I may take the initiative in ascertaining the facts and the law; where necessary I would refer back to the Parties if I considered that a new piece of evidence or a different aspect of the law required their submissions, however the basic execution of the task given to me, to determine the values of various elements of Interim Payment No 37, and being provided with the necessary information to do so, does not in my opinion require the reference back to the Parties for their observations. The Parties have asked me to use the information provided by them and my own experience, to determine the values of the items in dispute, which process may include accepting one or other of the Parties' valuations or forming one of my own." "I would respectfully suggest that my actions are not a breach of natural justice, but merely the fulfilment of the task set by the Parties to evaluate the disputed Changes."
22/01/2025	The Defendant replied to the adjudicator's email of 21 January 2025. The Defendant asserted that the workings provided on 21 January 2025 should have been provided within the decision. In addition, the decision did not allow the Defendant to understand the basis upon which the adjudicator used those new rates nor what their "technical and evidential" basis was. Further, the adjudicator had used new rates, methodologies and the different measurement to come to his decision

	on those Relevant Charges without informing the parties of the method he proposed to use and without giving the parties the opportunity to make submissions on the new method. As a result, the Defendant asserted that the adjudicator's decision was not enforceable.
22/01/2025	The Claimant's solicitors emailed the adjudicator to inform him that the Claimant had paid his fees. They also stated that if, as had happened on previous occasions, the Defendant failed to pay the sums adjudicated, enforcement proceedings would be issued.
27/01/2025	The Defendant sent a follow-up email to the adjudicator, and to the Claimant, stating again that it considered the adjudicator was in breach of natural justice or jurisdiction and the decision was unenforceable.

7. I have had the benefit of reading the following witness statements:
   (a) Mr Nick Cook, Solicitor for the Claimant, dated 3 February 2025 and 4 March 2025, and
   (b) Mr Paul Barge, Solicitor for the Defendant, dated 21 February 2025.

8. I also had the opportunity to read the various documents to which I was taken during the course of the hearing and directed to in skeleton arguments. I read and considered the evidence as a whole in addition to all the arguments raised by the parties before coming to my decision.

The Law

9. Happily, counsel largely agree on the legal principles, even if they disagree as to whether or how some of the principles apply on the facts of this case.

10. I was referred to the following authorities:
    (a) Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358 ;

(b) Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWHC 778 (TCC) ;
(c) Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) ;
(d) Primus Build Limited v Pompey Centre Limited [2009] EWHC 1487;
(e) Roe Brickwork Ltd v Wates Construction Ltd [2013] EWHC 3417 (TCC);
(f) Van Oord UK Ltd v Dragados UK Ltd [2022] CSOH 30;
(g) Corebuild Limited v Cleaver [2019] EWHC 2170 (TCC);
(h) Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board [2012] EWHC 84 (TCC);
(i) Balfour Beatty Construction Ltd v Lambeth LBC [2002] EWHC 597 (TCC);
(j) Willow Corp Sarl v MTD Contractors Ltd [2019] EWHC 1591 (TCC);
(k) Givaudan & Co Ltd v Minister of Housing and Local Government [1967] 1 WLR 250;
(l) Gillies Ramsay Diamond & Others v PJW Enterprises Ltd [2004] BLR 131;
(m) Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004]EWCA Civ 1418;
(n) Multiplex Constructions (UK) Ltd v West India Quay Development Company (Eastern) Ltd [2006] EWHC 1569 (TCC);
(o) Harris Calnan Construction Co. Ltd v Ridgewood (Kensington) Ltd [2007] EWHC 2738 (TCC);
(p) Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi) [2013] EWHC 87 (TCC);
(q) ABB Ltd v BAM Nuttall Ltd [2013] EWHC 1983 (TCC);
(r) Broughton Brickwork Ltd v F Parkinson Ltd [2014] EWHC 4525 (TCC);
(s) AECOM Design Build Ltd v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC); and
(t) Keating on Construction Contracts, 12th edition, Chapter 18.

11. The principles to be derived from those cases are:

(a) The court will refuse a summary judgment application to enforce an adjudicator's decision if there is a realistic prospect of establishing that there was a breach of natural justice or an excess of jurisdiction by the adjudicator.

(b) The court will not refuse to enforce an adjudicator's decision merely because of an error of fact or law.

(c) The test for breach of natural justice is whether there has been a breach of the principles of natural justice and, if so, whether any such breach was material. In Cantillon Ltd v Urvasco Ltd, Akenhead J set out the test as follows:

"(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 potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of ***Balfour Beatty Construction Company Ltd -v- The Camden Borough of Lambeth*** *was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."*

(d) In respect of breach, Coulson J (as he then was) in *Primus Build Limited v Pompey Centre Limited* stated in respect of the failure of an adjudicator to go back to the parties:

"39. ... It is a fine line for an adjudicator between wanting to help the parties on the one hand, and making one side's case for them, on the other. But if an adjudicator believes that, in the interests of justice, there is a legitimate alternative course which has not been considered or put forward by the referring party, but which may, on its face, meet the objections of the responding party, he should immediately ask himself the question: do I need to give notice of, and obtain submissions about, that alternative approach?

40. As I have said, these things are always a matter of fact and degree. An adjudicator cannot, and is not required to, consult the parties on every element of his thinking leading up to a decision, even if some elements of his reasoning may be derived from, rather than expressly set out in, the parties' submissions. But where, as here, an adjudicator considers that the referring party's claims as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim of some sort could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision."

(e) Whether or not there has been a breach of natural justice is exquisitely fact sensitive in the majority of cases. If an adjudicator intends to determine a point on the basis of material which has not been put before him by the parties, he must give them an opportunity to make submissions. However, he can reach a decision on the material before him on a basis for which neither party has contended if the parties are aware of the relevant material and the issues have been fairly canvassed before the adjudicator.

(f) If issues have been fairly canvassed before an adjudicator, or if the adjudicator has simply adopted an intermediate position, fairness does not require the parties to be given an opportunity to make further submissions. An adjudicator is obliged to make a decision and come to conclusions based on the evidence of each party, his analysis of it and of the submissions put to him. He is not under an obligation to invite comments on his conclusions reached after that process.

(g) Any breach of natural justice must be "serious" or "of considerable potential importance to the outcome" before an adjudicator's decision is compromised.

(h) In *Carillion v Devonport*, the Court of Appeal quoted and approved the principle set out by Jackson J (as he then was) about the need for an adjudicator to seek further submissions:

"it is often not practicable for an adjudicator to put to the parties his provisional calculations for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as Balfour Beatty v London Borough of Lambeth *that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the court will decline to enforce his decision."*

(i) An adjudicator can decide to crudely split the difference without further consultation with the parties. In *Arcadis*, Akenhead J held at paragraph 37:

"*…The fact that he was persuaded that the proper answer lay between the two adjusted forecast figures and that he happened to split it down the middle can not be considered to be a breach of the rules of natural justice. Whilst of course it is arguable that he was factually wrong, that does not impact on the enforceability of its decision*."

(j) In respect of summary judgment, in *Corebuild Limited v Cleaver*, Mr Adam Constable QC sitting as a Deputy High Court Judge set out at paragraph 26:

"There may be circumstances in which it is possible to demonstrate on summary judgment that the answer the adjudicator arrived at was so obviously correct, that the failure to have allowed the point to be properly ventilated is not material: permitting a party to make submissions could not have changed the outcome. However, generally, it is sufficient for a party to show that the substance of the point with which they were deprived of the opportunity to engage with was properly arguable i.e. it had reasonable prospects of success. Beyond

that, the Court should not determine the merits of the point itself on the summary judgment application."

The Issues

12. The parties broadly agree on the issues to be determined:
    (1) Was the adjudicator in breach of natural justice by failing to give the parties an opportunity to comment?
    (2) Did the adjudicator fail to provide sufficient reasons in his decision of 17 January 2025?
    (3) If there was a breach, should any part of the decision be severed and enforced?

13. Perhaps unsurprisingly, although the parties agree on the issues, their focus on the important facts to be considered and their application of the law in respect of those facts differ in emphasis.

14. I do not propose to set out the majority of the evidence which I read, nor all the detail of the arguments raised by the parties. It is not necessary to do so. Although the witness statements in this case and the various appendices to them are lengthy, in my judgment, the issues in this case can be simplified.

15. The dispute between the parties comes down to whether it was a breach of natural justice for the adjudicator:
    a. to fail to go back to the parties and ask for further submissions when he decided to use a new "fair and reasonable" rate and a single new measurement in respect of his valuation of a few individual items when asked to provide a gross valuation of Application 37; and
    b. to fail to provide adequate reasons for his decision including to explain the decision he made on "fair and reasonable" rates and to explain the re-measurement he made for one item.

    As will be seen from the arguments and evidence set out below, the Defendant approaches the issue from a micro standpoint and the Claimant approaches it from a macro standpoint.

Defendant's Submissions

16. I start first with the Defendant submissions because unless the Defendant can establish one of the few defences to enforcement of an adjudicator's decision, the Claimant will be entitled to summary judgment. The Defendant asserts that there was a breach of natural justice because the adjudicator used his own rates when assessing the value in five of the eight Relevant Changes and he remeasured work done (using the documentation provided in respect of one of the Relevant Changes) without informing the parties that he intended to do this and without giving them the opportunity to comment on the suitability of doing that.

17. The Defendant relies upon three cases in particular: *Primus Build Limited v Pompey Centre Limited*; *Roe Brickwork Ltd v Wates Construction Ltd* and the Scottish case of *Van Oord UK Ltd v Dragados UK* to assert the breach of natural justice. Relying on those cases, the Defendant asserts that by deciding new rates and a new measurement without consultation, the adjudicator plainly went too far in deciding an alternative way, not advanced by the parties, to value aspects of Application 37. That being so, the Defendant asserts that the rates and measurement were not fairly canvassed and the adjudicator had not simply adopted an intermediate value within the range contended for by the parties.

18. The Defendant asserts that this breach was material because it was founded on a novel analysis of the materials. As such, if consulted, the Defendant may have had a reasonable prospect of successfully objecting to the basis chosen by the adjudicator. The Defendant asserted that adjudicator's decision was not so obviously correct that the Defendant had no realistic prospect of success. By choosing new rates, the adjudicator "made good" the Claimant's case, as was the position in *Balfour Beatty Construction Ltd v Lambeth LBC.* In that case, the adjudicator had not informed the parties of the methodology which he proposed to adopt nor did he invite submissions as to whether that proposed methodology was reasonably and properly used in the particular circumstances.

19. The Defendant recognised that there were other cases such as *Roe Brickwork v Wates* where the adjudicator had heard submissions on whether to apply a day works rate or

a costs plus profit means of calculating loss. The adjudicator there decided to come to a valuation using a combined day works and profit rate. This was considered not to be a breach of natural justice. The Defendant submitted that decision was justified because the appeal judges could work through the adjudicator's calculations to understand precisely what had been done. The Appeal Court found that the decision of the adjudicator was immaterial in respect of the alleged breach in any event because, had he consulted the parties, the result "would probably have been the award of a greater amount…".

20. The Defendant submitted that there was ample opportunity for the adjudicator in this case to state his intentions or directly seek submissions concerning the new rates and measurement. The fact that additional workings were provided by the adjudicator after the decision underlines the fact that further explanation was required to enable the parties to start to understand his decision. However, in any event, the list of numbers with the simple explanation that the adjudicator had decided upon a "new rate" was not sufficient to enable the parties to understand how the adjudicator had arrived at the new rates.

21. This was a material breach because the new rates affected a substantial proportion of the total sums in dispute. The Defendant notes that the difference between the parties' gross valuations in respect of all items contained within the eight Relevant Changes totalled £738,469.58, which is approximately 71% of the difference between the parties' gross valuations of Application 37. The difference in the gross valuation between the parties in respect of the five Relevant Changes affected by the new rates and measurement was £407,246.86, or approximately 55% of the value of the eight Relevant Changes.

22. Further, as the Defendant could not understand how the adjudicator decided upon his new rates, it was impossible to say what defences might have been raised to his methodology or figures by either party. On that basis, it is reasonably arguable that the Defendant may have been able to challenge the new rates and the measurement so as to substantially reduce its liability under the decision.

Claimant's Submissions

23. The Claimant seeks summary judgment and denies that there has been any breach of natural justice, much less a serious breach. The Claimant argues that the adjudicator was absolutely entitled to use his own knowledge and experience in order to come to a gross valuation of Application 37. In any event, when the facts are analysed properly, the Claimant argues that the Defendant has no prospect of establishing that there is any injustice, let alone anything which could be described as substantial injustice.

24. The Claimant submits that complaints about the new rates are "excessively granular" and are, in effect, a smokescreen to attempt to distract from the key facts. The adjudicator was asked to provide a gross valuation of Application 37, which application included the eight Relevant Changes. Each Relevant Change had multiple items and sub items. The adjudicator's valuation of every disputed sub item was within the range established by the parties' rival valuations in their submissions.

25. The Claimant notes that the adjudicator was not tasked with making declarations as to the rates to use for valuing each of the various items and sub items. His task was a much broader one, namely that of valuing the entirety of Application 37, included in which gross valuation would of course be the Relevant Changes and their sub items.

26. Moreover, the Claimant submits that the Defendant faces a more fundamental difficulty. In order to vitiate a decision, any breach of natural justice must be serious or of considerable potential importance to the outcome. The Claimant asserts that is not the position here. In the witness statement of Mr Barge, the Defendant asserts an impact in respect of natural justice on both parties. The Claimant emphasises that it does not object to the methodology used by, nor the outcome of, the decision of the adjudicator. In that situation, even if there was any breach, the Defendant cannot rely on any unfairness alleged to affect the Claimant as a reason to refuse summary judgment. In reality therefore, as the argument advanced by the Defendant is breach of the rules of procedural fairness, the Defendant must establish that such procedural unfairness causes substantial injustice to the Defendant.

27. The Claimant argues that the Defendant engages in a nitpicking exercise about the use of new rates without consultation. The difficulty with that approach is that, without exception, the rates which the adjudicator used to arrive at overall valuations in respect of the Relevant Changes were within the range established by the parties' contentions. Further, "even at this excessive level of granularity" and treating the single re-measurement as a new rate, in all but two cases the use of the new rates was more advantageous to the Defendant than at least one of the unobjectionable rates which could have been chosen by the adjudicator, without needing to consult. Those unobjectionable rates are the Claimant's rate, the Defendant's rate or a crude "split the difference" rate.

28. The two exceptions (the use of the adjudicator's own measurement in EAI 22 and the use of a different rate when valuing EAI 29A) meant an increase in the valuation against the Defendant of less than £2,600. That increased figure equates to less than 0.2% of the Relevant Changes. Moreover, those increases are vastly outweighed by more than £202,000 resulting from the adjudicator's use of the new rates which were more favourable to the Defendant than the rates which the adjudicator could unarguably have used without further consultation.

29. In his evidence, Mr Cook set out a table of hypothetical scenarios to demonstrate the outcome of various rates which the Claimant submits could have been chosen by the adjudicator without any justifiable objection by the Defendant because the rate used by the adjudicator was the rate proposed by either the Claimant or the Defendant, a crude "split the difference" or a rate more favourable to the Defendant than those proposed by the parties. In all those circumstances, the rates adopted are more favourable to the Defendant. Thus there cannot be a serious breach of natural justice affecting an issue of considerable potential importance to the outcome for the Defendant – the Defendant is better off.

30. The only scenario in which the Defendant may have a justifiable complaint against the use of a new rate, depending on the facts, would be if the adjudicator generated a wholly uncanvassed case, rather than assessing the case from the materials provided to him by the parties, and the use of any new rate was material to the outcome and

materially prejudiced the Defendant. Here, the plain effect of the two new rates which went against the Defendant were obviously de minimis (less than 0.2% of the adjudicator's valuation of the Relevant Changes alone) when one considers the value being assessed overall by the adjudicator both of the Relevant Changes and of the gross valuation of Application 37. In short, submits the Claimant, it is a nonsense for the Defendant to suggest that it is entitled to complain about the use of new rates and a single remeasurement which have the overall effect of very substantially reducing the amounts payable to the Claimant. That is particularly the case when the figures are compared with the position which would obtain if the adjudicator had accepted the Claimant's rates (the use of which rates would be plainly unobjectionable) which he could have used without any consultation.

31. The Claimant submits that there is also no merit in the Defendant's submission that the reasons set out in the decision were inadequate to understand what conclusion the adjudicator had reached on the principal controversial issues. Decisions on values reached by the adjudicator were in between the parties' rival positions on valuation. This is not an exceptional case of the kind envisaged by the Court of Appeal where an adjudicator's failure to put his provisional conclusions to the party will constitute such a serious breach of the rules of natural justice that the court would decline to enforce the decision. These decisions are an intermediate position for which neither party was contending in respect of value. The position is analogous to the *Arcadis* case. The fact that the adjudicator may have got it wrong is entirely irrelevant.

32. The adjudicator here was not bound to accept the entirety of either party's case on valuation on any of the Relevant Changes. If he did not accept the parties' submissions, his task was to value each Relevant Change in accordance with clause 5 of the contract, evaluating and comparing that change with work items for which there was a contract sum analysis ("CSA") rate. That is precisely what the adjudicator asserts he did in his replies to the emails sent by the Defendant after the decision was given and, unobjectionably, he reached an intermediate position for which neither party was contending. It is wholly unrealistic in the context of interim applications for payment which need adjudicating to insist that there is detailed description of how a

particular rate was reached in respect of every minor change in the various sub items set out in the Relevant Changes.

33. Even in respect of the aspects of the adjudicator's decision which went against the Defendant's submissions, those aspects are further complicated because the parties and the adjudicator adopted different approaches to grouping items under some of the sub items in different numbered EAIs. Some adjustment would therefore be needed to compare like with like. The very fact that this would need to be done shows how wholly unrealistic the Defendant's criticisms are, given the task allocated to the adjudicator of providing the overall gross valuation of Application 37.

34. The practical context is important and the Claimant argues that the practical context has been ignored by the Defendant in its nitpicking approach. Arguing against the new rates is unjustified when a higher rate could have been imposed by the adjudicator and there could have been no argument. The reliance on *Balfour Beatty v Lambeth LBC* is misplaced. In that case, the adjudicator did one party's work for it, creating a critical path in respect of EOTs without any analysis as to critical and non-critical events in circumstances where, without the creation of that critical path, no or no material EOT could have been granted on the basis presented by the other party. It was against that background that the adjudicator was required to have raised those issues with the parties in advance of finalising his decision.

35. The reality is that the 1996 Act and Scheme can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded. The provisional nature of these decisions justifies ignoring non-material breaches. The adjudication process is inevitably a rough and ready process and that is why errors of fact and law by adjudicators are disregarded for the purposes of enforcement action. The Defendant's approach is therefore obviously too granular. If there was any technical breach, it would not in any event be material looking at the facts. In short, the Defendant "is simply scrabbling about for reasons to avoid payment".

Findings

Was the adjudicator in breach of natural justice?

36. Dealing first with the alleged breach of natural justice by the adjudicator for failing to go back to the parties to seek additional submissions in respect of the "fair and reasonable" rate and the single remeasurement, I do not accept the Defendant's arguments that this was a breach of natural justice.

37. Firstly, both parties specifically invited the adjudicator to award the amount each of them submitted for the gross valuation or "such other sums as the adjudicator shall see fit". The Defendant asserted that this was not an invitation by the parties for the adjudicator to carry out his own independent valuations using new rates. Whilst I accept that the adjudicator could not go off on a frolic of his own, deciding rates without considering the submissions of the parties and the evidence submitted, I accept the Claimant's argument the adjudicator was not tasked with making declarations as to the individual rates to use when valuing the sub items within the Relevant Changes. The decision he was asked to make was, I find, much broader - that is the overall valuation of Application 37.

38. In my judgment, it is relevant that the adjudicator was asked to provide an overall gross valuation of Application 37. Inevitably, an adjudicator given that task has to look at the individual items which make up the payment application as a whole. However, in my judgment, it is acceptable for an adjudicator to come to a different view from the parties in respect of the value of a particular item which he considers "fair and reasonable" using the documentation provided and submissions made by the parties.

39. I do not accept that the various cases relied upon by the Defendant support the arguments made on the facts of this case. Each case is of course a matter of fact and degree but an adjudicator "*cannot, and is not required to, consult the parties on every element of his thinking leading to a decision, even if some of the elements of his reasoning may be derived from, rather than expressly set out in, the parties' submissions*" (per Coulson J (as he then was) in *Primus Build Limited v Pompey Centre Limited* at paragraph 40). I do not accept that the adjudicator was filling a gap

in the evidence. Both parties made submissions on rates. The adjudicator did not consider and use material which the parties instructed him not to consider.

40. I find that the issues had been fairly canvassed during the course of the adjudication. In addition, I also find that it is significant that in respect of each "fair and reasonable" value, and in respect of the single remeasurement, used to calculate the gross value of each Relevant Change by the adjudicator, that value was an intermediate position between those contended for by the parties, or was more favourable to the Defendant.

41. The Defendant accepted that if the adjudicator had simply accepted the position on value by either party, or used a crude "split the difference" rate, the Defendant could have no legitimate complaint.

42. I accept the submission made by the Claimant that it would be wrong to accept the Defendant's granular approach to its arguments on breach of natural justice in circumstances where the parties sought a global valuation. That said, of course I accept that some explanation for reaching the global figure is required.

43. In my judgment, the decisions taken by the adjudicator, in respect of some of the Relevant Changes, to use a rate which he considered to be "fair and reasonable" was acceptable. I do not accept that it is a breach of natural justice for the adjudicator to fail to seek further submissions when coming to a decision after considering the materials provided by the parties and then determining that the appropriate rate is the within the range contended for by the parties. The parties chose to instruct a Chartered Quantity Surveyor to assess the parties' submissions and decide the gross valuation for Application 37, which would involve deciding disputes about Relevant Changes. They provided him with the materials to decide that valuation in accordance with clause 5 of the Contract and, by reference to or by analogy with the CSA which the parties provided to him, he provided a valuation within the range contended for by the parties, or which was more beneficial to the Defendant. I do not accept that it was necessary for the adjudicator to set out the details of the methodology used by him to come to his decision.

44. In addition, the Defendant must establish that any breach was both material and of considerable importance to the Defendant. I do not accept that the Defendant has been able to establish that any breach, if proved, was material in any event. It was accepted by the Defendant that the adjudicator could simply have adopted the rate proposed by the Defendant in its submissions. In those circumstances, I do not accept that the Defendant can establish that it has suffered a substantial injustice because it was not consulted about the use of a rate which was more favourable to it than the Defendant's own rate. In my judgment, this underlines the excessive granularity with which the Defendant seeks to undermine the adjudicator's decision.

45. It is right that in respect of some sub issues the decision of the adjudicator meant that his "fair and reasonable" rate was more favourable to the Claimant than the Defendant. However, that was not always the position. For example, in respect of the adjudicator's valuation of EAI#27, the use of his "fair and reasonable" rate meant that the adjudicator used a rate which was more favourable to the Defendant than the rate for which the Defendant contended. In that example, the complaint about the use of the "fair and reasonable" rate is a nonsense. As Ms Connors observed in her submissions, "… the Defendant cannot properly complain that it lost an opportunity to persuade the Adjudicator to order it to pay more than it was in fact ordered to pay".

46. Further, I do not accept the Defendant's arguments that the breach alleged is both material and of considerable importance to the Defendant because the overall difference between the parties gross valuations is £738,469.58. Whilst it is correct that was this the difference between the parties valuations in respect of the total value of all of the Relevant Changes, I do not accept that it is the accurate figure when considering the decision made by the adjudicator.

47. In my judgment, the Claimant's submission that when analysed correctly, in all but two of the cases, the use of the "fair and reasonable" rate/new measurement was more advantageous to the Defendant than if the adjudicator had used either the Claimant's rate, the Defendant's rate or had crudely split the difference between those two rates, all of which both parties agree he could have done without further consultation.

48. Those two instances where a less favourable rate to the Defendant was used is significantly less than the gross valuation figure argued by the Defendant to be the appropriate figure to consider when considering materiality. The total value of the two items assessed using the less advantageous rate for the Defendant is less than £2,600, which is less than 0.2% of the adjudicator's total valuation of the Relevant Changes. For example, EAI 27 comprised 10 separate items and the complaint in relation to the new rate affects just one of those items. In EAI 68B, the complaint related to one of five separate items.

49. I accept the submission made by the Claimant that those differences are vastly outweighed by the effect of the use of new rates which were more favourable to the Defendant than the rates which the adjudicator could have used without further consultation. The effect of such use has been to benefit the Defendant by more that £200,000. That being the position, the Defendant has not established that it would suffer substantial injustice such that there is a material breach.

50. In my judgment, there is a further difficulty with the approach argued for by the Defendant. At what point does a variation by an adjudicator from the Claimant's rate, the Defendant's rate or a broad "split the difference" rate require consultation? Does any deviation at all from the unobjectionable rates require consultation? I would expect any party to answer "of course not" to that question.

51. The difficulty then becomes: when does a variation become one which should be referred for consultation? Should the variation be measured in money? Should it be measured by a particular percentage? On what basis is the monetary amount or percentage assessed? Is it in respect of:
    (1) the individual item or sub item being varied?
    (2) the claim for the whole of an individual item?
    (3) the value of the entirety of the gross valuation of the interim payment being assessed? Or
    (4) some other basis?

    The very fact that those questions would need to be posed by itself indicates that the approach taken by the Defendant is excessively granular. As noted above, these cases

are invariably fact sensitive. It is only in an exceptional case that the court would consider a breach to be sufficiently serious that the court would decline to enforce a decision. I do not accept that this is such an exceptional case.

Did the adjudicator failed to provide sufficient reasons in his decision?

52. In addition to the reasons set out above considering whether there was any breach of the rules of natural justice, I do not accept that the adjudicator failed to provide sufficient reasons in his decision. Again, I find that the approach taken by the Defendant is simply too granular and unrealistic when considering the aims and purposes of the 1996 Act and Scheme.

53. The Defendant relies upon the fact that within days, the adjudicator provided additional workings and, even then, the Defendant asserts it could not understand adequately the reasons for the adjudicator's decision. At least part of the difficulty with that submission is that it was the Defendant who asked the adjudicator to provide his workings. In my judgment, just because the adjudicator provided his workings and answered questions in relation to his reasoning when asked directly by the Defendant does not mean that his initial decision was such as to amount to a failure to provide adequate reasons.

54. If the adjudicator had been asked to declare the value of each and every item and sub item, the Defendant's arguments would have been stronger. However, against the background of a broadbrush process where the overall values arrived at for the different elements of Application 37 are set out, there is sufficient detail in the 88 page decision to enable the parties to understand how the adjudicator came to his decision in the round.

55. I accept that the reasons provided are broad brush, making references throughout using footnotes to submissions and documents. Fuller reasons could have been set out, but that does not mean the reasons given were inadequate. In my judgment, the reasons given cannot possibly be said to be "*so incoherent that it makes it impossible for the reasonable reader to make sense of them*" (per Clerk LJ in *Gillies Ramsay Diamond* at paragraph 31). Detailed reasons, workings and explanations do not have

to be given in respect of each individual sub item when the dispute put to the adjudicator is one concerning a global valuation.

56. Even if I am wrong on this point and the decision is unintelligible by reason of the inadequacy of the reasons given in the decision, for the reasons given above, I do not accept that the Defendant is able to demonstrate that it suffered substantial prejudice when looking at the facts for the reasons given above.

If there was any breach, should any part of the decision be severed and enforced?

57. As a result of the findings made above, it is not necessary to consider this question.

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