

Neutral Citation Number: [2012] EWHC 2428 (TCC)

Case No: HT 12-226

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 August 2012

Before :

THE HON MR JUSTICE RAMSEY

Between :

WSP CEL LIMITED

Claimant

- and -

DALKIA UTILITIES SERVICES PLC

Defendant

Mr Sean Brannigan QC and Ms Jennie Gillies (instructed by Weightmans LLP) for the
Claimant

Mr Michael Soole QC (instructed by Reynolds Porter Chamberlain LLP) for the Defendant

Hearing dates: 7 August 2012

Judgment

Mr Justice Ramsey:

Introduction

1. This is a Part 24 application by the Claimant (“WSP”) for summary judgment against the Defendant (“Dalkia”) in relation to an adjudicator’s decision. Dalkia seeks to defend these proceedings on the basis that the adjudicator did not have jurisdiction to deal with various claims within a claim for payment on termination made by way of a final account (“the Final Account”).

Background

2. Dalkia entered into a Consultancy Services Contract dated 12 May 2009 (‘the Consultancy Services Contract’) with WSP for WSP to carry out engineering, project management and construction management services in relation to a biomass energy plant at Diageo Distilling Limited’s distillery in Fife, Scotland. That contract was subject to the NEC 3 Professional Services Contract (June 2005) terms (“NEC Conditions”). The Housing Grants, Construction and Regeneration Act 1996 did not apply and accordingly the relevant adjudication provisions were those provided in NEC Option Clause W1.
3. On 6 May 2011 Dalkia terminated the Consultancy Services Contract with effect from 11 May 2011. On 22 August 2011 WSP served the Final Account dated 19 August 2011 on Dalkia seeking payment on termination both in respect of compensation events and “Loss and Expense”. Dalkia did not respond substantively to the Final Account and WSP initiated adjudication proceedings (“the First Adjudication”) in which it sought declarations as to the effect of the compensation event provisions in the NEC Conditions on Dalkia’s obligations.
4. In his decision dated 21 December 2011 the Adjudicator, Mr Tony Bingham, determined that for a number of claims Dalkia had not accepted the relevant compensation events or quotations, that for certain claims the NEC machinery for compensation events had come to an end and a dispute had arisen and that in relation to the Loss and Expense claim, Dalkia ought to have responded to it by 22 October 2011 and the failure to respond had the effect of giving rise to a dispute and a right to adjudicate after 1 December 2011.
5. On 28 December 2011 WSP gave notification to Dalkia of a dispute “*concerning the value of the amount due to the Claimant as set out in the Final Account dated 22 August 2011*”, to be referred to adjudication. This led to discussions between the parties and an agreement dated 13 January 2012 (“the Consent Agreement”) which is of central importance to this application.
6. The Consent Agreement provided for Dalkia to respond to the Final Account by 13 January 2012, which it did, followed by without prejudice meetings with the aim of reaching a negotiated settlement of the Final Account dispute. Either party could terminate the negotiation process and WSP was then entitled to refer to adjudication such aspects of the Final Account dispute as remained disputed.
7. In the event, on 22 February 2012 WSP served Notice of Adjudication on Dalkia referring the Final Account dispute to adjudication as provided for in the Consent Agreement.

8. On 13 March 2012 Dalkia sent an email to the Adjudicator in the following terms:

“Before Dalkia takes any step in this current adjudication, please note the following.

1. That Dalkia will be asserting in the case of many if not all of the issues referred that the Referring Party is not entitled to do so for failure to comply with clause W1.3(2), which provides:

“If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the tribunal.

2. To the extent that any claims in this referral seek to re-open issues already decided in [WSP’s] First Referral Dalkia will assert that they are already the subject of a decision.

Dalkia therefore formally reserves its right to assert that so far as such issues are jurisdictional (and not for example simply part of ascertaining [WSP’s] entitlement to final payment pursuant to clause 92), you have no jurisdiction to determine them. I propose for convenience to develop these reserved issues in Dalkia’s Response to the Referral Notice, unless you or the Referring Party require to take them as preliminary issues.

All steps Dalkia takes hereafter are subject to this reservation.”

9. WSP responded to this email on 14 March 2012 contending that the Adjudicator had jurisdiction because the terms of the Consent Agreement conferred jurisdiction on the Adjudicator and inviting the Adjudicator to make a preliminary decision under the jurisdiction given in Clause 6 of the Consent Agreement.

10. Dalkia replied to this on 15 March 2012 inviting the Adjudicator as a matter of construction to construe the intention of the parties under the Consent Agreement as not extending the time for the right to refer to adjudication disputes which were not referred to adjudication under Clause W1.3 of the NEC Conditions. Dalkia stated, in particular:

“4. I concede that by clause 6 of [the Consent Agreement] the parties conferred on you exclusive jurisdiction in the first instance to decide the effect and interpretation of it. I reserve however Dalkia’s right to argue hereafter before the court that you have no jurisdiction to determine whether any claims within the Final Account were themselves barred by the operation of option W1.3(1) at the time [the Consent Agreement] was made.

...

I therefore invite you to rule that the effect of [the Consent Agreement] of 13 January is as stated in paragraph 2 above and that option W1 applies in full to the conduct of the adjudication save as conceded in paragraph 2 above. Dalkia maintains the jurisdictional reservations I have already communicated in my previous email.”

11. On 17 March 2012 the Adjudicator sent through his ruling holding that there was “substantive (threshold) jurisdiction to adjudicate” the Final Account dispute and that this “Authority arises pursuant to the Consent Agreement”.

12. The Adjudicator then determined the Final Account dispute by a decision dated 22 June 2012 (“the Decision”), holding that WSP was entitled to £1,054,800.60 exclusive of VAT.
13. On 4 July 2012 Dalkia gave notice that they were dissatisfied with the Decision, including the Adjudicator’s decision on jurisdiction. It stated:

“We maintain our denial that the adjudicator had jurisdiction to determine those claims which by operation of clause W1.3(1) were not open for referral to adjudication and/or about which he had made a previous finding of fact and we dispute the adjudicator’s decision as to the effect of the [Consent Agreement] of 13 January 2012.”
14. Dalkia also said that it was prepared to make payment in full, without prejudice to its arguments on jurisdiction, provided that WSP agreed that payment did not constitute a waiver of Dalkia’s rights to argue before the [court] that any part of the decision was made by the Adjudicator without jurisdiction.
15. WSP then commenced these proceedings on 13 July 2012 seeking to enforce the Decision by way of an application for summary judgment under Part 24. Directions were then given leading to a hearing on 7 August 2012. At the end of that hearing I gave my decision that WSP was entitled to summary judgment for the amount claimed. In this judgment I give my reasons for that decision.
16. There were a number of issues raised by way of defence to the application which I now turn to deal with, after setting out the relevant terms of the Consent Agreement and the NEC Conditions.

The Consent Agreement

17. The Consent Agreement consists of six recitals and six clauses, although some of the recitals record agreements and are expressed in terms similar to the substantive clauses of the document.
18. Recital 3 refers to the Final Account and Recital 4 refers to a dispute between Dalkia and WSP “concerning the validity and value of the claims incorporated into the Final Account (the “Dispute”)”.
19. Recital 5 then provides that Dalkia and WSP agree that *“insofar as it proves to be necessary, Mr Tony Bingham shall be appointed as adjudicator of the Dispute (or any aspect thereto)”*.
20. Recital 6 then states that, subject to Clause 4, which I set out below, Dalkia and WSP agree that *“time to refer any aspect of the Dispute for determination through adjudication is hereby extended.”*
21. Clause 1 deals with service of a response to the Final Account by Dalkia; Clause 2 deals with the agreement for without prejudice meetings and Clause 3 deals with notice terminating those discussions.
22. Clause 4 then states that provided notice has been given under Clause 3,

“[WSP] shall be entitled to refer the Dispute (or such aspects of the Dispute as remain disputed) for determination by the Adjudicator provided always that:

- (1) The referral shall take effect once the Adjudicator is appointed and a Notice of Adjudication has been served on the Adjudicator; and*
- (2) The appointment of the Adjudicator and service of the Notice of Adjudication must be made within 7 days of effective written notice given under clause 3.”*

23. Clause 5 then sets out the timetable for the Adjudication and Clause 6, which is of importance to the matters in issue, provides as follows:

“The effect and interpretation of this Agreement shall be subject to the exclusive jurisdiction of the Adjudicator in the first instance (and whose decision is final and binding on the Parties unless and until revised by the English Courts).”

The NEC Conditions

24. The relevant provisions of the NEC Conditions include the following. Words in italics in the original (identified in the Contract Data as set out in Clause 11.1) are underlined in this judgment:

- (1) Clauses 61 to 65 which deal with compensation events;
- (2) Clause 92.1 which deals with payment on termination;
- (3) Option W1 which provides:
 - (a) By Clause W1.1 that *“A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator.”*
 - (b) By Clause W1.3(1) that *“Disputes are notified and referred to the Adjudicator in accordance with the Adjudication Table”* which is then set out.
 - (c) By Clause W1.3(2) that: *“The times for notifying and referring a dispute may be extended if the Consultant and the Employer agree to the extension before the notice of referral is due. If a disputed matter is not notified and referred within the times set out in the contract, neither Party may subsequently refer it to the Adjudicator or the tribunal.”* In this case the tribunal was the courts of England and Wales.
 - (d) By Clause W1.3(10) that: *“The Adjudicator’s decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the parties and not as an arbitral award. The Adjudicator’s decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal.”*
 - (e) By Clause W1.4(1) that: *“A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been referred to the Adjudicator in accordance with this contract.”*

(f) By Clause W1.4(2) that: “*If after the Adjudicator notifies his decision a Party is dissatisfied, he may notify the other Party that he intends to refer it to the tribunal. A Party may not refer a dispute to the tribunal unless the notification is given within four weeks of notification of the Adjudicator’s decision.*”

The jurisdiction of the Adjudicator under Clause 6 of the Consent Agreement

25. The first issue is whether Clause 6 of the Consent Agreement gave the Adjudicator the right to rule on his own jurisdiction.
26. Mr Sean Brannigan QC, who appeared with Ms Jennie Gillies on behalf of WSP, submitted that Clause 6 on its plain terms gave the Adjudicator jurisdiction to determine the effect and interpretation of the Consent Agreement. In the particular context of that agreement which dealt with the jurisdiction of the Adjudicator, he submitted that Clause 6 gave the Adjudicator jurisdiction to determine issues of jurisdiction which arose from the effect and interpretation of the Consent Agreement.
27. Mr Michael Soole QC, who appeared on behalf of Dalkia, submitted that Clause 6 is not sufficient to be an agreement to the effect that Dalkia has agreed that the Adjudicator should rule on the issue of jurisdiction and that Dalkia would be bound by that ruling. He submitted that there is no express agreement that the Adjudicator should rule on the issue of jurisdiction and he said that the terms of Clause 6 do no more than give the Adjudicator jurisdiction in relation to the Consent Agreement in the same terms as would normally apply to any agreement.
28. The relevant law was summarised by Simon Brown LJ in Thomas-Frederic’s (Construction) Limited v Keith Wilson [2004] BLR 23 at [33] where he said:

“The position can I think be summarised in the following two propositions. (1) If a defendant to a Part 24(2) application has submitted to the adjudicator’s jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue. (2) Even if the defendant has not submitted to the adjudicator’s jurisdiction in that sense, then he is still liable to a Part 24(2) summary judgment upon the award if the adjudicator’s ruling on the jurisdictional issue was plainly right.”

29. In this case the purpose of the Consent Agreement was to set out a procedure for dealing with the Dispute concerning the validity and value of the claims incorporated into the Final Account, leading to a determination by the Adjudicator of any aspects of the Dispute that remained disputed after without prejudice discussions. Essentially therefore the Consent Agreement was an agreement to vary the terms of Clause W1 of the NEC Conditions so as to set out the procedure for adjudication. In that context disputes as to the effect and interpretation of the Consent Agreement would, as Mr Brannigan QC submitted, be issues which substantially or wholly went to the question of the Adjudicator’s jurisdiction.
30. Whilst I accept that the agreement does not in so many words state that the Adjudicator has jurisdiction to deal with jurisdiction issues, I consider that on the basis of the particular terms of the Consent Agreement, an agreement that the

Adjudicator should have exclusive jurisdiction in the first instance to deal with disputes as to the effect and interpretation of an agreement dealing with dispute resolution would necessarily amount to an agreement that the Adjudicator should rule on the issue of jurisdiction arising out of the Consent Agreement.

31. Clause 6 then expressly says that the Adjudicator's decision is "final and binding on the parties" and therefore clearly envisaged, in my judgment, that the parties would be bound by the Adjudicator's ruling on jurisdiction arising from the effect and interpretation of the Consent Agreement.
32. I therefore consider that this case comes within the first proposition in Thomas-Frederic's and that the parties submitted to the Adjudicator's jurisdiction in the full sense of having agreed not only that the Adjudicator should rule on the issue of jurisdiction but also that the parties would then be bound by that ruling.
33. Mr Soole QC submitted that, even if Clause 6 did confer jurisdiction on the Adjudicator to rule on jurisdiction issues under the Consent Agreement, the provision in Clause 6 that the Adjudicator's decision was final and binding "unless and until revised by the English Courts" meant that, on an application under Part 24 the Court should consider afresh the question of the effect and interpretation of the Consent Agreement to determine whether the Adjudicator did have jurisdiction.
34. Mr Brannigan QC submitted that this was not the purpose of the provision allowing the court to revise the decision under that clause. He submitted that the intention was that this would form part of any review by the Court of the underlying merits of the dispute at a future date and did not alter the general principle that, on an application under Part 24 for the enforcement of an Adjudicator's decision, the Court should not investigate the underlying factual or legal issues arising in the Adjudication.
35. I consider that Mr Brannigan QC is correct in his submissions. Once the parties have agreed that the Adjudicator should have jurisdiction to make a final and binding decision, subject to review and revision by the Courts, then on an application for summary judgment the Court should no more investigate the issue of jurisdiction determined by the adjudicator than they should investigate any of the other issues in the underlying dispute.
36. On that basis, the Adjudicator had jurisdiction to make a binding determination on jurisdiction in the short term and he held that he had jurisdiction to deal with the Dispute arising on the Final Account and I do not consider that it is open to Dalkia, on this application under Part 24, to seek to review that finding by the Adjudicator.
37. On that basis, whilst it is strictly unnecessary for me to deal with the other issues, I consider that it is appropriate to do so as they were fully argued before me.

Jurisdiction under an ad-hoc agreement in March 2012

38. Mr Brannigan QC submitted that, even if Clause 6 of the Consent Agreement was not sufficient to give the Adjudicator jurisdiction to make a binding ruling on his jurisdiction, Dalkia in the exchange of emails between the parties and the Adjudicator in March 2012 accepted that Clause 6 did have that effect and this amounted to an ad-

hoc agreement by Dalkia that the Adjudicator should determine the issue of jurisdiction so that Dalkia should be bound by that ruling.

39. Mr Soole QC submitted that the exchange of emails did not have that effect but rather it expressly had the opposite effect of reserving Dalkia's position on jurisdiction.
40. In Dalkia's email of 13 March 2012, Dalkia sought to make a general reservation of its right to assert that the adjudicator had no jurisdiction to determine jurisdictional issues arising out of WSP's failure to comply with Clause W1.3(2) of the NEC Conditions or out of an attempt by WSP to reopen issues dealt with in the First Adjudication. In that email Dalkia proposed to develop those reserved issues of jurisdiction in its Response but left open the possibility that WSP might require them to be taken as preliminary issues.
41. By the email of 14 March 2012 Weightmans on behalf of WSP did seek a determination of whether, in the light of the Consent Agreement, Clause W1.3(2) of the NEC conditions deprived the Adjudicator of jurisdiction in relation to any or all of WSP's claims. In response to that request Dalkia wrote the email of 15 March 2012 in which it also sought the Adjudicator's determination of the issue whether the Consent Agreement deprived Dalkia of contending that claims were barred by the operation of Clause W1.3(1) of the NEC conditions. In that email and in the context of Dalkia seeking a ruling on jurisdiction, Dalkia "*conceded that Clause 6 of the Consent Agreement conferred exclusive jurisdiction on the Adjudicator in the first instance to decide the effect and interpretation of it.*" In the context of that email I consider that that concession amounted to an agreement that Clause 6 had the effect, which as I have held above, it did have in giving the Adjudicator jurisdiction to deal with jurisdiction issues.
42. The email then continued by saying that Dalkia reserved the right to argue before the court that the Adjudicator had no jurisdiction to determine whether any claims within the Final Account were barred by the operation of Clause W1.3(1) at the time of the Consent Agreement. When read with the first sentence which refers to the concession that the Adjudicator had jurisdiction "*in the first instance*" to decide the issue I consider that this reference to the court was a reference to the reservation in terms of Clause 6 of the right to seek the court's revision of the Adjudicator's decision of the effect and interpretation of the Consent Agreement upon the provisions of Clause W1.3(1) of the NEC conditions. That email from Dalkia concluded by expressly inviting the Adjudicator to rule on the issue.
43. Dalkia then stated that it maintained the jurisdictional reservation communicated in the email of 13 March 2012. That dealt first with the assertion that some issues could not be determined because of a failure to refer the dispute in accordance with Clause W1.3(2) and, secondly, with the contention that certain issues had already been dealt with in the First Adjudication. The first objection had clearly been developed as the preliminary issue, as proposed in the email of 13 March 2012. Given the concession by Dalkia and the limited reservation together with the invitation to the Adjudicator to determine whether he had jurisdiction, I do not consider that the reservation in the email of 13 March 2012, which still applied to issues in the First Adjudication, was intended to have any effect on the express request for the Adjudicator to rule on his jurisdiction under the terms of Clause 6 of the Consent Agreement.

44. Rather, in my judgment, what Dalkia did by the email of 15 March 2012 was to concede that Clause 6 of the Consent Agreement had the effect that I have found it did have. Therefore if I were wrong in my interpretation of Clause 6 as granting the Adjudicator jurisdiction to determine jurisdiction in the short term, I consider that Dalkia's email of 15 March 2012 conceded that Clause 6 did have that effect, subject to the Court's ability to revise that decision, as stated within Clause 6 itself. This therefore forms an alternative basis for the Adjudicator's jurisdiction.

The interpretation of the Consent Agreement

45. I have therefore found that either by the terms of Clause 6 of the Consent Agreement itself or by Dalkia's concession in respect of that agreement in the email of 15 March 2012, Dalkia agreed to the Adjudicator having jurisdiction to determine, in the short term, the issue of jurisdiction which arose out of the Consent Agreement. If however the Adjudicator was not given that jurisdiction then, as indicated by the second proposition in the Thomas-Frederic's case, the court has to consider whether the Adjudicators' ruling on the jurisdictional issues was plainly right.

46. The Adjudicator held that he had substantive jurisdiction to adjudicate under the Consent Agreement. At paragraph 11.1.3 of the Decision, the Adjudicator found that Dalkia's submission that the Consent Agreement did not remove its right to rely upon the time limits to refer any aspect of the Dispute via Clause W1 of the NEC conditions was "*an unrealistic approach to interpreting the Agreement.*" He therefore held that the Consent Agreement permitted WSP to adjudicate issues even where the time limits, set out in Clause W1, to refer any aspect of the Dispute had not been complied with. In that conclusion the Adjudicator was, in my judgment, plainly right for the reasons set out below.

47. The effect and interpretation of the Consent Agreement necessarily requires consideration of Clause W1 of the NEC Conditions. Clause W1.3(1) of the NEC Conditions, in the language characteristic of the NEC Contracts, provides that: "*Disputes are notified and referred to the Adjudicator in accordance with the Adjudication Table.*"

48. The Adjudication Table consists of three columns and sets out four grounds on which disputes might be referred to adjudication. The first column, "Dispute about" contains four classes of dispute. The second column sets out whether for each of those disputes it is "*The Consultant*" or "*The Employer*" or "*Either Party*" who may refer that type of dispute to the Adjudicator. The final columns then provide "*When may [the dispute] be referred to the Adjudicator*".

49. The first two grounds or categories of dispute are "*An action of the Employer*" and "*The Employer not having taken an action*". In each of those cases it is the Consultant who may refer the dispute to the Adjudicator. For each of these disputes the third column then provides that the Consultant has to give notification of the dispute to the Employer not more than 4 weeks after the Consultant becomes aware, either "*of the action*" or "*that the action was not taken*". The Consultant then has to refer the dispute to the Adjudicator "*between two and four weeks after the Consultant's notification of the dispute to the Employer*".

50. The third ground relates to a dispute about a quotation for a compensation event which is treated as having been accepted. It gives the Employer the right to adjudicate within a similar timeframe but based upon the Employer's notification of the dispute to the Consultant.
51. The fourth and final ground in the Adjudication Table relates to a dispute about "Any other matter" which may be referred to the Adjudicator by "Either Party" but it merely specifies that it may be referred to the Adjudicator "between two and four weeks after notification of the dispute to the other Party." Whilst, therefore, in relation to disputes about "An action of the Employer" or "the Employer not having taken an action", the Consultant has a limited time to refer the dispute to the Adjudicator after becoming aware of the action or that the action was not taken, in the case of "Any other matter", the time for referring the dispute to the Adjudicator depends on when that party notifies the dispute to the other party.
52. The importance of the time periods for referring disputes to the Adjudicator is set out in Clause W1.3(2) which provides as follows:

"The times for notifying and referring a dispute may be extended if the Consultant and the Employer agree to the extension before the notice or referral is due. If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the tribunal."

53. Clause W1.3(10) then provides for the effect of an Adjudicator's decision. It provides for the decision to be binding on the parties "unless and until revised by the tribunal". It also provides that the decision is final and binding if neither party has notified the other that it is dissatisfied with the decision and intends to refer the matter to the tribunal, within a limited time.
54. Clause W1.4 contains important provisions about the tribunal. At Clause W1.4(1) it is provided that:

"A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been referred to the Adjudicator in accordance with this contract."

55. In the language used in NEC Contracts "does not refer" means "cannot refer" or "may not refer". This provision therefore means that if a party is precluded from referring a dispute to the Adjudicator because the necessary notice is not given in accordance with the Adjudication Table, that party is also precluded from having that dispute determined by the tribunal, in this case the court.
56. Clause W1.4(2) then provides that the ability to refer a dispute to the tribunal is also limited because the party dissatisfied with the decision of the Adjudicator has to notify the other party that he intends to refer it to the tribunal and

"A Party may not refer a dispute to the tribunal unless the notification is given within four weeks of notification of the Adjudicator's decision."

57. In this case Mr Brannigan QC submitted that the Dispute as to the validity and value of the claims incorporated into the Final Account comes within the fourth category of dispute in the Adjudication Table because the Dispute relates to “*Any other matter*”. Mr Soole QC submitted that disputes within the Dispute come within the first two categories because they arise out of either “*an action of the Employer*” or “*the Employer not having taken an action*”
58. For the reasons set out below I consider that Mr Soole QC is correct. In addition for the purpose of this issue on this application, I accept, as contended by Dalkia, that there are some claims within the Final Account dispute which were not notified and referred within the period set out in the Adjudication Table and therefore under Clause W1.3(2) could not be referred to the Adjudicator or the tribunal for resolution.
59. The issue of jurisdiction which the Adjudicator had to decide and which, on a later revision the Court would have to decide, is whether despite the fact that there were such claims which could not be referred to adjudication under the terms of Clause W1 of the NEC conditions, the Consent Agreement varied that position so that the claims could be adjudicated.
60. In my judgment that depends upon the true construction of Recitals 5 and 6 and Clause 4 of the Consent Agreement.
61. In Recital 4 of the Consent Agreement the “Dispute” is defined as the dispute concerning the validity and value of the claims incorporated into the Final Account. It is not limited to certain of the Final Account claims which can be referred under Clause W1.3 of the NEC Conditions. Recital 5 records an agreement between Dalkia and WSP that, insofar as it proves to be necessary, Mr Bingham should be appointed as adjudicator of the Dispute “*or any aspect thereto*”. Again, there is no limitation on the aspects which can be referred, indeed, quite the contrary it refers to any aspect.
62. Recital 6 then records another agreement that, subject to Clause 4, which I shall deal with below, Dalkia and WSP “*agree that time to refer any aspect of the Dispute for determination through adjudication is hereby extended.*” The plain and clear meaning of that provision in Recital 6 is that the parties agreed to extend the time to refer any aspect of the Dispute for determination through Adjudication. As stated above, the final column of the Adjudication Table in Clause W1.3 of the NEC Conditions limits the time to refer disputes for determination through adjudication. Recital 6 in plain and unambiguous words states that the “*time to refer any aspect of the Dispute*” is extended. Again there is no limitation, it refers to any aspect. That in my judgment means that Dalkia cannot contend that any aspect of the Dispute on the Final Account has not been referred to Adjudication within the required time under Clause W1.3(1) and the Adjudication Table because the time to refer “*any aspect of the Dispute*” to adjudication is extended. That therefore gives a general right for WSP to refer any aspect of the Final Account, which is not resolved by the parties through their without prejudice discussions under Clause 2, to the Adjudicator for adjudication.
63. That interpretation is consistent with the provision of Recital 5 which provided that Mr Bingham was to be appointed as the adjudicator on the Dispute “*or any aspect thereto*” in so far as that proved to be necessary in the light of the without prejudice negotiations. It is also supported by the wording of Clause 4 which says that WSP

shall be entitled to refer “*the dispute (or such aspects of the Dispute as remain disputed) for determination by the Adjudicator*”. That, in my judgment, gives a freestanding entitlement for WSP to refer the whole or any part of the Dispute to adjudication provided that the referral and the appointment take place as set out in Clauses 4(1) and (2) of the Consent Agreement.

64. Mr Soole QC submitted that, in interpreting the Consent Agreement, the court has to take account of the provisions of Clause W1.3(2) of the NEC conditions. The first sentence provides “*The times for notifying and referring a dispute may be extended if the Consultant and the Employer agree to the extension before the notice of referral is due.*” Mr Soole QC submitted that this shows that, insofar as matters had not been referred to the Adjudicator by the date of the Consent Agreement, the parties could not under this provision of Clause W1.3(2) have intended that the extension of time should apply retrospectively. He therefore submitted that it would only be in respect of the referral to adjudication of other matters that the time for referring to adjudication would be extended from the date of the notification of the dispute by WSP.
65. Whilst the terms of Clause W1.3(2) evidently have to be taken into account, I do not consider that the clear wording of the Consent Agreement is consistent with such a limited extension of time and I do not consider that the plain meaning of Recital 6 can be cut down by the provision of Clause W1.3(2). Whilst the first sentence of Clause W1.3(2) provides that the times for notifying or referring a dispute may be extended before the notice of referral is due, that does not preclude the parties from making a wider subsequent agreement to extend the time for referring a dispute to adjudication, as I consider they did by the terms of the agreement in Recital 6 to the Consent Agreement. It is evidently open to the parties to agree what they wish subsequently. The first sentence merely says that the times may be extended if the parties agree to the extension before the notice of referral is due. It seems likely that on the language characteristic of the NEC Conditions that meant that the times may “only” be extended before the notice of referral is due. However, the NEC Conditions do use the word “only” in, for instance Clause 63.4, when that meaning is intended and it does not use the word “only” here. Nor does it say that the parties may not agree to extend the time after the notice of referral is due. In any case, the parties can agree whatever they wish to agree subsequently and are not bound by the previous agreement.
66. Further, Recital 6 is not the only relevant provision of the Consent Agreement in this context. The second sentence of Clause W1.3(2) states that “*if a disputed matter is not notified and referred within the times set out in this contract, neither party may subsequently refer it to the Adjudicator or the tribunal.*” However this is in clear conflict with the provisions of Recital 5 of the Consent Agreement which provide that Mr Tony Bingham was to be appointed as Adjudicator of the Dispute concerning the validity and value of the claims incorporated into the Final Account “*or any aspect thereto*” and also the provisions of Clause 4 of the Consent Agreement that WSP was entitled to refer the Dispute (or such aspects of the Dispute as remained disputed) for determination by the Adjudicator. Those provisions show that any aspect of the Dispute which remained disputed was to be referred to adjudication before the Adjudicator. This would include claims which might not have been referred to adjudication in accordance with the Adjudication Table.

67. Mr Soole QC submitted that the court should not construe the Consent Agreement in an un-businesslike way which deprived Dalkia of the right not to have certain disputes within the Dispute adjudicated because the time to refer those disputes to adjudication under Clause W1.3 of the NEC Conditions had already passed. I do not consider that such an outcome is un-businesslike or that, given the clear and unambiguous terms of the provisions of the Consent Agreement, the Court should attempt to rewrite that agreement to provide Dalkia with what it says would be a more businesslike agreement than it entered into.
68. In any event, I am not persuaded that an agreement to extend time to adjudicate is un-businesslike in the context of the terms of the Consent Agreement. This was a case where WSP's engagement had been terminated and it put in a Final Account on 22 August 2011. Dalkia had made no substantive response to that claim and WSP were clearly seeking adjudication. Dalkia wanted time to put in a response and also time to seek to agree the claims within the context of without prejudice negotiations where they would not be bound to take time limit points. In such circumstances I do not consider that it is un-businesslike for a party to say that they will not prevent any dispute from being determined on the merits rather than taking a strict view of the failure to refer disputes to adjudication within a particular period as precluding the ability to have those disputes adjudicated on the merits. If they were prepared to entertain without prejudice discussions on the Dispute, I see nothing inconsistent with an acceptance that, if aspects of the Dispute could not be resolved by without prejudice discussions, it should be open to WSP to seek to have the dispute resolved by adjudication rather than by relying on a time limit to prevent this.
69. It follows that I therefore consider that the terms of the Consent Agreement varied Clauses W1.3(1) and (2) so that the time to refer any aspect of the dispute concerning the validity and value of the claims incorporated into the Final Account was extended and WSP was entitled to refer the Dispute or any aspects of the Dispute that remained after the without prejudice discussions for determination by the Adjudicator appointed to adjudicate the Dispute or any aspect thereto.
70. It follows that I consider that the Adjudicator was plainly right in determining that he had jurisdiction to deal with every aspect of the dispute between Dalkia and WSP concerning the validity and value of the claims incorporated into the Final Account and was not precluded from doing so by the time limits in Clause W1.3(1) and the Adjudication Table in the NEC Conditions.

The ability to refer disputes to adjudication under Clause W1.3(1)

71. I have held that the provisions of clause W1.3(1) and (2) do not preclude WSP from seeking the adjudication of the validity and value of the claims incorporated into the Final Account because of the terms of the Consent Agreement.
72. If the Consent Agreement did not have the effect that I have held it did then it would be necessary to consider how the Adjudication Table in Clause W1.3(1) would apply to the Dispute concerning the validity and value of the claims incorporated into the Final Account.

73. Clause 92.1 of the NEC Conditions deals with payment on termination and provides that “*A final payment is made as soon as possible after termination.*” Under which provision of the Adjudication Table does a dispute as this payment come?
74. Mr Brannigan QC submitted that the Adjudication Table in Clause W1.3(1) operates in the manner of a notice provision and therefore Dalkia’s challenge to the Adjudicator’s finding that the Final Account claim could be brought under the fourth ground in the Adjudication Table, “*Any other matter*”, was a finding of fact and law within the Adjudicator’s jurisdiction rather than a issue which went to the Adjudicator’s jurisdiction. He submitted that Dalkia does not argue that the Adjudicator acted outside his jurisdiction by considering the operation of the Adjudication Table or that the Adjudicator failed to ask himself the correct question.
75. Mr Soole QC submitted that whether a matter comes within Grounds 1, 2, 3 or 4 in the four rows of the Adjudication Table, so as to permit it to be referred to Adjudication, is a matter which goes to the jurisdiction of the Adjudicator. He submitted that the Adjudicator was wrong in determining that the Final Account dispute came within Ground 4 rather than coming within Grounds 1 or 2. He submitted that, as that was a matter of jurisdiction, the adjudicator’s decision could be challenged under Part 24 on that basis.
76. In my judgment Mr Soole QC is correct in that submission. Absent the Consent Agreement the question of whether a dispute can be referred to the Adjudicator and therefore whether the Adjudicator has jurisdiction to deal with that dispute is a matter which goes to the jurisdiction of the Adjudicator. It therefore follows that, in the absence of the Consent Agreement, the decision of the Adjudicator on this aspect could be challenged on an application under Part 24. I therefore turn to consider whether, on the premise of the absence of the Consent Agreement, the Dispute on the Final Account came within Ground 4, as Mr Brannigan QC submitted or whether, in fact, it came within Grounds 1 or 2, as Mr Soole QC submitted.
77. Mr Brannigan QC submitted that the starting point is to consider the principles which apply to a clause by which a party seeks to preclude another party from relying on a claim because of a failure to comply with a notice provision. He referred to the decision of the House of Lords in Bremer Handels GmbH v Vanden Avenne Izegem PVBA [1978] 2 Lloyd’s Rep 109 which he says established that the party must demonstrate that the clause provided for a precise time for service for notice and that the clause or contract as a whole states in clear plain language that unless notice is served within that time all rights to recover a remedy are lost.
78. He submitted that the Adjudication Table in Clause W1.3(1) when viewed as a whole does not contain clear and precise provisions demonstrating when notice is required to be provided. He refers to the first two grounds and submits that it is impossible for the parties to determine the end date by which it must provide notification of the dispute. He submits that for every claim there is a multitude of end dates which can be arrived at. For instance he submits that the 63 claims which form the Final Account raised various complaints about Dalkia and that, in many cases, there were multiple complaints which applied to each claim. He submitted that these included:
- (1) Dalkia’s wrongful rejection of a valid compensation event;

- (2) Dalkia's failure to respond at all to WSP's notification of a compensation event or a compensation event quotation;
 - (3) Dalkia's assessment of the value of a compensation event at an amount less than that calculated by WSP;
 - (4) Dalkia's failure to provide notification of a compensation event where a compensation event had occurred for which Dalkia was responsible;
 - (5) Dalkia's late payment of invoices rendered giving rise to an entitlement to interest.
79. Mr Brannigan QC submitted that it was unclear from the Adjudication Table when notification of a dispute ought to have been given or, indeed, whether multiple notifications were required where a claim involves multiple criticisms of Dalkia. He submitted that it is unclear whether Dalkia maintained that the parties ought to have operated the system so as to give rise to 63 separate adjudications.
80. Further, Mr Brannigan QC submitted that in order to find that WSP's entitlement to refer a dispute to adjudication was lost, it must be incapable of coming within the definition of Ground 4 as "*Any other matter*". He submitted that this was a broad definition which was capable of applying to all the claims which were referred for determination in the Dispute arising out of the Final Account. He submitted that it was wide enough to include a matter which is formed from a composite or combination of some or all of Grounds 1, 2 and 3 in the Adjudication Table.
81. He submitted that the declarations which were sought by WSP in the Final Account adjudication and the nature of the dispute as to the validity and value of the claims in the Final Account was not a dispute simply about whether Dalkia's rejection of the claim was correct or whether Dalkia was wrong not to have provided notification under Clause 61.1 because those matters were elements within a larger dispute concerning the value of the Final Account and whether, in respect of each of the claims referred to adjudication, a compensation event had occurred. He submitted that this is precisely the type of dispute which comes within the all encompassing definition of "*Any other matter*".
82. Mr Soole QC submitted that the relevant disputed claims all fell within Ground 1 as being "*an action of the Employer*" rather than Ground 4 "*Any other matter*". He submitted that, if a relevant dispute is properly characterised within Grounds 1, 2 or 3, it cannot fall within Ground 4. He submitted that the Ground 4 simply sweeps up claims which are not within Grounds 1, 2 or 3 and that the use of the word "*other*" makes that clear. He submitted that the task of characterisation is a matter of substance and that, if in substance, the dispute is about an action of the Employer, it cannot be reformulated under Ground 4 so as to give a more generous time provision.
83. Mr Soole QC submitted that central to an understanding of the Adjudication Table are the contractual mechanisms in Clauses 60 to 65 of the NEC Conditions relating to compensation events. He pointed out that compensation events, as defined in Clause 60.1(1) to (12) deal comprehensively with matters which might give rise to a cause of action by the Consultant against the Employer. In particular, he referred to Clause 60.1(10) "*a breach of contract by the Employer which is not one of the other compensation events in this contract.*"

84. He referred to the detailed provisions for the notification of compensation events, for the provision of quotations for compensation events to cover proposed changes to the Prices and any delay to the Completion Date and Key Dates assessed by the consultant, for the assessment of compensation events and for the implementation of compensation events. He referred, in particular, to Clause 63.4 which provides:

“The rights of the Employer and the Consultant to changes to the Prices, the Completion Date and the Key Dates are their only rights in respect of a compensation event.”

85. Mr Soole QC submitted that claims which were made by WSP for any matters which are compensation events have to be dealt with under Grounds 1 and 2 of the Adjudication Table as these relate to an action of the Employer or the Employer not having taken an action, generally at the end of the compensation event machinery. He submitted that therefore the dispute as to validity and value of the claim in the Final Account would all have to be dealt with under Grounds 1 and 2 and that the provisions of the NEC Conditions do not contemplate there being a large number of disputes which only arise at a later date, such as the date of termination and give rise to a dispute on a composite claim or on a final account at termination.

86. I consider Mr Soole QC’s submission to be correct. The philosophy of the NEC Conditions is to avoid disputes at the end of a project by having intensive management machinery to deal with issues during the process of a project. The notification of disputes and the reference to an adjudicator is a necessary part of the detailed management philosophy under the NEC Conditions. This requires disputes to be referred to the adjudicator in a timely manner so that they can be resolved at the time. This necessarily means that for each of the stages of a compensation event, there may need to be a reference to the adjudicator to resolve the dispute.

87. In the present case Clause 92(1) provides for the final payment due on termination to include:

- (1) an amount due assessed as for normal payments and
- (2) other costs reasonably incurred by the Consultant in expectation of completing the whole of the services and to which the Consultant is committed.

88. The payment has to be made “*as soon as possible after termination.*” It would normally be expected that a number of compensation events and other payment matters would have been dealt with already so that only issues which arise in the weeks before termination or at termination would then have to pass through the compensation event procedure. Claims in this case were based on compensation events. I do not consider that just because a claim forms part of the composite claim at termination it changes its character under the machinery of the NEC Conditions. In my judgment, claims based on compensation events should, in principle, be dealt with under that machinery. Any disputes arising either from an action of the Employer or the Employer not having taken action, would be referred to adjudication under Grounds 1 or 2. Those claims do not change to become “*Any other matter*” just because they are included in the Final Account. If they come within Grounds 1 and 2 then they remain there and Ground 4 only deals with disputes which do not arise from Grounds 1 or 2 or where relevant Ground 3.

89. As result I do not consider that, in the absence of the Consent Agreement, WSP could have sought the adjudication by the Adjudicator of issues arising under Grounds 1 and 2 unless they had been referred within the time set out under those grounds. They could not seek adjudication of matters, such as Employer's actions or inactions, which are properly within Grounds 1 and 2 by relying on them being "*Any other matter*" under Ground 4 because the Final Account was a composite claim of a number of different claims. Those claims have to be dealt with, as appropriate, under Grounds 1 and 2 unless the claim is not based on any action or inaction of the Employer.

Jurisdiction concerning Claims 30 to 63

90. Dalkia contended that the adjudicator lacked jurisdiction to consider Claims 30 to 63 as claims based on compensation events because, in the Notice of Adjudication, WSP distinguished between claims which were made for declarations relating to compensation events and claims for "loss and expense". The latter claims were made in relation to Claims 30 to 63 and these claims were not originally stated to be claims for compensation events. They were identified as claims for compensation events only in the Referral Notice. As a result Mr Soole QC submitted that WSP was not entitled to increase the scope of the adjudication in a manner inconsistent with the Notice of Adjudication by pursuing Claims 30 to 63 on the basis that they are claims for compensation events.

91. Mr Brannigan QC submitted that the claims which were included in the Notice of Adjudication in relation to Claims 30 to 63, whilst referred to in terms of loss and expense, sought a declaration "*as to the amount payable to the Referring Party whether pursuant to the Consultancy Services Contract, by way of damages for breach of contract, by way of quantum meruit or otherwise at law.*"

92. Accordingly he submitted that WSP had not broadened the scope of the Adjudication by seeking a remedy in terms of a compensation event in relation to Claims 30 to 63.

93. I consider that Mr Brannigan QC is correct. The claims which were incorporated into the Notice of Adjudication included Claims 30 to 63 on the basis that they were claims in relation to the amount payable pursuant to the Consultancy Services Contract. I consider that this reference in the Notice of Adjudication is broad enough to incorporate a claim on the basis of a compensation event under the Consultancy Services Contract and that under the Notice of Adjudication WSP was entitled to pursue that Claim. The fact that some claims expressly referred to them as being claims for compensation events does not preclude other claims from being pursued as compensation events provided that the terms of the Notice of Adjudication is broad enough to encompass those claims, as it was for Claims 30 to 63 in this case.

Other Issues

94. A number of other issues were raised which I can deal with briefly.

95. First, as Mr Soole QC pointed out and I accept, the Adjudicator could not in the Adjudication open up matters decided in the First Adjudication. Whilst in the First Adjudication the Adjudicator made specific findings to the effect that the compensation event machinery had been exhausted and a dispute had arisen, that did not preclude the Adjudicator from determining the effect of the Consent Agreement on the time for referring the dispute to the adjudicator under Clause W1.3(1) and the

Adjudication Table. That did not amount to a finding which was inconsistent with the finding made in the First Adjudication.

96. Secondly, if I had found that certain individual claims for compensation events could not be referred to the Adjudicator then this is a case where I consider that it would have been possible to sever the Decision. As Mr Soole QC set out in his skeleton argument, the claims which he alleged were “time-barred” under Clause W1.3(2) of the NEC Conditions amounted to £575,145.19 and those for which he asserted that Notice of Adjudication had sought loss and expense but the referral notice re-cast the claims as compensation events amounted to £253,887.20 of the total Decision by the Adjudicator of £1,054,800.50. This was a case, therefore, where the individual claims could have been isolated and where the jurisdictional challenge referred only to certain claims and not to all claims. As a result, in those circumstances, in the same way as Mr Justice Akenhead did in Beck Interiors Limited v UK Flooring Contractors Limited [2012] EWHC 1808 (TCC) at [34], I consider that it would have been possible to sever the Decision in this case.

Summary

97. For the reasons set out above I have therefore come to the conclusion that the Adjudicator had jurisdiction to determine whether he had jurisdiction in a final and binding manner, subject to review by the court in any proceedings for a final determination of the disputes. His jurisdiction to do so arose from the provision of Clause 6 of the Consent Agreement and therefore Dalkia did not have real prospects of successfully defending the Claim brought by WSP to enforce the Adjudicator’s Decision and accordingly WSP is entitled to summary judgment for the sums awarded by the Adjudicator in that Decision.
98. If contrary to that finding, the Adjudicator did not have jurisdiction under Clause 6 of the Consent Agreement then he was given that jurisdiction by the concession made by Dalkia in an email of 15 March 2012 to the effect that he did have jurisdiction to decide jurisdiction under Clause 6 of the Consent Agreement.
99. If contrary to those findings the Adjudicator did not have jurisdiction to determine his jurisdiction then, having considered the finding of the Adjudicator, I consider the Adjudicator to have been plainly right in his finding and that WSP were entitled to seek Adjudication of the Dispute as to the validity and value of all the claims incorporated into the Final Account even if they would otherwise not have been referable to Adjudication because notice had not been given in accordance with the time set out in the Adjudication Table in Clause W1.3(1) of the NEC Conditions.