

Neutral Citation Number: [2013] EWHC 87 (TCC)

Case No:HT-12-421

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th January 2013

Before:

MR JUSTICE AKENHEAD

- -

Between:

ARCADIS UK LIMITED	**Claimant**
- and -	
MAY AND BAKER LIMITED (t/a SANOFI)	**Defendant**

- -
- -

William Webb (instructed by **Birketts**) for the **Claimant**
Hamish Lal, Solicitor-Advocate (instructed by **Jones Day**) for the **Defendant**

Hearing date: 22 January 2013

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JUDGMENT

Mr Justice Akenhead:

1. Issues are raised in these adjudication enforcement proceedings as the extent to which it is legitimate or unfair for an adjudicator to take into account or adopt the reasoning of a previous adjudicator's decision.

The History, Facts and the Background

2. These facts are based on the evidence put before the Court and are not intended to bind any tribunal ultimately charged with resolving finally the related disputes between the parties.

3. By a contract ("the Contract") dated 16 March 2011, Arcadis UK Ltd ("Arcadis"), the Claimant, was employed as a contractor by the Defendant, May & Baker Ltd which trades as Sanofi-Aventis ("Sanofi") to carry out "remediation" works at Sanofi's site at Rainham Road, Dagenham. Part of this site was known as D44 Landfill which Sanofi wished to have remediated by soil washing, chemical treatment and off-site disposal methods in order to allow future redevelopment and use of the land for industrial purposes. Work included breaking out existing concrete and tarmac, crushing concrete for re-use and excavating up to 14,400 m^3 of landfill material for washing or other chemical treatment. The Contract incorporated various site plans which showed the delineation of the site which was to be the subject matter of work or processes by Arcadis. The total tender was about £4.5 million. The Contract incorporated the NEC3 Engineering and Construction Contract June 2005 (with June 2006 amendments). Provision was made in the contract for adjudication. The work was supposed to be started on 28 February 2011 and completed within 42 weeks, subject to provisions for extension of time.

4. Section 6 of the NEC3 form of contract provides for what are known as "Compensation Events". Clause 61.1 legislates for the Project Manager (retained by Sanofi in this case) to notify the Contractor of the compensation events, be they variation instructions or otherwise; alternatively, the Contractor can notify the Project Manager of what is believed to be a Compensation Event. Provision is made then for the Contractor to be required to submit a quotation identifying the price or likely costs of and occasioned by the Compensation Event, with provision made for that quotation to be accepted. Clause 62 appears to allow the Project Manager to accept a quotation, to instruct the contractor to submit a revised quotation, to make his own assessment of the consequential effects of the Compensation Event or to decline to go ahead with the matters for which a quotation has been sought. Clause 64 addresses the scope of the Project Manager's own assessment.

5. Towards the end of 2011, there came a time when it became apparent that some work might need to be done beyond the "Northern" and the "Southern" boundaries of the worksite, albeit on land owned by Sanofi. This work related to landfill or contaminated material and would require treatment. So far as can be ascertained, the Project Manager secured from Arcadis in about August and September 2011 a quotation or quotations in respect of the Northern Boundary work and then through a series of Project Manager Instructions (PMI Nos. 26, 33, 34 and 44 in September and October 2011) he instructed Arcadis to carry out such work. It appears that the Project Manager initially accepted that this work amounted to a Compensation Event and indeed produced his own financial assessments of what with the work was worth;

indeed over £300,000 was certified by the Project Manager for such work. The work outside the Northern Boundary seems to have been done by the end of 2011. Arcadis encountered what it said were similar ground conditions at the Southern Boundary and on 11 November 2011 issued an "Early Warning" that contaminated ground extended beyond that boundary; on 15 November 2011 the Project Manager instructed it to provide alternative quotations; Arcadis provided a quotation on 2 December 2011 in the sum of £456,111.24 and indicating an extension of time required of 16 days. On 5 December 2011 the Project Manager issued PMI 51 which instructed Arcadis proceed with the work, albeit assessing the amount due as £326,877.41; this figure excluded any costs associated with prolongation. Following discussions, Arcadis submitted a revised quotation in the sum of £541,898.10 indicating an extension of time requirement of 29 days. This was rejected by the Project Manager on 18 January 2012.

6. On 27 January 2012, for reasons which are not clear to the Court, the Project Manager purported to withdraw PMI51 in respect of Southern Boundary work and PMI Nos. 33, 34 and 44 in respect of the Northern Boundary work. Later in October 2012, the Project Manager adjusted payment certification by removing what had been allowed for the Northern Boundary work, he never having certified anything in respect of the Southern Boundary Work. The Southern Boundary work was done in or about March or April 2012. Perhaps unsurprisingly, disputes arose between the parties in relation to entitlement to payment for both the Northern and Southern Boundary work.

The First Adjudication

7. On 18 August 2012, Arcadis served its Notice of Adjudication in what has come to be called the First Adjudication; this related to entitlement to payment for the Northern Boundary. A well-known adjudicator Dr Derek Ross was appointed as the adjudicator in the First Adjudication. Amongst other issues which Arcadis asked him to resolve were:

> "Issue 1 – Is the Project Manager entitled to reverse his decision that a matter constituted a compensation event and/or his assessment of the effects of a compensation event?
>
> Issue 2 - If it is decided that the Project Manager is entitled to withdraw acceptance of a compensation event, do the works to the Northern Boundary in fact constitute a compensation event?
>
> Issue 3 -- If it is found that the Project Manager is entitled to withdraw acceptance of a compensation event nor [sic] his assessment thereof or that, if he can withdraw it, the works to the Northern Boundaries still form a valid compensation event, then we will ask the Adjudicator to decide the assessment of the resultant change to the Prices and changing the Completion Date that the Project Manager should have accepted and/or assessed."

8. There was a full participation by both parties in this adjudication and in a thorough 50 page decision the First Adjudicator found in favour of Arcadis, declaring that the Northern Boundary work which he found was situated to the north of the Northern boundary of the area defined in the Works Information as the area to be remediated, constituted a Compensation Event under the Contract (Paragraph 11.02); he also

found that the appropriate compensation ought to have been a change in the contract Prices of £412,060.78 and an extension of the Completion Date by 12 working days which would take the Completion Date to 18 January 2012 (Paragraph 11.03). He also declared that the Project Manager's certification of a deduction of £10,725 for delay damages as at 7 February 2012 was incorrect. He found that, given the amount already certified for the Northern Boundary work, the outstanding amount for the Northern Boundary Compensation Event was £98,111.54 in addition he awarded interest and make provision for the payment of these fees. With regard to Issue 1, he said at Paragraph 6.02:

> "…prior to the implementation of the compensation event, the Project Manager may reverse his decision that the matter constituted a compensation event. However, after the compensation event has been implemented, as defined in the Contract, the Project Manager may neither reverse his decision that the matter is a compensation event, nor reassess the effects of the compensation event."

He then went on from Paragraph 6.02 through to Paragraph 6.22 to give reasons why the Project Manager was not entitled to withdraw his acceptance of the Northern Boundary work compensation event as a compensation event nor reassess its effect on the contract prices.

9. The First Adjudication Decision was, I understand, honoured by Sanofi.

The Second Adjudication

10. On 23 October 2012, Arcadis served a Notice of Adjudication in relation to the Southern Boundary Work. This Notice raised verbally identical issues (Issues 1, 2 and 3) as had been formulated by it for the First Adjudication. It sought declarations that (a) the Project Manager's assessment "should have been a change in the Prices of £541,898.10 and delay in the Completion Date of 16 days or such other sum or period as the Adjudicator may decide, (b) "the deduction for delay damages should be £Nil" and (c) Sanofi was to pay the sum of £533,769.63 or such other sum as the Adjudicator decides, plus interest…". Arcadis' representative invited the Institution of Civil Engineers which was a or the adjudicator nominating body to appoint Dr Ross as he had been involved on the First Adjudication, saying that his "nomination would save the Parties both costs and time as he is already familiar with the contract and reading-in time would be minimised". Sanofi's solicitors objected on grounds that his fees were excessive, that he had exceeded his jurisdiction and that they did not agree to his appointment. The ICE appointed a Chartered Engineer, Mr Rogers, as adjudicator.

11. There were no challenges to his jurisdiction. The parties exchanged a Referral Notice, Response, a Reply to the Response and, following a hearing on 16 November 2012 a Rejoinder and final submission. The Referral Notice ran to 43 pages with 10 Appendices which included opinions from Leading Counsel and Dr Ross' decision in the First Adjudication. It set out details of the Works, the Contract and how the dispute arose including the history between November 2011 and October 2012 broadly set out above. Section 7 of the Referral Notice analysed in some detail the issues between the parties. Issue 1 was addressed in Paragraphs 7.2.1 to 7.2.69, with an analysis as to how the contract was intended to work in relation to compensation events, a detailed chronology of events, an "explanation" over 20 paragraphs as to

why the Project Manager was incorrect in withdrawing his implementation of a compensation event and a declaration sought that the Project Manager was not "entitled to withdraw his acceptance of a Compensation Event nor his assessment of a Compensation Event once an assessment had taken place…". Paragraph 7.2.68 said this:

> "There has already been an adjudication in respect of the additional works at the north of the site on a similar factual basis. The Adjudicator in that referral has decided that the Project Manager was not entitled to reverse his assessment of the compensation event after it had been implemented…That Decision has not been put aside by the courts and is therefore binding on the Parties. As the same principles apply to this Issue in this referral we consider that the Adjudicator is bound by that previous decision (see Section 23(2) of the Scheme for Construction Contracts) and should therefore decide that the project manager is not entitled to withdraw a compensation event once it has been implemented. Should the Adjudicator not feel bound by the previous decision, which we consider would be incorrect, we request the Adjudicator to adopt the compelling arguments of Dr Ross in this issue."

The Notice then went on to address Issues 2 and 3 in respect of which Arcadis sought a declaration that the Southern Boundary work constituted a Compensation Event under the contract, payment and an extension of time as requested in the Notice.

12. The Response from Sanofi ran to 14 pages together with a witness statement and sought to argue on the merits and the evidence that the Southern Boundary work was not a compensation event; it was asserted that there were no binding, operative or contractually compliant quotations or assessments pursuant to the compensation event provisions. The arguments were detailed and comprehensible. So far as quantum and delay was concerned, Paragraphs 15 to 17 (running over five pages) suggested that the Adjudicator may need to make his "own assessment of the change in the Prices and to the Completion Date caused by the" Southern Boundary work (Paragraph 15). In Paragraph 16, it argued that Arcadis had not proved by way of cause and effect or otherwise how this work caused a delay and indeed pointed in some detail to assertions that Arcadis was in a period of significant culpable delay, and averting to the fact that the work should have been completed on 19 December 2011 but was not certified complete until 14 September 2012. Sanofi also argued at Paragraph 18 that the First Adjudicator's decision had no relevance and was not binding save with regard to the extension of time of 12 days.

13. The Reply to this Response ran to 23 pages together with various attachments. It sought to argue on the merits and on the facts why there was a compensation event. With regard to delay, Arcadis argued that delay caused by the Southern Boundary work was to be assessed in accordance with Clause 63.3 by reference to "the length of time that… planned Completion is later than planned Completion as shown on the Accepted Programme"; essentially it argued that this work was or would be critical and that one could properly determine the allowable extension of time by reference to a programming exercise (Paragraphs 39 to 51). So far as the financial compensation was concerned, it asserted that what was required was the determination of a proper forecast cost judged at the time when the contractor was instructed to provide a quotation (Paragraphs 52 to 82).

14. There was then a meeting between the parties and the Second Adjudicator on 16 November 2012 at which amongst other things there was a discussion about how, if at all, Arcadis should prove its case or entitlement with regard to delay and quantum. In its Rejoinder served on 22 November 2012, Sanofi challenged the assertions that the financial and time assessments should be based upon a forecast and the adjudicator was asked to "apply [legal and factual] rigour" (page 3); it believed that the best that Arcadis was trying to do was to ask the adjudicator to make a "rough and ready assessment so that it can get some time and money".

15. Arcadis' Final Submission ran to 29 pages and addressed the further arguments raised including the date when the forecast time and money assessments needed to be made. Section 3 went in some detail into the programming exercise which, it argued, showed that but for the Southern Boundary work it was on time to meet the extended completion date of 18 January 2012 (page 12), and asserting that this work was effectively critical and would extend the Completion date by however long it took. The work actually took 29 days from 6 March 2012 onwards. This exercise sought to demonstrate that an extension of 29 days was justified accordingly.

16. The Second Adjudicator's decision dated 25 November 2012 ran to 27 pages and decided at Paragraph 145 overall that:

> "145.1 The Project Manager is neither entitled to reverse its decision that the matter constitutes a compensation event nor entitled to reverse his assessment of the effect of a compensation event;
>
> 145.2 The additional works to the Southern Area…does constitute a compensation event under the Contract;
>
> 145.3 The Project Manager's assessment of the compensation event should have been a change in the Prices of £480,231.44 plus VAT and delay to the Completion Date of 29 days;
>
> 145.4 The Referring Party is due the sum of £15,324.81 in respect of interest;
>
> 145.5 There shall be no deductions made for delay damages…"

17. Between Paragraphs 34 and 40, he deals with the First Adjudication referring to the decision, summarising what the adjudicator decided and continuing:

> "36. Whilst the Referring Party considers that I am bound by the previous adjudicator's decision, it suggests I should adopt the previous adjudicator's reasoning should I not feel bound by its decision.
>
> 37. The Responding Party contends that I am not bound by the previous adjudication on the basis that the Scheme for Construction Contracts does not bind and adjudicator in a successive adjudication to the reasoning or analysis employed by an earlier adjudicator.
>
> 38. I am bound by a previous adjudicator's decision and whilst I am not empowered to decide my own jurisdiction, I do have a duty to consider the

> matters raised regarding whether, and to what extent, I should be bound by the previous adjudication.
>
> 39. I note that the previous adjudicator predicated his decision to the extent that the compensation event in that particular case had been implemented.
>
> 40. I take the view that if I find that the Southern Boundary Works had been properly implemented under the Contract as a compensation event, then I am bound by the previous adjudicator's decision that [the] Project Manager was not entitled to withdraw his acceptance of that compensation event. I will also be bound by the decision that the Project Manager could not reverse his assessment of that event. However, the previous adjudicator's decision would not prevent me from making my own assessment of the effect of the Southern Boundary Works."

He was later in his decision at Paragraph 100 to "find that the Southern Boundary Works compensation event was not properly implemented in accordance with the contract".

18. It would be fair to say that the Second Adjudicator then proceeded to consider more or less specifically the issues in the Second Adjudication. At Paragraphs 52 to 56, he addressed the arguments about whether the Project Manager had the power to withdraw his acceptance or his assessment of a compensation event, deciding at Paragraph 56 that he was "neither entitled to reverse his decision that a matter constituted a compensation event nor entitled to reverse his assessment of the effects of a compensation event". At Paragraphs 57 to 76 he considered the issue as to whether the Southern Boundary work constituted a compensation event, finding at Paragraphs 76 that it did do so. Part of his reasoning was that he formed the view that the contractual quantities of 14,400 m^3 of landfill material related only to landfill material found within the footprint of the landfill site. He then went on in some detail at Paragraphs 77 to 100 to consider whether this compensation event was properly implemented in accordance with the contract and found that it was not at Paragraph 100. He said at Paragraph 95 however that he agreed:

> "with the previous adjudicator's decision that the only assumptions that the Project Manager may legitimately make in respect of a compensation event are those that relates to the <u>effect</u> that compensation event [has] a bearing on the forecast of Defined Cost and the forecast of the delay to the Completion Date".

At Paragraph 101 to 104 he found that the Southern Boundary Work Compensation Event was not properly assessed in accordance with the contract. At Paragraph 105 to 118 he considered the effect which the Southern Boundary work compensation event had on the Completion Date finding that its effect should be "to extend the Completion Dated by 29 days". He broadly accepted Arcadis' argument that the exercise could be done by reference to the updated Accepted Programme saying:

> "116. I have studied the Accepted Programme Rev 3 dated May 2011 together with a series of re-baselined programmes, albeit not Accepted Programmes, up to Contract Programme Rev 11 dated 27 January 2012 together with other evidence provided by the Responding Party. Whilst noting that the Responding Party contends that the programmes do not evidence any prolongation, I am satisfied

> that the Southern Boundary Works did not occur in parallel with any other critical path activity and did cause a critical delay to the Completion Date."

19. Between Paragraphs 119 and 137 he reviewed the effect which the Southern Boundary Work had on the contract Prices. He reviewed the history and referred to Sanofi's assertion that no entitlement to any money had been established given the lack of evidence. He set out (what Arcadis argued were) four potential assessments which included £541,898.10 being its revised quotation of 13 January 2012, £455,786.79 being its adjusted original quotation of 2 December 2011 and £326,877.41 being the Project Manager's own assessment on 14 December 2011. He said at Paragraph 130 that the Project Manager had rescinded his instructions relating to the Southern Boundary work because he "later challenged whether [it] constituted a compensation event rather than because he had no basis for his own assessment of the cost of the works, as stated in PMI 51 and reaffirmed as being his own assessment in his e-mail dated 14 December 2011". Given his view that there was a 29 day prolongation cost, he said at Paragraph 133 that "any forecast of the effect on the Prices should include for prolongation cost". He concluded as follows:

> "136. In deciding what the forecast costs should have been at the time the Contractor submitted his revised quotation, I choose to split the difference between the Contractor's forecast (as recently requested by the Referring Party to be reduced to £541,799.79) and the Project Manager's forecast inclusive of prolongation costs (£418,663.09).
>
> 137. Given the above, I find that the effect of the compensation event should be to increase the Prices by £480,231.44 [(£541,799.79 + £418,663.09)/2]".

He concluded at Paragraph 145 with his overall decision as set out above.

20. This decision has not been honoured and so it is that Arcadis issued proceedings to enforce it.

The Proceedings

21. Arcadis' Claim was issued in this court on 12 December 2012 with the Particulars of Claim exhibiting the contract and accompanied by a witness statement which attached much of the material to which I have referred above. The Court issued directions on 13 December 2012 to bring Arcadis' summary judgement application to a hearing and it required the Defendant to serve and file evidence by 11 January 2013. Sanofi lodged its Acknowledgement of Service in time and identified a defence in simple terms:

> "The adjudicator made an error in his jurisdiction and/or breached the rules of natural justice. The adjudicator treated an earlier decision as binding and did not allow the defendant to address fully this issue."

There was no further involvement of the Defendant or its solicitors until shortly before the hearing when the solicitors lodged a comprehensible and comprehensive skeleton argument together with their own bundle which included some contemporaneous documents not previously lodged together with some authorities.

22. In his skeleton submissions and by way of oral argument at the hearing, Mr Lal instructed by Sanofi ably and articulately sought to argue the points raised but which went substantially beyond the defence indicated in the Acknowledgement of Service. The arguments were fourfold:

> 1. The Second Adjudicator "took an erroneously restrictive view of his own jurisdiction, with the result that he decided that he was bound by Adjudication Decision 1 and by the first adjudicator's reasoning in Adjudication Decision 1" and that Arcadis " brought about the adjudicator's error by a misguided attempt to seek a tactical advantage or otherwise influence" him.
>
> 2. The Second Adjudicator "went off on a frolic of his own" in relation to the quantum by "splitting the difference) between the Project Manager's figure (adjusted for prolongation) and the Arcadis' slightly adjusted forecast figure. This frolic involved him deciding the case "upon a basis which had not been argued or put forward by either side, without giving the parties an opportunity to comment."
>
> 3. The Second Adjudicator failed to consider Sanofi's defence on delay.
>
> 4. The Second Adjudicator's decision was invalid on the grounds of apparent bias in effect because he was put in the position in which he had to have regard to the First Adjudication decision.

23. These arguments were challenged in detail by Counsel for Arcadis and I mean him no disrespect by not setting out those arguments which I will cover in the following parts of the judgment. There was no request for an adjournment to enable the Claimant to counter the new evidence and arguments.

The Law

24. It has been said that the Court should not encourage losing parties in adjudications to scrabble around to find some argument, however tenuous, to resist payment (see **Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2006] BLR 15 at Paragraph 85). The Court of Appeal went on to state at Paragraph 86:

> "It is only too easy in a complex case for a party who is dissatisfied with the decision of an Adjudicator to comb through the Adjudicator's reasons and identify points upon which to present a challenge under the label of 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of Adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the Adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the Adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to recognise that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The Scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to

> doubt whether Parliament contemplated the dispute in evolving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the Scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in the case like the present."

25. I take from this approach the view that, when the Court comes to consider what an adjudicator has said and done, it needs to bear in mind that often adjudicators are not legally qualified (as here), that (as here) there was limited time for the adjudicator to produce this decision and to digest the substantial amount of material before him and that one should not seek unfavourably to compare a decision of an adjudicator with a detailed reserved judgement of the High Court.

26. So far as breaches by an adjudicator of the rules of natural justice, I refer to Paragraph 57 of the judgement of this court in **Cantillon Ltd v Urvasco Ltd** [2008] EWHC 282 (TCC), which followed a review of the cases:

> "From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:
>
> (a) It must first be established that the Adjudicator failed to apply the rules of natural justice;
>
> (b) Any breach of the rules must be more than peripheral; they must be material breaches;
>
> (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable 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."

27. There is, broadly, no suggestion that this statement of principle was wrong. Reliance is placed by Mr Lal on the more recent case of **Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board** [2012} EWHC 84 (TCC) which adopted the statement

of principle in the **Cantillon** case. The Court did hold that the adjudicator in that case had exceeded his jurisdiction and breach the rules of natural justice:

> "33. In essence, and doubtless for what he believed were good and sensible reasons, the adjudicator has gone off "on a frolic of his own" in using a method of assessment which neither party argued and which he did not put to the parties. In some cases, this may not be sufficient to prevent enforcement of the decision where the "frolic" makes no material difference to the outcome of the decision. Thus, an adjudicator who refers to a legal authority which neither party relied upon, may have his or her decision enforced nonetheless if the application of that legal authority obviously makes no difference to the outcome. The breach of the rules of natural justice has to be material. Here, for the reasons indicated above, the breach is material and has or has apparently led to a very substantial financial difference in favour of HKM but necessarily against the interests of DHB.
>
> 34. It follows from the above that the adjudicator's decision can not be enforced because not only has he exceeded his jurisdiction by addressing and finding a method of assessment which formed no part of the dispute referred to him but also he has breached the rules of natural justice, doubtless unwittingly, by deciding the case not only on the basis not argued by either party at any stage but also without giving each party the opportunity to make submissions at least on the method of assessment which the adjudicator considered that he should adopt."

Each case in which there is a substantive criticism of the adjudicator's conduct needs to be looked at on its merits. The **Herbosch** case was a relatively extreme albeit clear case in which the adjudicator departed from the quantum methodology put forward by both parties without giving either the opportunity to address the adjudicator's eventual approach and in which that approach made a very significant difference to the financial outcome of the decision.

28. The test for bias is now well established and is set out in the judgement of Lord Justice Dyson (as he then was) in **Amec Capital Projects Ltd v Whitefriar City Estates Ltd** [2004] EWCA Civ 1418:

> "29. It is rightly not in dispute that the rule against bias applies to adjudicators appointed to determine disputes under the 1996 Act. It is not said on behalf of Whitefriars that Mr Biscoe was in fact biased in reaching his second decision. It is, however, submitted that his decision should be declared to be invalid on the grounds of apparent bias. The test for apparent bias is not in doubt. It is whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased: *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 para 103".

29. In **Pilon Ltd v Breyer Group Ltd** [2010[BLR 452, Mr Justice Coulson said in the context of adjudicators taking an erroneously restricted view of his jurisdiction:

"22. As a matter of principle, therefore, it seems to me that the law on this topic can be summarised as follows:

22.1. The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see ***Carillion v Devonport***.

22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see ***Ballast***, ***Broadwell***, and ***Thermal Energy***.

22.3. However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see ***Bouygues*** and ***Amec v TWUL.***

22.4. It goes without saying that any such failure must also be material: see ***Cantillon v Urvasco*** and ***CJP Builders Limited v William Verry Limited*** [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see ***Keir Regional Ltd v City and General (Holborn) Ltd*** [2006] EWHC 848 (TCC).

22.5. A factor which *may* be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor which, in my view rightly, Judge Davies took into account in ***Quartzelec*** when finding against the claiming party.

23. I should add this. I note that, in any application under section 68 of the ***Arbitration Act 1996***, a party who is alleging a serious irregularity, because the arbitrator failed to have regard to a particular issue, has an uphill task in demonstrating to the court that the issue went to the root of the arbitration and that the failure to deal with it has caused a substantial injustice: see ***Checkpoint Ltd v Strathclyde Pension Fund*** [2003] EWCA Civ 84 and ***Weldon Plant v The Commission for New Towns*** [2000] BLR 496. These and other cases repeatedly stress that the losing party cannot utilise this provision to scrabble around in the award to find a point, no matter how obscure, with which the arbitrator failed to deal. It seems to me that it would be wholly contrary to the ***Housing Grants (Construction and Regeneration) Act 1996***, and all the subsequent decisions of the TCC and the Court of Appeal emphasising the temporarily binding nature of the adjudicator's decision, if a disgruntled party to an adjudication was in a better position than he would have been after a full-blown arbitration, to comb through the adjudicator's decision and find some aspect of the dispute which it is said that the adjudicator failed to address, whether deliberately or otherwise, in order to defeat the summary enforcement of the decision."

I can not improve on or add to this.

30. There is, rightly, no issue between the parties that the mere fact that an adjudicator in the decision has answered the questions, which he or she has jurisdiction to answer, wrongly as a matter of fact or law does not give rise to any good reason to challenge the enforcement of the decision. Authority for that proposition is given in the Court of Appeal decision in **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 49** and see also **Pilon** above.

Discussion

31. The first issue for consideration is whether there was anything improper or contrary to the rules of natural justice either in the decision in the First Adjudication being put before the Second Adjudicator or in the Second Adjudicator having regard to that earlier decision. I have no hesitation in saying that it was neither improper nor contrary to the rules of natural justice. Arcadis had succeeded in the First Adjudication in relation to very similar issues both in fact and in law. Although there were some distinctions (principally the fact that the Northern Boundary work had been implemented before the Project Manager withdrew his acceptance or endorsement that it comprised a Compensation Event, whereas that withdrawal occurred before the Southern Boundary work was done), the First Adjudicator's findings on what the contract meant were at the very least germane and could well be thought at the very least to be persuasive. It was not, obviously or at all, improper or even necessarily misguided for Arcadis to consider that it was or might be binding or to wish to put it before the Second Adjudicator.

32. It is not uncommonly the case in court proceedings that one side's advocate will seek to put before the judge an earlier previous court decision between the same parties to argue either that it is binding or gives rise to an issue estoppel or that it is at the very least persuasive. No-one could conceivably complain that the judge could not at the very least look at the previous decision or that the judge finds it, if not binding, persuasive. It must be a rare case in which either party to an adjudication can not refer a previous adjudicator's decision between the same parties and on the same contract to a later adjudicator on the basis that the earlier decision either is binding or at the very least is persuasive. There might well be circumstances in which it would be positively wrong for a party not to refer the later adjudicator to a decision of an earlier adjudicator; the reason is that arguably the later adjudicator may be bound by the earlier decision and as a consequence may have no jurisdiction to decide the same dispute as has already been resolved in the earlier adjudication. Adjudicators must be trusted, generally at least, to be able to reach honest and intelligible views as to the extent to which such earlier decisions are relevant or helpful or not.

33. It was argued forcefully by Mr Lal that in effect the Second Adjudicator had restricted his jurisdiction or acted unfairly or otherwise in breach of the rules of natural justice in finding that "he was bound by" the First Adjudication decision. However, it is clear on any sensible reading of the Second Adjudication decision that the adjudicator did not consider that he was bound by the earlier decision. I have set out at Paragraph 17 above the relevant parts of his decision. He makes it clear that he would only be bound if he found that the Southern Boundary work had been properly implemented

under the Contract as a compensation event; he finds at Paragraph 100 that it was not so properly implemented. It is clear from the rest of the decision that he actually decides the issues on their own merits and not (only or at all) because he felt that he was bound by the First Adjudication decision. His reference in Paragraph 38 to being "bound by a previous adjudicator's decision" is in context simply a generic point and not a conclusion that he was in fact bound by the earlier decision.

34. The fact that at one place in the decision (Paragraph 95) he happens to agree with the First Adjudicator on one particular point does not mean that he was restricting his jurisdiction or acting otherwise unfairly. He was simply agreeing that as a matter of contractual interpretation on that point the First Adjudicator was right. That is not impeachable.

35. I can take with this point the argument about bias. It was not improper or wrong for Arcadis to put before the Second Adjudicator the First Adjudicator's decision. It will be a rare case in which the adjudicator's jurisdiction or conduct can be challenged in later enforcement proceedings because he or she looked at and considered any material put forward by either party. Generally, it would be wrong of an adjudicator to ignore any material put before him or her. I do not say that there might not be an exceptional case where the adjudicator could be criticised for having regard to particular material put before him or her; an example might be genuinely "without prejudice" material but even then it would be difficult to criticise the adjudicator at least for initially looking at it if it was put before him or her. The decision of a previous adjudicator does not obviously fall into this exceptional type of category.

36. I conclude therefore by reference to Mr Lal's first and fourth points that his client can not begin to found any justification for not enforcing the Second Adjudicator's decision. It was neither wrong nor unjustified let alone improper for the Second Adjudicator to have regard to the First Adjudicator's decision or for Arcadis to submit a copy of it to the Second Adjudicator. As for bias, I consider that any fair-minded and informed observer, having considered all the circumstances in this case, would conclude that there was no real possibility that he was biased as a result.

37. Turning then to the complaint that the Second Adjudicator "went off on a frolic of his own" by "splitting the difference" on the quantum between an adjusted Arcadis forecast figure and the Project Manager's adjusted forecast figure, this is not a case in which it can be said that there was any or any material breach of the rules of natural justice on the part of the Second Adjudicator. This case is wholly different from the **Herbosch** case. There was a fundamental difference in the current case in the approach of each party to quantum. Arcadis argued that the proper approach to quantification (subject to liability) was, contractually, to be based on what it did (or what should or could reasonably have been) forecast whilst Sanofi argued that the value needed to be determined by reference to the work actually done and actual cost. Both arguments were respectable and it is not for this court to form a view as to which, if either, was correct as a matter of contractual interpretation. It is clear however that the Second Adjudicator formed the view that the forecast basis, that is the basis advanced by Arcadis, was the right one; whether he was right so to find is immaterial when it comes to considering the enforceability of the adjudicator's decision. Having therefore decided that the forecast approach was right, the adjudicator looked at the possible forecast figures and, ultimately he was drawn to Arcadis' figure in its revised quotation of 13 January 2012 (adjusted downwards by

about £100) and to the Project Manager's figure of £326,877.41 adjusted upwards to reflect the prolongation attributable to the prolongation (which the Project Manager had felt unable to accept but which the Second Adjudicator found was established). Although in one sense, his "splitting the difference" was Solomon-like in its simplicity, he was effectively choosing between two figures, both of which had an evidential basis. He was therefore not (as the adjudicator did in the **Herbosch** case) coming up with some basis of assessment which the parties had not had an opportunity to comment on; he was basing his assessment on the quantum approach specifically put forward by Arcadis and actually addressed by Sanofi. 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.

38. Finally, there is the complaint that the Second Adjudicator is said to have "failed to consider Sanofi's defence in respect of culpable delay and/or delay/inefficiency that may have been caused by the compensation event and so denied himself the opportunity to consider the merits of the exercise that Sanofi had asked him to determine…" (Paragraph 3(d) of Mr Lal's skeleton submissions). This is said to involve a breach of the rules of natural justice. Essentially the argument between the parties on this topic revolves mainly around whether or not the exercise of determining any delay caused by the Southern Boundary work was to be related to the (updated) Accepted Programme (in effect, by way of a programme based analysis) or by reference to an approach based on the evidence or lack of evidence of any delay being caused by such work. I have no reason to doubt the honesty or integrity of the Second Adjudicator in his statements in effect that he considered Sanofi's contentions (summarised at Paragraph 106 of the decision: "that the Contractor was in culpable delay, actual progress of the work was not being properly reflected in delays were not properly recorded") and the "other evidence provided by" Sanofi (said by him at Paragraph 116 of the decision as having been studied by him).

39. It simply can not be said that he did not consider the defence. However, it is clear that he was persuaded by a combination of the two approaches (consideration of the updated Accepted Programme and the time taken actually to carry out the work in question) that critical delay of 29 days was actually caused to overall completion by the Southern Boundary work. Once he had formed the view, as he did, that the Southern Boundary work was on the critical path and that it took 29 days to carry out that critical work, he did not need to make any specific findings about the individual details of the "culpable" delay points taken by Sanofi. It is not necessary for an adjudicator to address each and every point, piece of evidence or argument raised by each party unless and then only to the extent that it is necessary to resolve the dispute which has been referred to adjudication. I have regard in this context to the general sentiments expressed by Mr Justice Coulson at Paragraphs 22.3, 22.4 and 23 of his judgment in the **Pilon** case set out above. It follows from this that I do not consider that there has been any breach, let alone any material breach, of the rules of natural justice, by the Second Adjudicator in this case in relation to his findings about delay. His findings, which may ultimately be open to challenge in the tribunal of final resolution, are logical and understandable and Sanofi can have no doubt as to why it lost on that point. There is no complaint as such that the Second Adjudicator did not provide more detailed reasoning but his reasoning such as it is reasonably clear.

Decision

40. The Second Adjudication decision should be enforced and Arcadis is entitled to judgment for the full amount claimed. There is no proper ground upon which this enforcement can be challenged.

Procedural Comment

41. I was concerned that Sanofi through its solicitors did not lodge the contemporaneous documentation upon which it wished to rely until shortly before the hearing. The Court required Sanofi to lodge "any further evidence" on or by 11 January 2013. The reference to "evidence" can be taken to mean any evidence upon which that party wishes to rely. That evidence will usually come in the form of witness statements but there is no reason why a party could not lodge contemporaneous or other documents as "evidence", particularly if it is felt that they do not have to be separately proved as legitimate documents. What is not acceptable is for a party, particularly without leave of the Court, to lodge documents or statements later than the date ordered. This is to ensure not only orderliness in the proceedings but also fairness to the process so that the other party is not taken by surprise. In this case, Arcadis and its legal team were able to proceed notwithstanding the late service of documentation by Sanofi's legal team; however, if they had been taken by surprise and had asked for an adjournment, the Court could either have refused Sanofi permission to rely on those documents or adjourned the hearing at its expense. Practitioners should therefore be aware of the importance of complying with the directions given in relation to adjudication enforcement proceedings.