Neutral Citation Number: [2018] EWHC 1874 (TCC)

Case No: HT-2018-000138

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2018

Before :

MR JONATHAN ACTON DAVIS QC

- -

Between :

VINCI CONSTRUCTION UK LIMITED	**Claimant**
- and -	
BEUMER GROUP UK LIMITED	**Defendant**

- -
- -

Mr Andrew Goddard QC, Miss Felicity Dynes and Mr Mathias Cheung (instructed by **Fenwick Elliott LLP**) for the **Claimant**
Mr Roger ter Haar QC (instructed by **Silver Shemmings Ash LLP**) for the **Defendant**

Hearing dates: 10th, 24th July 2018
Judgment available to the parties 19th July 2018

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Judgment Approved

The Deputy Judge :

1. This is an application for summary judgment by the Claimant, Vinci Construction UK Limited ("Vinci") in respect of an Adjudicator's Decision dated 2nd May 2018 which was made in its favour against the Defendant, Beumer Group UK Limited ("Beumer"). The amount of the Decision was £9,671,500 and interest on that sum as provided for under the Contract.

2. There were four Witness Statements and numerous Exhibits, such that the Bundle for an application estimated to last half a Court day ran to seven full lever arch files. Mr Francis, a Partner in Fenwick Elliott LLP, Solicitors for Vinci, prepared Witness Statements dated 16th May 2018 and 22nd June 2018. Mr Silver, a Partner in Silver Shemmings Ash LLP, Solicitors for Beumer, prepared Witness Statements dated 6th June 2018 and 4th July 2018.

3. I take the background to the dispute from the First Witness Statement of Mr Francis at paragraphs 6 – 10. At paragraph 10 of Mr Silver's First Witness Statement, he accepts the accuracy of what is said by Mr Francis in those paragraphs.

4. Vinci entered into a Sub-contract with Beumer on 8th November 2012, based on the NEC Engineering and Construction Sub-Contract (3rd Edition) with bespoke amendments.

5. The Sub-contract provided that Beumer would carry out the design, manufacture, fabrication, supply, delivery, offloading, installation, testing, commissioning and user training in respect of the baggage handling system forming part of the new Pier 1 at the South Terminal of Gatwick Airport ("the Sub-contract Works").

6. In particular, the Sub-contract Works included (amongst other things) the Section 5 Baggage Works ("Baggage Works") and Section 6 Remaining Works ("Remaining Works"). The defined scope of the Baggage Works and Remaining Works, and the operability and enforceability of the liquidated damages provisions in respect of those Sections were the subject of proceedings before the Court and were resolved in Vinci's favour by the Judgment of O'Farrell J in Vinci Construction UK Limited v. Beumer Group UK Limited [2017] EWHC 2196 (TCC) which was handed down on 30th August 2017.

7. Following the Judgment of O'Farrell J, Vinci issued a Payment Certificate on 25th October 2017 setting out its entitlement to the sum of £9,671,500 as liquidated damages for Beumer's delay in completing the Baggage Works and Remaining Works by the agreed Completion Dates for those Sections.

8. By its response to the Payment Certificate dated 27th October 2017, Beumer denied Vinci's entitlement to any liquidated damages. The final date for payment of the Payment Certificate was 29th November 2017, and as at 30th November 2017, the liquidated damages in the sum of £9,671,500 was overdue. A dispute had, therefore, crystallised in respect of Vinci's entitlement to liquidated damages in the sum of £9,671,500 (" the Dispute").

9. The Sub-contract includes provision for adjudication under Options Clause W2 of the Standard Conditions (as amended by Schedule 3 to the Sub-Contract). Clause W2.1(1) expressly provides that "[a]ny dispute arising under or in connection with this Sub-contract may be referred to and decided by the Adjudicator. A party may refer a dispute to the Adjudicator at any time".

10. Clause W2.3 sets out in detail the procedure to be followed in any Adjudication under the Sub-Contract. In respect of the appointment of an Adjudicator, paragraph 1 of Sub -Contract Data Part 1 (in Schedule 4 to the Sub-Contract) provides that:

> "The Adjudicator in this Sub-Contract is one of the following to be agreed between the Contractor and the Sub-Contractor
>
> - Brian Eggleston (CEng, FICE, FIStructE, FCIArb) […]"

11. Clause W2.3(11) of the Sub-Contract (as amended by Schedule 3) provides that "the Adjudicators [sic] decision is binding until the dispute is finally determined by the Tribunal or by agreement."

12. By way of further background, Vinci and Beumer have previously engaged in six other Adjudications under the Sub-contract prior to the dispute. All previous Adjudications were commenced by Beumer as Referring Party:

(i) The first three Adjudications were before Dr Cyril Chern (who is also named as a potential Adjudicator in paragraph 1 of Sub-contract Data Part 1);

(ii) The first Adjudication was decided by Dr Chern in Beumer's favour and was the subject of the substantive proceedings decided by O'Farrell J mentioned in paragraph 6 above;

(iii) In respect of the second Adjudication, the Court refused to enforce Dr Chern's Decision on the ground of breach of natural justice, which was the subject of the Judgment handed down by Fraser J on 13th September 2016 in Beumer Group UK Limited v. Vinci Construction UK Limited [2016] EWHC 2283 (TCC);

(iv) Following these events, Dr Chern resigned from his appointment in the third Adjudication;

(v) Subsequently, in November 2016, Beumer's legal representatives proposed appointing Mr Eggleston as the Adjudicator under the Sub-contract to which Vinci agreed;

(vi) The fourth to sixth Adjudications were before Mr Brian Eggleston and were begun by Beumer. Mr Eggleston's Decisions in the fourth to sixth Adjudications remain binding on the Parties until the disputes are finally determined by the Court or by agreement.

13. On 20th March 2018, Vinci served a Notice of Intention to Refer a Dispute to Adjudication on Beumer pursuant to Clause W2.3(1) of the Sub-contract: this was the seventh Adjudication between the Parties. A copy of the Notice was also served on Mr Eggleston.

14. Thereafter, after various procedural steps, the Adjudicator issued his Decision on 2nd May 2018 in respect of the seventh Adjudication in which he decided as I have set out above. The Adjudicator also directed the Parties to pay his fees and expenses in equal shares as provided for in the Sub-contract.

15. By letter dated 8th May 2018, Vinci wrote to Beumer demanding payment of the sums ordered by the Adjudicator's Decision, namely the sum of £9,671,500 in respect of liquidated damages plus interest, amounting to £54,552.39 as at the date of the letter and continuing to accrue at the daily rate of £340.95.

16. By letter dated 14th May 2018, Silver Shemmings Ash said that Beumer were dissatisfied with the Adjudicator's Decision and that Beumer did not intend to make payment under the Decision. No explanation was then provided as to why Beumer did not consider the Adjudicator's Decision to be binding. Absent payment, Vinci issued these proceedings on 16th May 2018 and applied for summary judgment.

17. In Beumer Group UK Limited v. Vinci Construction UK Limited [2016] EWHC 2283 (TCC) Fraser J said:

> "12. It is trite law that adjudication is a speedy process designed only to provide what is called "interim finality" on construction disputes. Parliament intended that the parties should be given a quick answer, and that quick answer should be binding on the parties until the dispute, whatever it may be, is resolved finally either by litigation or arbitration. It has been said in a case concerning what is called the statutory Scheme, namely the statutory instrument entitled the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) by Chadwick LJ in Carillion Construction Limited v. Devonport Royal Dockyard Limited [2006] BLR 15, paragraph 86 that "the need to have the "right" answer has been subordinated to the need to have an answer quickly". Although made in a case under the Scheme, that statement is of wide application to Adjudicators generally, whether under the Scheme or otherwise. Adjudicators' decisions will be enforced by the Court by summary judgment regardless of errors of fact and/or law by the Adjudicator. Aggrieved losing parties can and should comply with the Adjudicator's decision, as long as that decision was made by an Adjudicator with jurisdiction over the dispute who has conducted the Adjudication fairly and in accordance with the rules of natural justice.
>
> …
>
> 16. It is therefore clear that for breaches of natural justice to be sufficient to justify the Court declining to order summary judgment enforcing an Adjudicator's decision, they must be the plainest of cases; the Adjudication proceedings must have been obviously unfair. Combing through what has occurred, or concentrating on the fine detail of the material before the Adjudicator, to allege a breach of natural justice, will neither be encouraged nor permitted by the Court. Adjudications are conducted very quickly, and this speed is part of the process imposed by Parliament on those who enter into construction contracts. The framework within which Adjudicators have to reach decisions has to be taken into account when complaints are made by losing parties."

18. In the last paragraph of his written Submissions, Mr ter Haar QC for Vinci summarises his case in the following language:

> "For the reasons set out above, the Adjudicator did not keep the requirements of natural justice in mind when writing his decision."

19. At paragraph 18 of that document, Mr ter Haar argued:

> "the main focus of Beumer's resistance to Vinci's attempt to enforce the Adjudicator's decision stating that Vinci was entitled to recover £9,671,500 is that the Adjudicator failed to follow the rules of natural justice in reaching his decision."

20. Mr Silver says, at paragraph 8 of his First Witness Statement:

> "These three aspects of his Decision constitute the basis upon which Beumer resists enforcement by Vinci of that Decision in these proceedings. Those three aspects are:

(i) The fact that, in his Decision in the Seventh Adjudication, the Adjudicator made findings which were inconsistent with findings made in a previous adjudication, with the result that the Adjudicator not only decided something which had already been decided but did so in a manner inconsistent with the previous Decision;

(ii) The Adjudicator did not give any or any adequate reasons for his decision in relation to the key issues in the dispute; and

(iii) The Adjudicator did not disclose or order Vinci to disclose material from a previous adjudication (between Vinci and another sub-contractor) which Beumer had good reason to believe would have demonstrated that the case Vinci was advancing in this adjudication was inconsistent with the case it had advanced in that other adjudication."

21. Then, at paragraph 9, Mr Silver says:

> "Beumer contends that each of these complaints constitutes a breach of natural justice and that, as a result, the decision is not and should not be enforceable by the Court."

22. I deal with each of those complaints in the order in which they are made.

23. **The First Argument**.

It is plain from paragraphs 49 - 51 of Mr ter Haar's Written Submissions (and from paragraphs 20 - 27 of Mr Silver's First Witness Statement) that the specific allegation is that the Decision in Adjudication No. 7 is inconsistent with Mr Eggleston's findings in Adjudications Nos. 4 and 6.

24. The relevant Contractor's Instructions, are C.I. 119, 120 and 127.

25. Section 13.10 of Beumer's Response in Adjudication No. 7 identified C.I. 119 and spelled out its programme consequences. At paragraph 13.10.3, Beumer say that Vinci accepted on the face of the Instruction that it was a Compensation Event.

26. Section 13.9 of Beumer's Response in Adjudication No. 7 identified C.I. 120 and spelled out its programme consequences. At paragraph 13.9.3, Beumer say that Vinci accepted on the face of the Instruction that it was a Compensation Event.

27. Section 13.14 of Beumer's Response in Adjudication No. 7 identified C.I. 127 and spelled out its programme consequences. Beumer say, at paragraph 13.14.14, that Vinci accepted on the face of the Instruction that it was a Compensation Event.

28. Mr Goddard QC argues that the programme consequences are not adequately spelled out in the Response and supporting documents: much of the Hearing was taken up with argument as to whether that was accurate or not.

29. Paragraphs 9.12, 9.13.1 and 9.13.2 of the Decision set out the Adjudicator's conclusions in the following language:

> **"This is because there are two relevant matter [sic] which stand out above all the others.**
>
> **The first is the restriction arising from clause 61.7 of the Sub-contract which states that:**
>
> > **"A compensation event is not notified after the defects date"**
>
> **and, as noted above in paragraph 7.15 of this Decision, the defects date for the Sub-contract is 14 October 2017.**
>
> **The second is that Beumer's claims for extensions of time fall well short of the basic requirements for supporting evidence and delay analysis."**

30. I apprehend that the oral argument and lengthy references to the documents were intended to convince me or otherwise of the correctness or otherwise of the Adjudicator's Decision that the claims for extension of time lack adequate substantiation and delay analysis.

31. But whether Mr Eggleston's conclusion is correct or not is no concern of this Court on an application to enforce. It was part of the dispute referred to the Adjudicator which he decided. If he is wrong, Beumer must litigate or arbitrate as they are advised under the provisions of the Sub-contract. No issues of natural justice arise.

32. In Adjudication No. 4, the Adjudicator said at paragraph 5.2:

> "At paragraphs 9 - 12 of its Opening "Executive Summary", Vinci expresses in general terms, its position in respect of the Referred Matters, saying:…
>
> In relation to C.I.s 119 - 120 and 127 Vinci accepts that these are Compensation Events and at no point has Vinci ever denied that these are not Compensation Events. Accordingly, it is Vinci's position that there is no dispute between the parties as the existence or otherwise of these Compensation Events claimed by Beumer."

33. In his Decision in Adjudication 6, the Adjudication said at paragraph 10.8 that "the matters for Decision are, as derived from the Notice of Adjudication, the amounts due to Beumer as assessments of Compensation Events arising from Contractor's Instructions 120, 119… 127…" Thus, says Mr ter Haar, "he decided that those three Instructions were Compensation Events."

34. In Adjudication No. 7, as set out above, Mr Eggleston found "that the claims made in this Adjudication for Compensation Events fail because they are all time-barred", by reference to Clause 61.7 of the Sub-contract. However, all that the Adjudicator decided in any previous adjudication was the determination of the additional monetary compensation claim in respect of the relevant C.I.s. In no previous adjudication, was the Adjudicator presented with or asked to determine claims for extensions of time. Thus, in Adjudication No. 7, the Adjudicator had to decide, for the first time, Beumer's new claims for extensions of time based on Compensation Events. At no time before Adjudication No. 7 had Beumer asked the Adjudicator to determine any claim for extension of time in respect of the Compensation Events to which Mr Silver refers.

35. Thus, there is no inconsistency between the Adjudicator's Decision in Adjudication No. 7 and any previous Decision.

36. Mr ter Haar also argued that the Adjudicator's construction of Clause 61.7 was wrong. Recognising that to be a potential error of law, Mr ter Haar did not suggest that any such error was a ground for non-enforcement of the Decision. However, he did argue that Vinci did not suggest that Beumer failed to comply with Clause 61.7. Thus he said the Adjudicator was deciding a point not argued before him by either Party and one in respect of which he invited no submissions from the Parties. Mr ter Haar relied upon the decision in ABB Limited v. BAM Nuttall Limited [2013] BLR 529, in particular, paragraphs 3 and 5. The heart of the argument was based upon the following passage by Akenhead J at paragraph 5:

> "If the Adjudicator relies upon such a point or issue (either of fact or law) and his whole decision stems from his finding on that point of issue, it will be decisive. A point or issue might well be of considerable potential importance to the outcome if it is not decisive of the whole decision but if it goes to important parts of the decision. Even if an Adjudicator's breach of the rules of natural justice relates only to a material or actual or potentially important part of the decision that can be enough to lead to the decision becoming wholly unenforceable essentially because the parties (or at least the losing party) and the Court can have no confidence in the fairness of the decision making process."

37. Mr ter Haar asserted that the "time-barring point was not taken before (the Adjudicator)". The difficulty with that submission is that Vinci did rely on Clause 61.7 see, for example, paragraphs 74 and 75 of the Referral Notice [2/391] and paragraph 10.1 and 15 on a document headed "Supplemental Submissions on Co-Habitation" [6/1597 and 1599]. Further, there is reference to "various time-barred events/issues" at paragraph 10 of a document headed "Submissions on Adjudicator's power to extend time for completion" [5/1091].

38. In my judgment, Vinci's reliance on Clause 61.7 was an issue in the Adjudication. Thus, there was no breach of natural justice when Mr Eggleston construed the clause in such way as to defeat the claim.

39. **The Second Argument**

The Defendant argues that "the Adjudicator has failed to provide any or any proper reasons for his decision and/or that he has failed to deal with a significant part of Beumer's case".

40. The relevant legal principles can be distilled from the following authorities:

(a) The law on challenges to Adjudication enforcement was set out by Jackson J (as he then was) at first instance in Carillion Construction Limited v. Devonport Royal Dockyard [2005] EWHC 778 (TCC) at [81] – in order to establish a breach of natural justice, the "complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice";

(b) The Decision need not be to the standard of a Court Judgment, can be "no work of art" and can be "in places confusing and repetitive" without being inadequate and "provided that the broad thrust of the reasoning is provided, the Court should enforce": see Balfour Beatty Engineering Services HY Limited v Shepherd Construction Limited v. [2009] EWHC 2218 (TCC) per Akenhead J at [75] to [79];

(c) Thus, as HHJ Davies said at [97] in Viridis UK Limited v Mulalley & Company Limited v. [2014] EWHC 268 "[i]t is enough that he made it clear that he had considered all of the documents and submissions supplied by the Defendant… and that he had considered those contra-charges and rejected this".

41. In argument, both Leading Counsel intermingled their submissions under Argument 1 with their submissions under Argument 2. Indeed, Mr ter Haar accepted that the second ground taken by itself might be insufficient as a reason not to enforce the Decision unless taken with the first ground.

42. At the heart of Beumer's arguments is the treatment by the Adjudicator of the programming information provided to him (see paragraphs 28-31 above).

43. In my judgment, there is no difficulty in discerning the Adjudicator's reasoning. The claims for extensions of time were made too late and were, therefore, timebarred and the claims in any event failed because "Beumer's claims for extensions of time fall well short of the basic requirements for supporting evidence and delay analysis": see paragraph 9.12 of the Decision [2/602] and "in any event, lack adequate substantiation and delay analysis": see paragraph 9.13 [2/602].

44. Whether that Decision be right or wrong is not a matter for the Court on an enforcement application.

45. **The Third Argument**

The Adjudicator did not disclose or order the Claimant to disclose materials from a previous adjudication, or failing that, did not resign.

46. The Defendant argues that there has been a breach of natural justice by virtue of the fact that it did not have available to it in this adjudication copies of the documents from an adjudication commenced by Balfour Beatty Engineering Services Limited against Vinci in September 2016. Specifically, Beumer alleges that "Beumer understood that Vinci had run a case in the Balfour adjudication that was inconsistent with the case that it was running in [this adjudication]."

47. Beumer rely upon the dicta of Fraser J in earlier proceedings mentioned at paragraph 17 above in which, at paragraph 25, Fraser J said:

> "I take a very dim view of the propriety of behaviour where Party A says in one set of adjudication proceedings with Party B "the works were complete on 16 December 2015" and, in relation to the very same works (or at least a sub-

> set of the works) on the very same project states in yet another set of adjudication proceedings with Party C "the works are not yet complete, you are liable to pay me liquidated damages." They are wholly inconsistent. The correct legal characterisation of that behaviour was not touched upon by either party before me, but I seriously doubt, for example, that a director of a company could sign a statement of truth in two sets of proceedings in such circumstances as saying such quite different things on the same point. That alone should provide obvious direction to the industry of the type of behaviour that this constitutes."

48. At paragraph 85 of Mr ter Haar's Written Submissions, he says "in the present case, Beumer had and has reason to believe that Vinci has taken inconsistent positions in an adjudication with Balfour Beatty and in the present proceedings. Mr ter Haar says, at paragraph 86 of that document:

> "The point was this: Balfour Beatty claimed against Vinci relief in respect of compensation events relating to the fire alarm installation. If Balfour Beatty delayed the fire alarm installations for reasons which were Balfour Beatty's responsibility, that was likely to have a knock-on effect delaying Beumer in the completion of the works."

49. At paragraph 87, Mr ter Haar says:

> **"**It is Beumer's understanding that Vinci did indeed contend that Balfour Beatty was guilty of culpable delay and therefore that (as between Balfour Beatty and Vinci) there was no compensation event."

50. At paragraph 94, Mr ter Haar concludes:

> "… the Adjudicator simply never dealt with the point made repeatedly that Vinci (and he) had in their possession a Decision which there was good reason to suppose contained evidence of an inconsistent position taken by Vinci. This injustice could, and should, have been removed by ordering disclosure of the material in the Balfour Beatty Adjudication or disclose that Decision himself, not to do one or other was fundamentally unfair."

51. At paragraph 2.1 of the Response in the Adjudication, Beumer pleaded "BUK maintains that a conflict has arisen and/or a breach of natural justice has occurred insofar as VCUK refuses to disclose the documents from the previous adjudication between it and Balfour Beatty Electrical Services ("Balfour"). The breach of natural justice is the keeping from BUK of the factually inconsistent case VCUK was advancing in the previous adjudication (as per paragraph 39 of Fraser J's Judgment) and before Mr Eggleston". At paragraph 2.2, Beumer pleaded "for the avoidance of any doubt, BUK is not in possession of the documents put before Mr Eggleston by VCUK in the adjudication with Balfour."

52. At paragraph 2.6 of the Response, Beumer pleaded "BUK asserts that it has not been given a fair opportunity to put its own case forward in relation to the inconsistent case that VCUK has run insofar as VCUK refuses to release the requested documentation" **[2/414 - 415].**

53. That issue was also canvassed in correspondence between the Parties and the Adjudicator as follows:

(i) On 25th March 2018, Mr Silver of Silver Shemmings Ash enquired of Mr Eggleston "We ask that you confirm whether you are aware of any matter which might give rise to a conflict, including acting as an Adjudicator in any dispute involving Vinci and concerning delay claims made by or against other sub-contractors";

(ii) On 25th March 2018, Mr Eggleston replied that he was "not aware of any matter which might give rise to a conflict of interest" but asking for "details you have of the particular adjudication which causes concern";

(iii) On 25th March 2018, Mr Silver said "We understand that there may have been one or more disputes before you between Vinci and another of its sub-contractors on this project namely Balfour Beatty Electrical Services. We further understand that such dispute(s) related to alleged compensation events.";

(iv) On 25th March 2018, Mr Eggleston said that he had seen from his account records that he did an adjudication in 2016 between the Parties mentioned in the latest email. "However, I cannot recall what it was about… I cannot locate any documents relating thereto…";

(v) By letter dated 26th March 2018, Fenwick Elliott said at paragraph 11 "The matters with which the BBESL adjudication dealt do not have relevance to the matters of delay and liquidated damages currently in dispute between Vinci and Beumer";

(vi) On 27th March 2018, Mr Silver emailed Mr Eggleston to say "We now understand that you were appointed as Adjudicator in regards to a dispute between Balfour Beatty and Vinci under the same project. Applying the ratio from the above Judgment (I interpolate: that of Fraser J,) it is submitted that Beumer must be given a fair opportunity to put its own case in relation to the delay claim now before you, namely that Vinci advanced an inconsistent case that Balfour Beatty Electrical Services were in culpable and critical delay in relation to the fire installation and that Balfour was not entitled to a compensation nor as a consequence an extension of time and hence liable for delay damages";

(vii) By letter dated 28th March 2018, Fenwick Elliott said "We do not at all accept Beumer's characterisation of Vinci's case and the BBESL adjudication. Contrary to Beumer's bare assertion the BBESL adjudication was not a claim by Vinci that BBESL was "liable for delay damages" nor did that adjudication decision relate to "culpable and critical delay" or entitlements to extension of time. Above all, it is not accepted that Vinci has advanced any "inconsistent case" and it is not understood what the basis is for that allegation";

(viii) By email dated 28th March 2018, Mr Silver responded "Should, however, Vinci refuse to issue the information and/or Beumer not be

afforded the opportunity to comment on the same, respectfully, you have no option but to resign.";

(ix) On 28th March 2018, Fenwick Elliott enquired of Silver Shemmings Ash whether or not they were in possession of any documents from the BBESL adjudication and, if so, to identify them and explain how they are in possession of such documents and to explain, if Silver Shemmings Ash were not in possession of such documents, the basis on which they felt able to describe Vinci's position in the BBESL adjudication;

(x) On 29th March 2018, Mr Silver responded that they were not in possession of any documents from the BBESL adjudication;

(xi) On 29th March 2018, Mr Silver emailed Mr Eggleston to say that a conflict might arise and/or a breach of natural justice might occur, the breach being the keeping from Beumer of the factually inconsistent case Vinci was advancing in the previous adjudication;

(xii) On 1st April 2018, there were seven emails passing between Mr Eggleston and Mr Silver in which Mr Silver asserted repeatedly that a conflict/breach of natural justice "has occurred" without providing any explanation, despite Mr Eggleston's numerous requests;

(xiii) On 2nd April 2018, Mr Eggleston told Mr Silver by email that he would not engage in any further exchange on the issue until he had seen and studied Beumer's response to the Referral;

(xiv) By email dated 3rd April 2018, after pressure from Fenwick Elliottt, Mr Silver revealed that Beumer had been "afforded the opportunity to read the Decision in the matter but was not permitted to take a copy thereof";

(xv) On 10th April 2018, Mr Silver provided further information, namely that a member of Beumer and Mr Silver met a former employee of Balfour Beatty on 28th November 2016 and Mr Silver read the Decision from a laptop for around 20 minutes. "The only note that was taken from the meeting was that the matter related to the delay in the Stage F1 (A and B) design for the use of five fire zones in association with the Smoke damper control strategy and whether the same was a compensation event";

(xvi) By letter dated 17th April 2018, Fenwick Elliott referred to Beumer's failure to disclose a copy of the i-pad note and the absence of any inconsistent case within the description of that note. Fenwick Elliott also said "As previously confirmed, the BBESL adjudication documents have been re-reviewed in light of your allegations and no factually inconsistent case was advanced by Vinci in the BBESL adjudication";

(xvii) By email dated 18th April 2018, Mr Silver asserted "Beumer, therefore, maintains that it has not been given a fair opportunity to put its own case in relation to the inconsistent case that Vinci has run in the BBESL

adjudication insofar as Vinci has and continues to refuse to release the requested documentation".

53. The Sub-contract provides at Option W2.3(4):

> "The Adjudicator may
>
> …
>
> - Instruct a Party to provide further information related to the dispute within a stated time; and
>
> - Instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time."

54. Thus, if asked, the Adjudicator would have had to consider whether or not to order disclosure under those powers.

55. At paragraph 40 of Mr Francis' Second Witness Statement [6/1526], Mr Francis says:

> **"I was not [and still am not] clear on how Beumer could properly be alleging inconsistency given that my team had re-reviewed the BBESL documentation and not found any inconsistency"**

and he then sets out paragraph 12 of a letter from his firm dated 28th March 2018 which says:

> **"In light of the challenge that has been made, we have reviewed the documents from BBESL adjudication and confirm that we do not consider there to be any inconsistency between the submissions made by Vinci in that adjudication and the case made by Vinci in the Referral Notice and supporting documentation. In order to allay concerns, we further confirm that to avoid any conceivable potential for unfairness we are prepared to re-review the BBESL adjudication documents in light of any Reply submitted by Vinci in this adjudication and to undertake that if Vinci makes submissions that are inconsistent with the submissions in the BBESL adjudication, Vinci will disclose any documents submitted in the BBESL adjudication with which the submissions in this adjudication are inconsistent…"**

56. I draw the following conclusions from the evidence available to me:

(i) Beumer and Silver Shemmings Ash have been aware of the BBESL adjudication, the identity of the Adjudicator as Mr Eggleston and the terms and content of the Decision since Autumn 2016;

(ii) With the full knowledge of the identity of the Adjudicator in the BBESL adjudication, the terms and content of the Decision in the BBESL adjudication and the fact that Vinci had declined to provide copies of the BBESL adjudication documentation, Beumer referred three disputes to Mr Eggleston as Adjudicator without raising any concern about his

ability to fairly decide those disputes or that a breach of natural justice might occur;

(iii) Beumer has never set out with any clarity the legal basis for its claimed entitlement to disclosure of the documents in the BBESL adjudication;

(iv) In neither this adjudication nor in any of the three disputes referred by Beumer to adjudication by Mr Eggleston did Beumer request that the Adjudicator order Vinci to disclose the BBESL adjudication documentation;

(v) There is no evidence that Vinci ran an inconsistent case in the BBESL adjudication to that which it advanced in this seventh adjudication.

(vi) There is positive evidence (from Mr Francis) that there was no inconsistency of approach in the 2 adjudications.

(vii) The description on Mr Silver's i-pad as reported does not suggest any inconsistency.

(viii) Absent any evidence of any inconsistency, the dicta of Fraser J referred to at paragraph 47 above does not arise. That is because there is no evidence that "the disputes were so closely connected and the issues so similar": see Beumer Group UK Limited v. Vinci Construction UK Limited [2016] EWHC 2283 [33].

57. At paragraph 55 of Mr Silver's First Witness Statement he says:

> "55. However, the Adjudicator neither ordered disclosure of the material nor resigned and Section 2 of his Decision in A7 deals with this.
>
> 56. It was not clear to me at the time, nor is it since on re-reading the correspondence, why the Adjudicator did not take either of the steps requested by Beumer."

58. In my judgment, Mr Eggleston did not order disclosure because:

(i) he was not requested to do so; and

(ii) no proper material was put before him which would have required him to so order and/or to resign.

59. I have already mentioned at paragraph 52 above, paragraph 2.6 of the Response **[2/415].** It is plain from the correspondence which I have summarised that Mr Eggleston gave Beumer every opportunity to make good that assertion but, faced with an absence of anything to support that assertion and the absence of any application for disclosure, Mr Eggleston was entitled to make no reference for that aspect of the dispute in his Decision. Certainly, the failure to do so does not support any allegation of breach of natural justice.

In the circumstances, the challenges to enforcement fail. There must be summary judgment for the Claimant. I invite Counsel to prepare a draft Order.