Neutral Citation Number: [2021] EWHC 1113 (TCC)

Case No: HT-2021-000060

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 30 April 2021

Before :

VERONIQUE BUEHRLEN Q.C.

- -

Between :

PRATER LIMITED	**Claimant**
- and –	
JOHN SISK & SON (HOLDINGS) LIMITED	**Defendant**

- -
- -

James Howells Q.C. and **David Johnson** (instructed by **KT Construction Law**) for the **Claimant**
Sarah Hannaford Q.C. (instructed by **Hawkswell Kilvington Limited**) for the **Defendant**

Hearing date: 20 April 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30 April 2021 at 10:30 am

BEFORE VERONIQUE BUEHRLEN Q.C. SITTING AS A DEPUTY HIGH COURT JUDGE:

1. This is the Claimant's (***Prater***) Claim and Application for Summary Judgment (***the Application***) for the enforcement of an adjudication decision dated 2 February 2021 (***Decision 4***) made by Mr Matthew Molloy (***Mr Molloy*** or ***the Adjudicator***). Mr Molloy was appointed pursuant to the contractual adjudication procedure set out in the Subcontract that has given rise to these proceedings.

2. By Decision 4, the Adjudicator decided that the Defendant (***Sisk***) was liable to make payment to Prater of the sum of £1,757,821.35 plus VAT and to pay the Adjudicator's fees in full. Sisk has paid the Adjudicator's fees but that is all. Prater claims summary judgment in respect of the sums awarded to it together with interest pursuant to section 35A of the Senior Courts Act 1981 from 2 February 2021 to the date of payment.

The Parties

3. Prater are specialist building envelope contractors. Sisk are part of the John Sisk group of companies that provides domestic and international construction services across a wide range of projects.

The Subcontract and the Adjudications to date

4. The Subcontract was for the design, supply, delivery and installation of envelope façade (cladding and roofing) works to a new Boeing Fleet aircraft maintenance hangar, office and plant room at London Gatwick Airport. The Subcontract forms part of a larger package of works pursuant to which Sisk is engaged by Boeing Commercial Aviation Services Limited for the construction of the hangar. The Subcontract was entered on 25 April 2018, the start date was 9 January 2018, and the contractual Completion Date was 22 March 2019. The Completion Date has been extended by the Adjudicator to 30 August 2019.

5. The Adjudication the subject of this Application was commenced under the contractual provisions for adjudication (Option W2 of the NEC3 Conditions of Subcontract, option A (2013) as amended by the Parties). It is the 4th Adjudication arising out of the Subcontract. I will come to the others briefly in a moment.

6. The Subcontract Works were subject to delays and changes. The Works were certified as completed on 7 November 2019. The Parties are in dispute as to the correct extension of time to the Completion Date, Prater's costs of prolongation and various other claims under the Subcontract. Prater maintains, among other things, claims for Compensation Events under the Subcontract that Sisk has largely refused to recognise. Ms Lisa Bull explains in her third witness statement that on 20 December 2019 Sisk issued an 'assessment' of Prater's account together with 8 lever arch files of documents. The parties are in dispute over several aspects of that assessment and of the subsequent Payment Certificate issued by Sisk on 22 January 2020 in response to Prater's December 2019 Payment Application and as to the final account.

7. There have now been 4 Adjudications, 3 before Mr Molloy (all commenced by Prater) and one commenced by Sisk before Mr Collier. This Application is Prater's application for enforcement of Decision 4. Decision 2 and Decision 4 are of primary relevance to

the Application. However, in summary and for completeness, the four decisions arose as follows:

(1) In the First Adjudication (***Adjudication 1***), Prater sought an amendment to the Subcontract Completion Date. No payment was sought. Mr Molloy issued his decision on 15 June 2020 (***Decision 1***). He decided that Prater was entitled to an adjustment to the Subcontract Completion Date from 15 March 2019 (the original completion date) to 15 July 2019.

(2) In the Second Adjudication (***Adjudication 2***), Prater sought decisions on a number of matters including (a) the correct Subcontract Completion Date following upon the findings in Decision 1, (b) the status of provisional sums within the Subcontract and (c) Sisk's entitlement to deduct certain indirect losses from any sums due to Prater. As in Adjudication 1, no payment was sought by Prater. Mr Molloy's decision is dated 5 October 2020 (***Decision 2***).

(3) In the Third Adjudication (***Adjudication 3***), Sisk sought a declaration that certain Compensation Events claimed by Prater were not Compensation Events under the Subcontract. Mr Collier was the Adjudicator, and he issued his decision on 28 October 2020 (***Decision 3***).

(4) In the Fourth Adjudication (***Adjudication 4***), Prater sought payment of the sum of £2,253,731.65 plus VAT following Decisions 1 – 3. Again, the Adjudicator was Mr Molloy. His decision was issued on 2 February 2021 following a slip rule correction (***Decision 4***). As already noted, he awarded Prater the sum of £1,757,821.35 plus VAT. Decision 4 is (in part) based on the findings made in Decision 2.

8. Were that not enough, I understand that a fifth Adjudication (also commenced by Prater before Mr Molloy) is ongoing as to outstanding issues in relation to Prater's final account and the appropriate final payment. Prater has also issued a Claim Form in this Court in respect of its final account to comply with the time limits set out in the Subcontract for challenges to a Final Certificate.

9. For the purposes of this Application, the Parties are in dispute as to several issues including the proper interpretation of the contractual and legal effect of Decision 2 which Sisk say is unenforceable impacting the enforceability of Decision 4, the subject of this summary judgment application.

The Parties' respective cases

10. In short it is Sisk's case that Mr Molloy had no jurisdiction to reach the decision he did in Adjudication 2 because Prater's referral included multiple disputes rather than a single dispute. As a result, Decision 2 is unenforceable, not binding and a nullity. Accordingly, Mr Molloy did not, in turn, have jurisdiction to reach the decision he did in Adjudication 4 which was based (in part) on his findings in Adjudication 2. Thus, it is argued that Decision 4 should not be enforced.

11. Sisk identify 3 disputes as having been referred for determination in Adjudication 2. The first being a dispute as to the correct Subcontract completion date i.e., as to Prater's entitlement to an extension of time. The second dispute being a dispute as to whether

the Subcontract included provisional sums, itself an issue of contract interpretation. The third dispute being as to Sisk's entitlement to deduct certain indirect losses from sums due to Prater. Sisk's case is that there was no clear link between these three issues, that they could each have been decided independently and that applying the test set out by Akenhead J at paragraph 38 of his judgment in *Witney Town Council v Beam Construction (Cheltenham) Ltd* [2011] EWHC 2332 (TCC) as to what will constitute a single dispute, the issues raised by Prater in Adjudication 2 constituted three separate disputes.

12. Prater submits:

(i) Firstly, that it is not open to Sisk to challenge Decision 2 in the context of Adjudication 4. Decision 2 is binding and enforceable against Sisk as a matter of principle as well as contractual obligation unless and until revised by the Court pursuant to clause W2.3(11) of the Subcontract.

(ii) Secondly, Sisk's argument does not give rise to a right to impugn Decision 4 on grounds of lack of jurisdiction of the Adjudicator, fraud or breach of the rules of natural justice which are the only bases on which enforcement of Decision 4 can be challenged. Even if correct, the complaint is that Mr Molloy based Decision 4 on a mistake of law by treating Decision 2 as binding or as recording matters that could not be revisited.

(iii) Thirdly, any challenge to the jurisdiction of the Adjudicator in Adjudication 4 would need to be based on the dispute referred to him in that Adjudication and the Adjudicator's jurisdiction to make a decision in Adjudication 4 and not his jurisdiction in respect of Adjudication 2. A challenge based on an assertion that an earlier decision upon which an adjudicator is asked to proceed is not a challenge to the Adjudicator's jurisdiction in the current Adjudication.

(v) Fourthly, if (contrary to Prater's primary case) a lack of jurisdiction in relation to Decision 2 is relevant to the enforcement of Decision 4, Sisk's case that the Adjudicator lacked jurisdiction in relation to Adjudication 2 because the referral included multiple disputes is misplaced. The genesis of the dispute was Sisk's "assessment" of Prater's account issued on 20 December 2019 and its 22 January 2020 Payment Certificate and the referral simply included a number of issues arising out of that disputed certificate.

The Issues on the Application

13. Accordingly, the following issues arise:

(i) Firstly, is a lack of jurisdiction in relation to Decision 2 capable of impugning the Adjudicator's jurisdiction in Adjudication 4 by virtue of the fact that Decision 4 is, in part, based on findings made in Decision 2?

(ii) Secondly, if it is, did the Adjudicator lack jurisdiction in relation to Adjudication 2?

14. In turn, the second issue involves determining whether the matters referred by Prater in Adjudication 2 concerned more than one dispute and, if so, whether the Adjudicator

had jurisdiction to deal with more than one dispute in the context of a single adjudication pursuant to the NEC3 Option W2 contractual adjudication scheme.

Issue 1: The alleged lack of jurisdiction in respect of Adjudication 4

15. I take as my starting point the fundamental principle set out at paragraph 7.37 of Coulson On Construction Adjudication (4th Ed.):

> "*The fundamental principle that governs all enquiries into the adjudicator's jurisdiction can be simply stated. If a dispute has arisen between two parties to a construction contract and the adjudicator is validly appointed to decide that dispute, then, provided his decision attempts to answer that dispute, his decision will be binding in accordance with the 1996 Act, regardless of errors of fact or law or procedure. If, on the other hand, he was not validly appointed, or he decided something other than the dispute that was referred to him, his decision will be unenforceable because it would have been made without jurisdiction. Thus it follows that it is not enough for the defendant to show an error on the part of the adjudicator. What matters, in the words of Sir Murray Stuart-Smith in C&B Scene, is whether the error on the part of the adjudicator went to his jurisdiction, or was merely an erroneous decision of law (or fact) on a matter within his jurisdiction. If it was the former, the decision would be unenforceable; if it was the latter, the decision would be enforceable by way of summary judgment*."

16. In the present case, Sisk do not challenge the jurisdiction of the Adjudicator in Adjudication 4 on any of the usual grounds. There is no issue as to the validity of Mr Molloy's appointment and no issue as to whether his decision was within the scope of the Notice to Refer. Whilst a point was taken before the Adjudicator as to whether the dispute had crystallised between the Parties prior to the issue of the Notice to Refer, that point was not pursued by Sisk in the context of the Application. There is no suggestion that the dispute the subject of Adjudication 4 is not a single dispute and there is no issue arising as to the scope of Decision 4 by reference to the dispute referred. Nor is there any suggestion that Mr Molloy overstepped his jurisdiction by re-opening or re-considering any matter that was the subject of one of the earlier adjudications.

17. Rather, Sisk take what appears to be a novel argument, at least insofar as no authority directly on the point was cited to me by either party. What is said is that Mr Molloy had no jurisdiction to decide the matters he did in Adjudication 4 because those matters were, in part, based on findings made by him in Adjudication 2 (i.e., on Decision 2) in which he did not have the requisite jurisdiction. I do not consider that proposition to be correct for the reasons following.

18. The Subcontract contained the NEC3 W2 dispute resolution clause as amended by the Parties which permits the Parties to refer a dispute to adjudication at any time. Each Adjudication was commenced pursuant to those contractual adjudication provisions. By clause W2.3(11):

> "*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 subcontract that he is dissatisfied with a matter decided by the Adjudicator and intends to refer the matter to the tribunal."

19. By clause W2.4(2):

"*If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision. (3) The tribunal settles the dispute referred to it. The tribunal has the powers to reconsider any decision of the Adjudicator and to review and revise any action or inaction of the Contractor related to the dispute. A Party is not limited in tribunal proceedings to the*
information or evidence put to the Adjudicator."

20. Sisk served a Notice of Dissatisfaction in relation to Decision 2 but as matters currently stand have not taken any further steps to refer Decision 2 to the Tribunal, in this instance, the Court. Accordingly, pursuant to the first sentence of Clause W2.3(11) Decision 2 remains (albeit potentially temporarily) binding on the Parties. That reflects the usual position under section 108(3) the Housing Grants, Construction and Regeneration Act 1996 (***the 1996 Act***) to the effect that until an adjudication decision is challenged, either in arbitration or in court, it is binding on the parties. In turn, it is trite law that an adjudicator in a subsequent adjudication cannot re-open matters decided in an earlier adjudication. Indeed, were he to do so that would render the decision in the subsequent adjudication a nullity.

21. Ms Hannaford Q.C. argued persuasively that if Mr Molloy did not have jurisdiction in relation to Adjudication 2, Decision 2 was not binding, was unenforceable and a nullity from the outset. She relied on the decision of the Court of Appeal in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041 (and in particular paragraph 12 in the judgment of Buxton LJ and paragraph 27 in the judgment of Chadwick LJ) in support of the proposition that if an adjudicator does not have jurisdiction to reach a particular decision that decision is a nullity. It seems to me self-evident that if, upon an application for enforcement or other challenge of an adjudication decision, it is found that the adjudicator did not have the requisite jurisdiction his decision will not be binding or enforceable and will fall to be described as a nullity. However, it does not follow that the decision falls to be treated as a nullity in subsequent adjudications when it has yet to be challenged by the aggrieved party. Clause W2.3(11) expressly states that the Adjudicator's decision is binding on the Parties unless and until revised by the tribunal. Further, I do not think that anything turns on whether one describes the effect of a lack of jurisdiction on an adjudication decision as resulting in a non-binding decision, an unenforceable decision or a decision that is a nullity. Unless and until the decision is challenged before a court or tribunal (as appropriate) it is to be treated as binding.

22. Ms Hannaford Q.C. argued that it could not be right that a decision that was, for instance, in breach of natural justice could be relied upon in a second adjudication. That, she submitted, would be contrary to public policy. However, that argument fails to recognise the reality of the situation which is that if Sisk was dissatisfied with Decision 2 be it because it was made by Mr Molloy without the requisite jurisdiction or

in breach of natural justice it was open to Sisk to take immediate steps to challenge the decision and get it set aside or revised by the Court.

23. Ms Hannaford Q.C. also argued that what clauses W2.3(11) and W2.4(2) of the Subcontract contemplate is a rehearing of the underlying merits of the dispute not a challenge to the jurisdiction of the adjudicator. However, there is no such carve out in the relevant contractual provisions. Clause W2.4(2) is concerned with circumstances in which a party is dissatisfied with the decision regardless of the grounds for that dissatisfaction. Further, the parties have agreed that the decision will be binding unless and until revised by the Tribunal. "Revised" must include a declaration that the decision is not enforceable or otherwise binding for jurisdictional reasons. Moreover, the provisions cannot be limited to a dispute as to the underlying merits of the decision because clause W2.3(11) provides that in the absence of a notice of dissatisfaction being served within four weeks of the notification of the Adjudicator's decision, the decision becomes final. Accordingly, if the dissatisfied party wants to challenge the decision for want of jurisdiction, he must serve a notice stating his intention to refer the matter to the tribunal.

24. Accordingly, unless and until successfully challenged before the Court pursuant to clause W2.3(11), Decision 2 remained binding on the parties and consequently on Mr Molloy in any subsequent adjudication including Adjudication 4. Indeed, had Mr Molloy decided to revisit his findings in Adjudication 2 that would have provided Sisk with a basis for challenging his jurisdiction in relation to Decision 4. He quite properly did no such thing, relying instead on Decision 2 as necessary to determine part of the dispute referred to him in Adjudication 4.

25. Nor do I accept Sisk's proposition that if Decision 2 is a nullity it automatically follows that Decision 4 must also be a nullity for want of jurisdiction. Mr Molloy dealt with Sisk's argument that Decision 2 was unenforceable at paragraphs 23 and 24 of Decision 4. He said this:

> "*23. Sisk's deductions are premised on the basis that the Subcontract contains provisional sums. In Adjudication No.2, there was agreement between the parties that the Subcontract did not contain provisional sums and my Decision reflected this in making a finding to that effect. However, Sisk says that the Decision in Adjudication No.2 is unenforceable. In support of its position, Sisk relies on the challenges to jurisdiction which were advanced and rejected by me in Adjudication No.2. Sisk says that I was wrong to do so and says the fact Prater has not sought to enforce the Decision indicates that it agrees.*
>
> *24. Prater makes the point that W2.3(11) of the Subcontract expressly provides 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…". Prater also makes the point that, as it did not claim payment in Adjudication No.2, there was nothing to enforce and it observes that Sisk has taken no steps to obtain a declaration to the effect that the Decision was either unenforceable or wrong. These points are well made. It therefore follows that, for present purposes, the Decision in Adjudication No.2 is binding on the parties. That being the case, it follows that the adjustment in respect of provisional sums adopted by Sisk does not reflect the provisions of the Subcontract and I therefore disallow these deductions*."

26. If an absence of jurisdiction in relation to Decision 2 was capable of impacting Mr Molloy's decision in Adjudication 4, then I agree with Prater that the error in Adjudication 4 lay in Mr Molloy's failure to understand the impact on Adjudication 4 of Sisk's case on jurisdiction in relation to Adjudication 2. That would be an error of law on Mr Molloy's part as to the meaning and effect of clause W3.2(11) of the Subcontract and as to the binding nature of Decision 2. That can clearly be seen from paragraph 24 of Decision 4 quoted above. That is not a matter going to Mr Molloy's jurisdiction in Adjudication 4 or a matter impacting Prater's right to enforce Decision 4. Serial adjudications are common. Yet I have not seen any authority to support the proposition that a lack of jurisdiction in relation to an earlier adjudication is a recognised ground for challenging an adjudicator's jurisdiction in a subsequent adjudication that relies on the findings of the challenged adjudication prior to any such challenge being made good.

27. Further, I agree with Mr Howells Q.C.'s submission that if Sisk wanted to avoid the findings in Adjudication 2 being relied upon in a subsequent adjudication it was incumbent on Sisk not only to issue a Notice of Dissatisfaction under WC2.4(2) but to refer its challenge to the Court. Adjudication 2 was concerned with various matters including (a) the correct Subcontract completion date, (b) the status of provisional sums within the Subcontract, and (c) Sisk's entitlement to deduct certain indirect losses from monies due to Prater. All issues going ultimately to determining what sum was due to Prater under the Subcontract. It must therefore have been obvious to Sisk given the nature of the parties' dispute that the findings the subject of Decision 2 would be relied upon by Prater in a subsequent adjudication to determine what, if any, sums were owed to it. Further, to my mind, Sisk's case that it was for Prater to obtain a declaration from the Court to the effect that Decision 2 was binding despite Sisk's jurisdictional challenge runs contrary to the contractual scheme set out in NEC3 Option W2 and the overall purpose of an adjudication scheme. If Sisk objected to Decision 2 it was up to Sisk to bring and make good that challenge before the Court.

28. Given my findings in relation to the First Issue there is no need for me to consider whether Mr Molloy did lack jurisdiction in relation to Decision 2. However, having heard detailed argument from the Parties I set out my conclusions on the matter below.

Issue 2: The jurisdictional challenge in relation to Decision 2

29. Ms Hannaford Q.C. submits that it is well established that only a single dispute may be referred to adjudication in any one referral, as is confirmed at paragraph 31 of Akenhead J's judgment in *Witney Town Council v Beam Construction (Cheltenham) Ltd* [2011] EWHC 2332 (TCC). She further says that, contrary to that principle, there were three disputes referred to Mr Molloy in Adjudication 2, namely:

    (1) The correct Subcontract Completion Date;
    (2) The status of provisional sums within the Subcontract; and
    (3) Sisk's entitlement to deduct certain indirect losses from any sums due to Prater.

    Was more than one dispute referred?

30. It was common ground between the Parties that relevant guidance for determining what constitutes a single dispute was set out by Akenhead J at paragraph 38 of his judgment in the *Witney* case. In that instance, Akenhead J said the following:

"Drawing all these threads together, I draw the following conclusions:

(i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.

(ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.

(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.

(iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties cannot broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.

(v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.

(vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes.

(vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute."

31. Ms Hannaford Q.C. submits that, applying the guidance set out in sub-paragraph (vii) of Akenhead J's judgment, the matters referred to Mr Molloy in Adjudication 2 were separate and distinct disputes. The first concerned Prater's entitlement to an extension of time, the second gave rise to an issue of contract interpretation as to whether or not the Subcontract contained provisional sums and the third was concerned with whether or not Sisk were entitled to deduct certain indirect losses from the sums otherwise due to Prater. It is said that there was no clear link between the 3 matters referred and that they could each have been decided independently.

32. Prater on the other hand submit that the matters referred in Adjudication 2 were part of a much larger dispute between the Parties as to Sisk's 20 December 2019 assessment, the final account process Sisk thereby commenced and Sisk's January 2020 Payment Certificate. Prater explained that any adjudication encompassing the entire final account dispute between the Parties would be lengthy and complex and that to bring a "*kitchen sink*" final account adjudication (to use the vernacular as referred to by HHJ Peter Coulson QC (as he then was) in *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd* [2005] EWHC 138 (TCC)) would have been inappropriate, not least given

the summary nature of the adjudication procedure. Therefore, the proper and pragmatic approach on a project such as this was that taken by Prater, namely to raise specific issues going to determination of the final account for resolution by means of more than one adjudication. That did not mean that the matters referred by Prater in Adjudication 2 were anything other than issues going to resolution of the real dispute between the parties as to the value of Prater's December 2019 Payment Application and/or the final account i.e., to resolution of a single dispute between the Parties.

33. Ms Hannaford Q.C. is right when she submits that each of the matters referred to Mr Molloy in Adjudication 2, and set out in paragraph [31] above, could have been decided independently. However, I do not read Akenhead J's guidance in the *Witney* case as meaning that unless each claim cannot be decided without deciding all or part of the other claims, each claim constitutes a separate dispute. Clearly a single dispute in the context of a construction contract may include several distinct issues such as when determining appropriate deductions for the purposes of a payment application or final account. One needs to look at the facts of each case and to use some common sense.

34. Mr Howells Q.C. pointed to the fact that in *David McLean Housing Ltd v Swansea Housing Association Ltd* [2002] BLR 125, HHJ Lloyd Q.C. held that the real dispute was how much the claimant should have been paid. In that case, the claimant made a payment application claiming monies for direct loss and expense, variations and measured works as well as adjustments relating to the expenditure of provisional sums. The claimant then served a notice of adjudication identifying six matters in dispute namely: "(i) the Referring Party's entitlement to direct loss and/or expense pursuant to clause 26 of the Contract; (ii) the Referring Party's entitlement to extension of time pursuant to clause 25 of the Contract; (iii) A proper valuation of variations … (iv) The proper valuation to be ascribed to measured work; (v) Release of retention; (vi) Expenditure of provisional sums." HHJ Lloyd Q.C. relied on the judgment of HHJ Thornton Q.C. in *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168 at page 176 including the passage in which HHJ Thornton Q.C. said that: "*At any particular moment in time, it will be a question of fact what is in dispute. Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the referring party first intimates an adjudication reference*". HHJ Lloyd Q.C. went on to hold that when the context of the case was examined, the real dispute between the parties was about what payment ought to have been made pursuant to the payment application and that the referral notice merely contained the various elements going to determining the outcome of that dispute.

35. It seems to me that the position in *Witney* was somewhat different in that the final account in that case was itself the subject matter of the adjudication. In *Witney* Beam's referral notice described the dispute by reference to some seven issues but those were all issues going to the determination of contractor's final account in the adjudication itself. What distinguishes the situation in *Witney* from the present is that in *Witney* the several issues were all part of the single dispute that had itself been referred to the adjudicator. In the present case the matters the subject of Adjudication 2 were only part of what was in dispute between the Parties at the time Adjudication 2 was commenced.

36. Does it matter that the issues referred for adjudication in Adjudication No. 2 were only part of the issues relevant to determining the Parties' dispute as to Prater's entitlement in respect of its December 2019 Payment Application? In my judgment it does not. At paragraph 20 if his judgment in the *Fastrack* case, HHJ Thornton Q.C clearly

contemplated the possibility that the "dispute" the subject of a referral might only be part of whatever was in dispute between the parties at the moment the adjudication reference was commenced. Further, it would in my judgment be arbitrary to treat distinct issues forming part of a single dispute as each giving rise to a separate dispute because the whole of the dispute itself had not been raised in the context of a single adjudication or because there were other issues that also needed to be resolved to determine the real dispute. Clearly it would not be desirable for a party to be forced into raising the entirety of the dispute in a single adjudication when that might be oppressive or the entire dispute too complex and extensive to be dealt with in the context of a single adjudication. What is therefore relevant is whether or not the matters referred by Prater in Adjudication 2 were part of a larger dispute at the time of the referral.

37. When the context of the present case is examined, it is clear that the matters referred by Prater for resolution in Adjudication 2 were part of a larger dispute between the Parties. The real dispute in this case is a dispute as to Sisk's assessment of Prater's account and Sisk's ensuing Payment Certificate dated 22 January 2020 in the sum of £4,984,867.09 as against Prater's Payment Application in the sum of £12,107,519.31. That was made clear at paragraphs 3.1.4 and 3.1.5 of Prater's Referral Notice in Adjudication 2 which read:

> "*3.1.4 There are significant disparities between the respective Parties positions in regard to the assessment of sums due under the Subcontract. The latest Payment Certificate of Sisk dated 22 January 2020 includes a gross certified sum of £4,984,867.09, the respective Payment Application included a gross sum due of £12,107,519.31 (Appendix 5/p.9). Prior to the recent adjudication decision Sisk maintained that Prater was not entitled to any adjustment to the Completion Date beyond 1 April 2019 and had rejected the majority of issued notification of compensation events. Despite the content of the recent adjudication decision Sisk has only released circa £151k of cash to Prater.*
>
> *3.1.5 The dispute between the Parties in respect of the appropriate assessment of compensation events and other sums due is complex and considered too cumbersome to be decided appropriately within a single adjudication. This Adjudication therefore is focussed upon the following issues:*
>
> *…*"

38. Prater deliberately did not refer the whole of the dispute to a single adjudication given its complexity and the unsuitability of the adjudication process to resolving all the issues arising in relation to Sisk's assessment of Prater's entitlement in the context of a single reference.

39. Each matter relied upon by Sisk as giving rise to a separate dispute is no more than an aspect of the dispute between the Parties as to the proper amount of Sisk's Payment Certificate dated 22 January 2020. Each issue raised by Prater in Adjudication 2 goes to an aspect of the disparity between Prater's Payment Application and Sisk's 22 January 2020 Payment Notice. Each issue was therefore linked to determining the real dispute between the Parties. Accordingly, all the matters raised in the context of Adjudication 2 were issues going to the determination of a single dispute. Further, I agree with Mr Howells Q.C. that it would not be practicable for a party to be faced with

either bringing all issues going to a complex account dispute in a single adjudication or bringing a whole series of different adjudications in relation to each and every issue arising on that account as if it was a separate dispute. In a case such as this what is obviously in dispute is the amount of Sisk's Payment Certificate dated 22 January 2020, alternatively the assessment Sisk issued in December 2019.

40. It is therefore not necessary for me to decide whether Prater is correct in its submission that the contractual adjudication scheme did not limit a referral to a single dispute. However, having heard the Parties' submissions on the matter I address the issue below.

Was it open to Prater to refer more than one dispute?

41. I did not understand Prater to take issue with the basic proposition that the weight of the relevant authorities is that unless otherwise agreed by the parties an adjudicator only has jurisdiction to deal with a single dispute in any one adjudication. However, Prater's point was that these authorities are concerned with the application of the statutory adjudication scheme and not the proper construction of the contractual adjudication scheme set out in NEC3 Option W2. As is clear from paragraph 31 of Akenhead J's judgment in *Witney*, parties to a construction contract can agree to more than one dispute being referred in a single adjudication.

42. Prater submits that there is no obvious basis for importing the wording of section 108(1) of the 1996 Act into the Subcontract, particularly given that (i) there is no express preclusion in clause NEC3 Option W2 against a reference of more than one dispute to the adjudicator; (ii) unlike the Statutory Scheme, Option W2 does not include a term similar to paragraph 8(1) of the Scheme by which *"[t]he adjudicator may, with the consent of all parties to those disputes, adjudicate at the same time on more than one dispute under the same contract*"; and (iii) by clause W2.2(3) once the Adjudicator is appointed, successive disputes are to be referred to the same Adjudicator unless and until that Adjudicator resigns or becomes unable to act.

43. It seems to me that this is a matter of contract interpretation that needs to be resolved according to the well established principles of contract construction set out in cases such as *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services Limited* [2017] UKSC 24. The key is to ascertain "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in their contract to mean*". For the purposes of undertaking that exercise the Court takes account of (i) the natural and ordinary meaning of the clause in question, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time the contract was executed, and (v) commercial common sense (see paragraph 15 of Lord Neuberger's judgment in *Arnold v Britton*). To quote Coulson J (as he then was) in *Dynniq UK Limited v Lancashire County Council* [2017] EWHC 3173 (TCC) para. 10: "*What matters is the objective meaning of the language used, to be derived from the natural meaning of the words in the contract, when seen against the background/context of the contract.*"

44. Clause W2.1 of the Subcontract expressly states that "A party may refer a dispute to the *Adjudicator* at any time". The natural and ordinary meaning of the words "a dispute" is a single dispute. Similarly, clauses W2.2(2), 2.2(4), 2.3(1), 2.3(2), 2.3(4), 2.3(8) and

2.5 all refer to "a" or "the" dispute in the singular. Further, the purpose of Option W2 is clearly to give effect to the provisions of section 108 of the 1996 Act. At the time this Subcontract was executed on 25 April 2018 it was already well understood that in the context of the Statutory Scheme only one dispute could be referred to adjudication at a time. If the authors of the NEC3 Option 2 had wished to take a different approach and to have multiple disputes referred at the same time one might expect them to have made that clear in their drafting of Option 2. They did not. If, in turn, the Parties wished to allow the referral of multiple disputes, it was open to them to amend the standard terms. Again, they did not. All that is reinforced by the fact that it makes sense for the Parties to have agreed that only one dispute should be referred to the adjudicator at any one time for the same reasons as under the Scheme namely that adjudication is a fast and summary procedure that risks becoming difficult to operate if an adjudicator has to deal with multiple disputes at the same time. In turn, that falls to be weighed against the fact that the Courts take a wide and commercial view of what constitutes a single dispute. Whilst, as Mr Howells points out, there is no express preclusion of the referral of multiple disputes in the contractual provisions nor is there any express inclusion of such a referral. The fact that paragraph 8(1) of the Scheme contemplates a single dispute being referred unless the parties agree otherwise is, as Mr Howells accepted, a neutral point. Lastly, the fact that clause W2.2(3) allows successive disputes to be referred to the same Adjudicator once appointed, does not mean that multiple disputes should be referred to him all at the same time. On the contrary, it contemplates a series of separate adjudications.

45. Accordingly, I have concluded that like section 108(1) of the 1996 Act on proper interpretation clause W2.1(1) of the Subcontract contemplates a single dispute being referred to the adjudicator at any time and not multiple disputes as submitted by Prater.

Conclusion

46. Accordingly, there must be summary judgment for the Claimant, and I would ask the Claimant to draft an order accordingly.