Neutral Citation Number: [2022] EWHC 2715 (TCC)

Case No: HT-2022-000169

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2022

Before :

MR ADAM CONSTABLE KC

- -

Between :

MANOR CO-LIVING LIMITED	**Claimant**
- and -	
RY CONSTRUCTION LIMITED	**Defendant**

- -
- -

Seb Oram (instructed by **DAC Beachcroft LLP**) for the **Claimant**
James Frampton (instructed by **Sheridan Gold LLP**) for the **Defendant**

Hearing date: 19 October 2022

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APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 27 October 2022 at 10.30am

Introduction

1. This is a Part 8 Claim brought by the Claimant Manor Co-Living Limited ('MCL'), against the Defendant, RY Construction Limited ('RYC'). The Part 8 Claim seeks the following declarations:

   (1) that by declining to consider, and excluding from his consideration, the Claimant's case that it had had a lawful entitlement to terminate the Contract (for which it did in fact terminate the Contract); the Adjudicator deprived the Claimant of a potential Defence to the Dispute and thereby acted in breach of the requirements of natural justice;

   (2) in consequence, the Decision is invalid and of no effect;

2. MCL relies upon a witness statement from Mr Warren Kemp dated 16 May 2022. No evidence in rebuttal was served by RYC, and the underlying facts are not materially contentious.

Background

3. The following factual background, relevant to the arguments deployed in the Adjudication, is drawn from the witness statement of Mr Kemp and/or from the face of the documents appended to his witness statement.

4. MCL and RYC were parties to a construction contract made on or around 30 October 2020 in the form of the JCT Standard Building Contract 2016, without quantities, incorporating bespoke amendments, for RYC to carry works described as "*to form 38no. bedrooms with ensuite bathrooms via a combination of conversion and extension and the creation of new rooms to provide communal kitchens, dining and living rooms, cinema and library; at Clare Hall Manor, Blanche Lane, South Mimms EN6 3LD*" . The contract sum (subject to adjustment) was £2,018,014.35.

5. By email on 11 November 2021 the Contract Administrator served a default notice on RYC, identifying specified defaults, and warning of MCL's intention to terminate the Contract if those defaults were not remedied within 14 days ('the Default Notice'). The Default Notice amended and replaced an earlier notice, given on 4 November 2021, the validity of which had been challenged by the RYC. That email was not sent in hard copy by post until 17 November 2021 and RYC did not receive the letter by post until 19 November 2021.

6. By letter dated 30 November, sent under cover of an email dated 1 December 2021, the Contract Administrator wrote a letter to RYC which concluded:

   > *'A result of your failure to proceed regularly and diligently, and your failure to remedy the defaults stated in the Notice of Default this letter should be considered Notice that the Contract is terminated with immediate effect in accordance with clause 8.4.2 of the Contract.'*

7. The email was timed 13.00, but due to the time difference from the sender, the time was 6pm in the evening on 1 December 2021. The covering email pointed out that MCL had arranged for security for the site, and asked RYC not to attempt to gain access without prior arrangement.

8. On 2 December 2021, RYC sent a letter to MCL stating:

> '*We acknowledge receipt of an email from Smithers Purslow yesterday, 1 December 2021, at 13:01 enclosing an electronic copy of a letter of 30 November 2021 also from Smithers Purslow, in which amongst other things they purported to give us notice that "the Contract is terminated with immediate effect in accordance with clause 8.4.2 of the Contract".*
>
> *Any such notice would only be effective if and when it was either delivered by hand or by recorded, signed for or special delivery post, pursuant to clauses 8.2.3 and 1.7.4 of the contract. We have not received a hard copy of the letter delivered in this way, and therefore any such termination pursuant to clause 8.4.2 has not yet occurred.*
>
> *We would also highlight that any such notice of termination given pursuant to clause 8.4.2 is supposed to be given by you, the employer, not the contract administrator. We therefore do not believe that Smithers Purslow's email and letter could amount to a valid notice in any event.*
>
> *Despite these points, when our men attended site this morning they discovered that you have changed the locks and we are now unable to get onto site to carry out the works. Smithers Purslow effectively confirmed this in its email of yesterday when they said "the client has arranged for security to take possession of the site, please do not attempt to gain access without prior arrangement". For the reasons explained above, your and Smithers Purslow's actions are premature, in breach of the contract, and you preventing us access to carry out the works in this way amounts to a repudiatory breach of the contract on your part.*
>
> *In short, there is no factual basis for you to terminate the contract pursuant to clause 8.4.2, and therefore notwithstanding the procedural points made above, your purported termination is invalid in any event, and as a result also amounts to a repudiatory breach of the contract.*
>
> *In the circumstances, with us having been locked out of the site, and you clearly no longer wanting us to work on the project, we have no alternative but to inform you that in light of your repudiatory breaches of the contract outlined above, you have brought the contract to an end with immediate effect.*

9. This was followed up by correspondence from RYC's lawyers the same day, reiterating that MCL's purported termination of the contract pursuant to the Termination Notice was invalid.

10. The battle lines were at this stage drawn: MCL considered that it had validly terminated the contract and was justified in sending the Notice of Termination. RYC disputed this, and considered that MCL's conduct was repudiatory and accepted it, bringing the contract to an end. The debate continued in correspondence, which does not need to be set out in detail. However, to set the scene for the impending Adjudication, it is worth noting that by its letter of 25 March 2022, solicitors for MCL wrote a letter setting out what was (then considered to be) the 'substance of the dispute'. After identifying the dispute relating to whether or not the Termination Notice had been served prematurely, it stated:

> *'... Further, even if our client was in repudiatory breach (which is denied), you have not challenged the underlying entitlement to terminate. Our client was always entitled to terminate and would have done so. Your client has therefore suffered no loss because our client's termination can be justified at common law (those rights being expressly reserved: JCT Condition 8.3.1); and, separately, because our client was entitled to and would have terminated the contract in any event. Your client has not claim for damages, because it would never have been permitted to complete the works…'*

11. Thus, the alternative case advanced at this time was not that MCL had *in fact* terminated the contract at common law by accepting RYC's repudiatory breach: it asserted that it had an entitlement to do so, and would have done so. This, it was said, went to the question of loss.

The Adjudication

12. In this section, I will set out the relevant sections of the various adjudication submissions, and make a number of observations that in due course will feed into my analysis of the parties' contentions.

13. By Notice of Adjudication dated 6 April 2022, RYC gave notice of its intention to refer to adjudication a dispute that had arisen. At paragraphs 10 and 11, RYC make clear what it considered to be the boundaries of what it was referring to adjudication, in the following terms:

> *'10. For the avoidance of doubt, the only issue that RYC is referring to adjudication is whether MC-L correctly served its notice of termination and/or otherwise complied with the notice requirements contained in clause 8.4 of the Contract, and, if not, the effect of this.*
>
> *11. The Adjudicator will not be asked to consider whether there were substantive grounds for MC-L to terminate RYC's employment, the substantive content of the notices that MC-L served, or any other procedural irregularities in relation to MC-L purporting to terminate RYC's employment. These other issues will not form part of the dispute that is being referred to adjudication; and RYC reserves the right to refer these issues to adjudication separately in due course*.'

14. In paragraph 14 of the Notice, RYC set out the relief that it sought from the Adjudicator, comprising 5 declarations, as follows:

> a) *[MCL]* purported *to terminate RYC's employment under the Contract prematurely, before the expiry of 14 days from RYC's receipt of notice specifying alleged defaults,*
>
> *b) in addition, or in the alternative, [MCL] did not otherwise comply with the notice requirements contained in clause 8.4 of the Contract,*
>
> *c) as a result, [MCL]'s purported termination was wrongful and invalid,*
>
> *d) [MCL] acted in breach of contract in (i) purporting to terminate RYC's employment and doing so wrongfully, and/or (ii) preventing RYC from accessing site to carry on with the Works, and/or (iii) appointing others to complete the Works in place of RYC,*
>
> *e) some or all of these actions by [MCL]amounted to repudiatory breaches of the Contract, which were accepted by RYC expressly or impliedly, bringing the Contract to an end.*

15. The Referral fleshed out the arguments advanced, but did not change or expand the matters referred, and as is usual repeated the relief sought at paragraph 42. It is to be noted, however, that RYC repeated its intended limit on what it considered it was referring to Adjudication. At paragraph 8 it stated:

> '*RYC also disputes that there were substantive grounds for MC-L to terminate. The grounds cited by MC-L were RYC's failure to progress the works regularly and diligently, and to comply with its obligations under the CDM Regulations; but the CA acknowledged that RYC was entitled to an extension of time to the end of March 2022 [Tab 2 / 3 and 45], and RYC obtained an independent report on health and safety matters at the beginning of November 2021, and actioned the one minor issue identified. RYC also disputes that the notices that the CA issued in relation to the termination were sufficiently clear to be valid. However, this adjudication is not concerned with these substantive issues; the Adjudicator is not asked to consider these; and RYC reserves the right to refer these issues to adjudication separately in due course.*'

16. It is commonplace for a referring party to seek to limit the scope of an adjudication. There is nothing impermissible about this as a strategy. Whether, however, a referring party is ultimately able to constrain the scope of an adjudication depends upon how matters develop, and in particular, how a responding party puts its defence to the matters alleged.

17. The Response ran to 32 pages. It is relevant to note that within the introductory paragraphs, MCL clearly raised its alternative claim on common law repudiation and (in light of the way RCL had sought to limit the scope of the adjudication) contended

that it was not precluded from advancing such an argument by the way in which the Notice and Referral had been drafted. Paragraphs 5 and 6 say:

> '5. *As explained below, the termination was valid as the exercise of the contractual right under Condition 8.4. In any event MCL is entitled in law to justify that that termination, as an accepted repudiation at common law. Where, as here, the rights consequent upon each method of termination are the same, the same notice (even if expressed to be given under the contractual mechanism) will be capable of operating to terminate both in the exercise of the contractual right, and as an acceptance of a repudiatory breach.*
>
> *6. The notice of adjudication (in para. 10) purports to confine the scope of this adjudication to the issue of compliance with Condition 8.4. It thereby attempts to preclude the Adjudicator from considering whether (if Condition 8.4 was not operated properly) MCL is entitled to justify the termination as the acceptance of a repudiatory breach. It cannot confine the adjudication in that way.'*

18. In the context of the arguments raised by the parties in the Part 8 Claim, Mr Frampton for RYC draws attention to the fact that the summary of the alternative case relating to common law termination relies upon, and only upon, '*the same notice…as acceptance of a repudiatory breach*'.

19. After referring to some authorities, the introduction concluded with para 9:

> '*9. The third declaration sought in this adjudication, is that MCL's termination was wrongful and invalid, and amounted to a repudiatory breach. The Adjudicator cannot reach that conclusion without considering whether MCL had any lawful entitlement to terminate, and whether it exercised that right. The issues in this adjudication, therefore, concern not simply the meaning and procedural requirements of Condition 8.4, but the substantive entitlement to terminate and whether that has been properly effected on any basis.'*

20. Sections B set out the issues, as follows:

> (1) was MCL *entitled* to terminate, whether on a ground specified by Condition 8.4, or because RYC had repudiated the Contract? (**"the Substantive Entitlement"**)
>
> (2) did MCL properly terminate RYC's employment under the Contract, in accordance with Condition 8.4? (**"the Condition 8.4 Termination Issue"**)
>
> (3) if not, did the termination amount to an acceptance of a repudiatory breach? (**"the Repudiation Issue"**)

21. Mr Frampton says that this framing supports the way the case was put at paragraph 5 of the Response, in that reference to 'the termination' in issue (3) refers back to what MCL had or had not done in an attempt to terminate under the contract, and in particular the service of the Termination Notice. In other words, the issue was: if the Termination Notice did not amount to proper termination under the Contract, did it nevertheless amount to an acceptance of a repudiatory breach?

22. Sections C to E then set out background and dealt with the question of contractual termination.

23. Section F was entitled 'Renunciation/Repudiation at common law'. This section asserted that the existence of a contractual right to termination does not, unless clear words are used, exclude the common law right to terminate for repudiate. It then, at paragraph 66, stated (correctly):

> '*66. To terminate at common law, the claimant must establish: (i) that the defendant was in repudiatory breach of the contract, and (ii) a communicated decision to bring the contract to an end, i.e. his acceptance of the repudiation.'*

24. Thus, in raising its alternative case, MCL explicitly accepted that it would need to establish both the substantive question of the RYC's conduct (was it repudiatory?) and also that, if so, there had been an acceptance of the repudiation. It goes without saying that if MCL failed to establish that it had validly accepted the repudiation, the first question becomes irrelevant: whether or not RYC was in repudiatory breach alone would be insufficient to establish a valid, common law termination.

25. In section F2, MCL argued (at paragraph 70) that the substantive grounds which had been set out in its Notice of Default amounted to repudiatory breaches, and also asserted (at paragraph 71) that RYC's response to that notice was itself repudiatory as it demonstrated an absence of intention to perform the work in accordance with the terms of the contract. Although not referred to as such in the Response, this latter argument came to be known as 'the renunciation' case, distinct from 'the repudiation' case', contained in paragraph 70.

26. The Response concluded at paragraph 72, that MCL was entitled to, and did, terminate the Contract at common law.

27. As Mr Oram fairly accepted in oral argument, Section F2 did not engage explicitly in the question of by what means the repudiation was accepted; it was silent on the point. Mr Oram sought to argue that this silence left the question open. However, it seems to me clear that a fair reading of the Response read as a whole would leave the reader with the very clear impression that MCL's case was on acceptance was that the Notice of Termination was the means of communication. Indeed, this is what paragraph 5 of the Response says in terms. No case was advanced in the Response which in any way suggested that MCL's conduct in barring RYC from site could itself amount to conduct which accepted preceding repudiatory breaches.

28. RYC served a Reply. At paragraphs 2.2 and 2.3, RYC identified two of the issues in the following terms:

> '*2.2 if RYC is correct on point 2.1 above, then MC-L failed to comply with the requirements for a valid termination of RYC's employment under the Contract and MC-L was itself in repudiatory breach. RYC is therefore entitled to the relief sought by RYC in this adjudication, subject only to the second issue. The second issue is that MC-L contends that if MC-L failed to operate the clause 8 provisions correctly, its termination letter received on 1 December 2021 may be justified as constituting the acceptance of a repudiatory breach by RYC. RYC's position is that that is not so as a matter of fact and law, without it being necessary to investigate whether there was in fact any repudiatory breach;*
>
> *2.3 repudiatory breach and the substance of MC-L's contention that RYC was in repudiatory breach (which is not within the scope of the adjudication but is in any event denied);*'

29. Thus, at paragraph 2.2 RYC appeared correctly to identify that it even if it succeeded on its case that the Termination Notice was invalid, it remained necessary for the Adjudicator to consider what is described as '*the second issue*'. This was whether the Termination Notice also amounted to an acceptance of repudiatory breaches at common law.

30. However, in the same breath, RYC went on to assert, at paragraph 2.3, that the substance of MCL's contention that RYC was in repudiatory breach was not within the scope of the adjudication. Notwithstanding the submission to the contrary by Mr Frampton, this cannot be right. Clearly, as is common ground, the 'common law repudiation' defence had two limbs: (i) whether there were repudiatory breaches and (ii) whether acceptance of those repudiatory breaches had been properly communicated so as to effect a common law termination. Both elements of that defence were placed before the Adjudicator by MCL, as it was entitled to do. In order to grant the declarations sought, the Adjudicator would be required to reject the defence of common law termination. If it was necessary to consider both limbs of the defence to do so, that is what the Adjudicator should have done. It is not open to a referring party to pick and choose which elements of the defence advanced were within the jurisdiction of the Adjudicator. Mr Frampton accepted that there was no authority to suggest otherwise. In fairness to Mr Frampton, I recognize that these submissions were underpinned by the contention that ultimately the point is irrelevant in circumstances where (if RYC is correct) the Adjudicator rejected limb (ii) in clear terms, obviating the need to consider limb (i).

31. Having dealt with matters relating to contractual termination, the Reply addressed the question: '*Can the purported Notice of Default of 11 November constitute acceptance of Repudiatory Breach*'. This it called 'The Second Issue'. Paragraphs 26 to 50 set out at length various authorities and a legal and factual analysis advancing the conclusion that the Termination Notice could not have constituted an acceptance of

repudiatory conduct. In other words, this section substantively engaged with the second of the two elements of common law termination.

32. There then followed a short section on 'Repudiatory Breach', which was called 'The Third Issue'. At paragraph 51, RYC contended that if the Adjudicator found that the purported notice of termination was premature and invalid (i.e. if its contention on the primary argument succeeded) *and* if the Adjudicator found that the notice was not an acceptance of repudiatory breach (i.e. if it also won on the substance of the argument on the Second Issue), then it followed that the Company was in repudiatory breach in serving the purported notice of termination. At paragraph 52, it was submitted that it was not necessary in these circumstances to consider the factual position as to whether RYC was in repudiatory breach. Assuming no other case existed as to the manner of acceptance of repudiatory breach, this was obviously logically correct.

33. At paragraph 53 onwards, RYC then set out submissions about what should happen if it did win on its primary case, but lost the Second Issue. It stated that in these circumstances, it would not be necessary to consider the substance of the allegations of repudiatory breach, and the Adjudicator could simply decline to make the relevant declarations (implicitly accepting that, having lost the Second Issue, it would not be possible to conclude that MCL was itself in repudiatory breach). It is this paragraph that MCL characterised in its Rejoinder, and in argument in Mr Oram's skeleton submission, as RYC's attempt to 'withdraw issues' from the Adjudication. As stated above, I do not consider it open to a referring party to pick and choose what elements of the responding parties' defence are within jurisdiction, or withdraw issues from the Adjudicator as it chooses.

34. The Reply concluded with a section entitled 'The Fourth Issue: Jurisdiction'. This sought to draw a distinction between issues related to termination of employment and termination of contract, and denied that the questions relating to repudiatory breach were a defence to the claim brought. Rather, it sought to characterise the argument raised regarding common law repudiation by MCL as one which went to the granting of declaration 42(c), but not a defence in respect of the dispute. Again, I do not regard this analysis as correct.

35. A Rejoinder was permitted. In this, MCL alleged that the attempt to withdraw part of the relief was an abuse of process (paragraph 3). At Section C, it asserted in paragraph 14 that the written response to the Notice of Default was a renunciation. At paragraph 15, it dealt with the law and argument relating to whether the 11 November letter could constitute a communication of acceptance of repudiatory breach at common law. At paragraph 16, it engaged with issues relating to the difference between termination of employment and of contract. Finally, at Section D, it denied that RYC had any right to withdraw relief, and contended that the question of its substantive entitlement to terminate for repudiatory breach was in issue.

36. At no point in Rejoinder did MCL suggest that if it was wrong about the Termination Notice being an acceptance of repudiatory breach, it had a further alternative case, namely, that its conduct in barring RYC from site would constitute such an acceptance. Nor did it engage with, let alone dispute, RYC's analysis at paragraphs 51 and 52 of the Reply, in which RYC had spelt out in terms what it understood the consequences to be of winning on (a) the invalidity of contractual termination and (b) the Termination

Notice not constituting a valid acceptance for the purposes of common law termination. MCL did not, for example, suggest that the analysis was incorrect because it had a further case relating to acceptance by conduct.

37. On 12 May 2022 the Adjudicator issued his decision ('the Decision').

38. After dealing with introductory matters, Section 3 dealt with Jurisdiction. Sub-section (a) related to a separate jurisdiction argument relating to the payment of fees of a previous adjudication, and is not relevant for present purposes. Sub-section (b) dealt with '*RYC's challenge as to my jurisdiction to decide MCL's assertion that RYC was in repudiatory breach of contract'*.

39. The Adjudicator then set out extracts from the parties' submissions. In terms of legal approach, he set out the relevant sub-paragraphs from *Global Switch Estates Ltd v Sudlows Ltd* [2021] BLR 111 (TCC) referred to further below, and directed himself to sub-paragraphs 50(vi), (vii) and (viii).

40. The Adjudicator then said as follows:

> *'38. It is clear from DACB's letter dated 25 March 2022 (see paragraph 31 above) that as at the date of 25 March MCL had not accepted what it claims to be RYC's repudiatory breach(es) of contract as the letter confirms that MCL*
>
> > *"... was always entitled to terminate and would have done so. Your client has therefore suffered no loss because our client's termination can be justified at common law (those rights being expressly reserved: JCT Condition 8.3.1); and, separately, because our client was entitled to and would have terminated the contract in any event." [Emphasis Added]*
>
> *39. I consider that in its submissions MCL recognises that there was (and is) no express acceptance of what it claims to be RYC's repudiatory breaches as at paragraph 5 of the Response it says:*
>
> > *'As explained below, the termination was valid as the exercise of the contractual right under Condition 8.4. In any event MCL is entitled in law to justify that that [sic] termination, as an accepted repudiation at common law. Where, as here, the rights consequent upon each method of termination are the same, the same notice (even if expressed to be given under the contractual mechanism) will be capable of operating to terminate both in the exercise of the contractual right, and as an acceptance of a repudiatory breach.*'

41. The Adjudicator thereby directed himself to the summary of MCL's alternative case, namely that if the Termination Notice was not effective as a contractual termination notice, the same notice operated as an acceptance of repudiatory breach. At paragraphs 40 to 51, he then goes on to deal with the substance of the debate about whether the

Termination Notice could be construed as an acceptance of repudiatory breach so as to bring about a common law termination. He concludes:

'*52. Applying the test as set out in Vannin, it is my view and I so find that the reasonable recipient of the letter dated 11 November 2021 from Smithers Purslow would have understood, as expressly stated by the letter itself, that it was a notice given in accordance with clause 8.4 of the Contract (Termination by Employer) and no more.*

53. As noted above, I have not been directed to any formal acceptance of what MCL now alleges to be RYC's repudiatory breaches (other than as now advanced in the submissions in this adjudication).

…

57. Therefore, in respect of MCL's reservation as to my having jurisdiction, I consider that nothing has been brought to my attention that would lawfully deprive me of jurisdiction to decide this dispute.

58. In respect of RYC's request for me to provide my non-binding views on MCL's 'substantive case as to alleged repudiatory breach' I consider that such is not a defence to the matter in dispute and therefore is as stated by RYC to be 'outwith the scope of this adjudication.'

42. In my view, it is clear that in this section of the Decision:

(1) The Adjudicator engaged substantively with the question of whether there had been an effective communication of acceptance of repudiatory breach, the second of the two necessary elements identified by MCL as a basis of establishing common law termination.

(2) He concluded in terms that there was no effective communication.

(3) He therefore concluded that there could be no common law repudiation (and thus no defence of common law repudiation).

(4) On the basis that common law repudiation was not a 'defence' to the matter in dispute, he considered that it was '*outwith the scope of this adjudication*'.

43. The Adjudicator then dealt with the primary case relating to contractual termination and returned to the question of repudiatory breach at paragraphs 79, particularly in the context of the argument that RYC's response to the Notice of Default, as had been asserted at paragraph 71 of the Response.

44. I set the relevant paragraphs relied upon by MCL in full, given the importance they play in the way the case is put:

'86. Given my decision as to the extent of my jurisdiction I cannot and do not make any findings as to the grounds upon which MCL claim to support the allegation of repudiatory breach on the part of RYC. However, that leaves open the issue as to whether MCL's purported termination of RYC's employment under the Contract is to be equated to acceptance of (what is alleged to be) RYC's repudiatory breaches?

87. I have noted above paragraph 6-121 of Keating, the relevant part states:

> *It may, however, depend on the order in which the alternatives are effected. An acceptance of repudiation followed in the alternative by a contractual determination expressed to be without prejudice to the acceptance of repudiation might achieve the contractual determination if there was held to have been no repudiation to accept ...*

88. It seems to be as a matter of principle that if an ineffective acceptance of repudiation followed in the alternative by a contractual determination can provide a lawful acceptance, then (in the absence of any authority being provided by the parties or found by me) it seems reasonable and logical that an ineffective contractual determination followed by acceptance of repudiation can also provided a lawful acceptance, but subject to "... words or conduct which [properly] amount to a renunciation": paragraph 27-049 of Chitty.

89. Paragraph 27-050 of Chitty states:

> *The renunciation must be "made quite plain". In particular, where there is a genuine dispute as to the construction of a contract, the courts may be unwilling to hold that an expression of an intention by one party to carry out the contract only in accordance with his own erroneous interpretation of it amounts to a breach which entitles the other party to terminate performance of the contract; and the same is true of a genuine mistake of fact or law. Even the giving of notice of rescission, or the commencement of proceedings by one party claiming rescission of the contract, does not necessarily amount to a breach which entitles the other party to terminate further performance of the contract, since such action may be taken in order to determine the respective rights of the parties, and so not evince an intention to abandon the contract. On the other hand, it is, generally, no defence for a party who is alleged to have committed a breach which entitles the other party to terminate the contract to show that he acted in good faith. The courts have struggled to reconcile the latter proposition with their reluctance to conclude that a party who has acted in good faith but was mistaken has thereby committed a breach which entitles the other party to terminate the contract.*

[He then quotes from RYC's emails of 9 November and letter of 11 November 2021]

…

92. I do not read RYC's e-mail dated 9 November and letter of 11 November 2021 as exhibiting an absolute refusal to continue with the Works and in many respects the correspondence shows that in circumstances where RYC considered it is entitled to extensions of time[9] *(and possibly payment for loss and expense) it cannot be said that RYC was not trying to adhere to the Contract.*

93. Accordingly, I find that even if MCL was entitled to determine the contract by reliance on the invalid contractual termination letter dated 11 November 2021, it cannot be said, in my view, that RYC was in repudiatory breach on the ground relied on by MCL at paragraph 71 of its Response.

(3) Was MCL's action of taking / re-taking possession of the site on 1 December 2021 an act of repudiation?

94. As noted on the chronology above, with the CA's letter dated 30 November 2021 (but sent by e-mail and hand delivered to RYC on 1 December 2021) the CA's accompanying e-mail confirmed that:

> *'The client has arranged for security to take possession of the site, please do not attempt to gain access without prior arrangement. We can organise a convenient time over the coming days for tools and belongings to be collected and a meeting to discuss the final account.'*

95. *The clear intent of the CA's e-mail noted above was to bar RYC from the site, thus rendering impossible any further performance by RYC.*'

45. Mr Kemp says in his witness statement at paragraph 31 that, in this section, '*the Adjudicator went on to consider whether there had been any other conduct that was capable of amounting to a common law acceptance (of a repudiatory breach by the Defendant). In paragraphs 86-88 of the Decision he determined that issue in favour of the Claimant. He accepted in those paragraphs that, even if (as he had found) the letter of termination could not be construed as a common law acceptance, the Claimant's conduct in terminating the Defendant's employment, would have amounted to a valid acceptance*.'

46. Making the same point in a different way, Mr Oram in oral submissions placed particular emphasis on paragraph 95 of the Decision. He said this paragraph was '*tantamount to finding that there had been a communication of acceptance for common law termination*'. This is central to MCL's case that the Adjudicator failed in breach of natural justice to consider their case on repudiatory breach. It is said that, having

concluded that there had been a communication of acceptance for common law termination, it was incumbent upon the Adjudicator to consider the substantive case on repudiatory breach. He failed to do so because of his consideration of jurisdictional matters, and his conclusion at paragraph 58 of the Decision, quoted above.

47. At the end of his reasoning, the Adjudicator then decided, by reference to the relief requested (as set out in paragraph 14 above):

(1) In relation to 14(a), that MCL sought prematurely, that is before the expiry of the 14-day period in clause 8.4.2, to terminate the Contract;

(2) In light of his decision at (1) above, that such a finding as requested by RYC at 14(b) was not necessary;

(3) In relation to 14(c), that MCL's purported termination of the Contract, for the reason that it was premature, was of no effect.

(4) In relation to 14(d), that MCL wrongly and in breach of contract prevented RYC from accessing the site to carry out the Works.

(5) In relation to 14(e), that MCL's breach of contract noted in 4 above was repudiatory and which was accepted by RYC.

The Parties' contentions

48. The argument advanced by MCL, deftly put by Mr Oram in oral submissions, can be summarised as follows:

(1) The relief sought by RYC included declarations which went beyond merely the validity of the contractual termination. They required a determination of whether MCL was itself in repudiatory breach by its actions (see in particular relief sought at paragraph 14(d) and (e) of the Notice of Adjudication);

(2) In order to determine whether MCL was in repudiatory breach of contract, it was necessary in light of the defence raised to consider not just whether it had successfully terminated the contract under the contract provisions, but also whether it had successfully terminated the contract at common law;

(3) The inclusion of this latter issue could not be excluded by RYC, either by the way the Notice of Adjudication was framed, or by subsequent requests purporting to withdraw relief;

(4) At RYC's invitation, and for tactical reasons, the issue of whether MCL had a substantive entitlement to terminate was deliberately not decided by the Adjudicator;

(5) Although the Adjudicator rejected the contention that the Termination Notice amounted in fact to a communication of acceptance of repudiatory breach, he

did go on explicitly to accept that the subsequent retaking of possession demonstrated a clear intention to bar RYC from site, which amounted to a valid acceptance of repudiatory conduct. Having done so, he failed to consider the preceding issue of substantive repudiatory conduct, because he had wrongly determined that that question was outside of his jurisdiction (at the tactical invitation of RYC);

(6) Whilst MCL accepts that the Adjudicator rejected the 'renunciation' case advanced by MCL on its substantive merits, this contrasts with the failure to have considered the substantive repudiation case;

(7) Had the substantive defence been considered, it could have provided a complete defence to the declarations (d) and (e) that he granted, and his deliberate decision not to do was a serious and material breach of natural justice.

49. Mr Frampton meets this by ably advancing, in summary, four main points:

(1) At the correct level of abstraction, and fairly construed, the Adjudicator determined what was asked of him in relation to MCL's alternative case, namely whether they had successfully terminated at common law. He concluded that they had not. The complaint made relates to sub-issues or reasoning and is not a proper basis for a conclusion that natural justice has been breached;

(2) A fair reading of the Decision is that he dealt with both the repudiation case and the renunciation case;

(3) The Adjudicator did not make any finding that MCL's conduct amounted to acceptance of repudiatory conduct, or if he did, it was subject to the issue of a preceding renunciation (which he substantively rejected);

(4) The case of conduct constituting acceptance (as opposed to the Notice of Termination) was not a case run in the adjudication, and any failure on the part of the Adjudicator to appreciate the case or fail to deal with common law repudiation on this basis was (a) inadvertent and/or (b) a failure caused by MCL's failure to take the point, and as such cannot amount to a breach of natural justice.

The Legal Principles

50. Both parties refer to me to helpful observations set out in O'Farrell J's judgment in *Global Switch Estates Ltd v Sudlows* [2021] BL111 (TCC). For the sake of convenience, I set these out here:

> 'i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.

ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.

iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.

iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.

v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.

vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.

vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.

viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.

ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.

x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced.'

51. I emphasise in particular the fact that '*a responding party is entitled to raise any defences it considers properly arguable to rebut the claim',* observation (iii). That is not widening the dispute, it is engaging with it. It is the principle which underlies observation (viii), namely that '*if the adjudicator fails to consider whether the matters relied upon by the responding party amounts to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice*'. By way of gloss, it seems to me that the use of the word 'may' in (viii) should not be taken to suggest that the enquiry into whether an adjudicator has asked the right question is somehow discretionary. Instead, it indicates that not all failures to have done so will be a breach of natural justice i.e. the point elucidated in (ix).

52. A number of other cases were cited by both counsel before me, which in the round demonstrated the range of different factual scenarios which have been presented to the Court in previous cases, which unsurprisingly demonstrate slightly different ways in which the observations identified by Mrs Justice O'Farrell have been applied in practice. I do not deal with all those authorities (whether cited in oral argument or counsels' skeletons), as it is unnecessary to do so. However, I draw from them the following further observations that guide my judgment:

(1) the Court must assess the correct level of abstraction at which to consider the question the adjudicator was required to determine (whether by way of referred claim or proffered defence), and should not be distracted by minor sub-issues. However, failure to consider a critical or fundamental element of a defence (even if it may properly be described as a sub-issue) may make the decision unenforceable;

(2) the Court must bear in mind the distinction between (a) considering an asserted defence and concluding it is not tenable and (b) deciding not to consider an asserted defence at all. The former is unlikely to be a breach of natural justice whereas the latter may well be;

(3) the distinction between a deliberate or conscious decision to exclude consideration of a defence and an inadvertent omission is a relevant consideration, but it is not determinative. Of much more importance is the gravity of the omission;

(4) whilst a relevant factor may also be whether an error was brought about by tactical manoeuvring by the claiming party, this will usually be at most a secondary consideration;

(5) it is necessary to look at the substance of the decision rather than the form.

Was there a breach of natural justice?

53. MCL's starting point is that the relief sought by RYC required a determination of whether MCL was itself in repudiatory breach by its actions and that it was necessary in light of the defence raised to consider not just whether it had successfully terminated the contract under the contract provisions, but also whether it had successfully terminated the contract at common law. This contention is undoubtedly correct.

54. Mr Frampton contends that the Court need simply determine whether the Adjudicator asked and answered the question at this level of abstraction: 'did MCL successfully terminate the contract at common law?'. I am not persuaded that this is so. As was common ground in the submissions before the Adjudicator, this question consists of two fundamental elements. MCL had to establish (i) that RYC was in repudiatory breach of the contract, and (ii) that MCL communicated its decision to bring the contract to an end, i.e. an acceptance of the repudiation. Both are critical elements of the defence. It was accepted, rightly, by Mr Oram that it was plainly permissible to deal with the second of these questions first, and if it was determined against MCL, it would make the first question irrelevant and unnecessary. Deciding not to deal with

that first question in such circumstances would be unimpeachable. However, it is correct in my judgment that if the Adjudicator had in fact determined that there had been a valid acceptance of the repudiation, but then failed (deliberately or, indeed, inadvertently) to consider at all the other fundamental element of the defence – namely the existence of repudiatory conduct – that would likely have been a breach of natural justice.

55. However, it is not possible fairly to read the Decision as containing any such error. As Mr Frampton rightly points out, the starting point is to consider the case actually advanced in the adjudication. That case was that the Termination Notice constituted a valid contractual termination notice, and in the alternative the same letter constituted a valid communication which brought to an end the contract by common law termination, accepting RYC's repudiatory breach. No part of the case in the Response or Rejoinder suggested that the conduct in refusing access to the RYC itself constituted a valid communication of acceptance of a repudiatory breach.

56. The case that was advanced by MCL was dealt with fully by the Adjudicator, albeit in the context of his consideration of the jurisdiction argument raised by RYC. It is very clear to me that the substantive question of common law termination was not outside the Adjudicator's jurisdiction, because it had been raised by way of a material defence to declarations which could not be granted if, as they argued, MCL had validly terminated the contract. It is equally clear that the Adjudicator dealt with it head on: he rejected the contention that the Termination Letter constituted an acceptance of repudiatory breach for the purposes of a common law termination, and in these circumstances (as was submitted to the Adjudicator by RYC, and as was not challenged at the time by MCL), it was unnecessary to consider the substantive question of repudiatory conduct.

57. It is perhaps unfortunate that the Adjudicator had succumbed to dealing with this question in the context of a misguided jurisdictional challenge, but this is no way detracts from the substance of his decision. Having decided that the only case explicitly advanced on acceptance of repudiatory breach failed on its merits, he was quite right to decide it was not necessary to consider the question of repudiatory conduct, because it was unnecessary to do so.

58. It may also be that the way in which he expressed himself also owes something to his identification of the way the case had been put in correspondence prior to the commencement of the adjudication, where it had not been said by MCL that there had in fact been common law termination, but merely that such a right would have existed, and that this would be relevant to the question of loss (see para 38 of his Decision in which he quotes from MCL's letter). However, whatever the precise reason for articulating his conclusion in the way he did, having decided that the Termination Notice was not a valid acceptance of repudiatory conduct at common law it is plain that he did not need to consider the substance of the allegations of repudiation and his decision not to do so was in no way a failure, let alone one which constituted a breach of natural justice.

59. That also is sufficient to dispose of the MCL's Part 8 Claim. The case that MCL's conduct was capable of constituting acceptance of repudiatory breach was simply not

put in the Adjudication, and it cannot have been a breach of natural justice for the Adjudicator to fail to deal with a case which was not advanced.

60. For the sake of completeness, however, I consider the case advanced by Mr Oram that (irrespective of the way the case was put by MCL at the time) the Adjudicator in fact found that there had been conduct capable of constituting acceptance of RYC's repudiatory breach, and in these circumstances it was a failure not to deal with the substance of the alleged breaches.

61. This case is untenable. I do not accept, on a fair reading of the Decision, that Adjudicator did in fact find, as Mr Oram contends, that that there had been a communication of acceptance for common law termination. It is clear to me that in paragraphs 86 to 88 he finds that conduct *could* amount to acceptance of repudiatory breach, but importantly subject to *"... words or conduct which [properly] amount to a renunciation"*. In this context, he goes on to consider the renunciation case and rejects it expressly in paragraph 93. Nowhere does he say that MCL's conduct *in fact* amounted to an acceptance of RYC's repudiatory breach. Indeed, he had concluded that conduct could only amount to an acceptance of repudiatory breach in certain circumstances, which he considered and rejected. His decision is therefore entirely inconsistent with MCL's contention that he had in fact decided that MCL's conduct could and did constitute and acceptance of RYC's repudiatory conduct. In these circumstances, nothing in these paragraphs should have led the Adjudicator to reconsider his earlier decision not to determine the question of repudiatory conduct, because to do so was unnecessary in light of his determination that there had been no valid acceptance. Paragraph 95 of the Decision does not add to the analysis. This part of the Decision was dealing with whether MCL's actions rendered them in repudiatory breach, in light of MCL's failure to have validly terminated the employment or contract either under the contract or at common law. The words cannot sensibly be read as a factual conclusion that MCL's conduct amounted to an acceptance of RYC's repudiatory breach. Again, nothing in this paragraph should have led the Adjudicator to reconsider his earlier decision not to determine the question of repudiatory conduct.

62. It is clear to me therefore that the Adjudicator did consider the substance of MCL's alternative claim based on common law repudiatory breach. He rejected it on its merits on the basis that there had been no valid acceptance, and in these circumstances he concluded correctly that it was not necessary for him to consider the question of substantive repudiatory conduct. He also dealt with MCL's renunciation case on its merits, and rejected it. There was no breach of natural justice.

63. Finally, although it is unnecessary to do so in light of my conclusion above, I observe (given the submission advanced by MCL) that although I do not consider RYC's submissions seeking to limit the Adjudicator's jurisdiction to have been analytically correct, I would not have regarded this as any sort of 'tactical manoeuvring' which would have been relevant to the determination of whether there had been a breach of natural justice. By definition, not every submission made by every party in a dispute is correct.

64. The Part 8 Claim for declarations fails.