Neutral Citation Number: [2023] EWHC 1946 (TCC)

Case No: HT-2023-000178

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY & CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

HOME GROUP LIMITED

Claimant

- and -

MPS HOUSING LIMITED

Defendant

- -
- -

Mr Matthew Thorne (instructed by Devonshires Solicitors LLP) for the Claimant
Mr Edmund Neuberger (instructed by Mishcon de Reya LLP) for the Defendant

Hearing date: 24 July 2023

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APPROVED Judgment

This Judgment was given on 24 July 2023, and a perfected version was handed down by release to The National Archives on 25 July 2023 at 2pm.

Mr Justice Constable:

Introduction

1. The Claimant ('Home Group') seeks summary enforcement of the adjudication decision ("the Decision") of Mr Derek Pye ("the Adjudicator") dated 28 April 2023. In the Decision, he ordered payment by the Defendant ("MPS") to Home Group of £6,565,831.94 plus interest and 85% of his fee.

2. Home Group claimed termination losses said to have been caused by MPS' repudiatory breach of a JCT Measured Term Contract under which MPS had been carrying out maintenance and repair works to Home Group's properties in the South-East of England. The works under the Contract generally comprised a high volume of individual work items, each of which had a relatively low value. On 11 May 2022 MPS purported to terminate the Contract pursuant to Clause 8.7.2. Home Group did not accept that MPS were entitled to terminate the Contract and asserted that MPS' purported termination was a repudiation of the Contract, which Home Group accepted on 16 May 2022. The validity of the termination was referred to the first adjudication. On 25 November 2022, it was determined that MPS' purported termination was invalid, and that MPS had repudiated the Contract. The second adjudication was commenced in order to recover Home Group's losses.

3. Home Group's Referral, served on 17 March 2023, included a quantum expert report of 155 pages, with 76 appendices, which comprised 202 files in 11 sub-folders, amounting to 338 megabytes of data and a further 2,325 files in 327 sub-folders and five factual witness statements (which amounted to 88 pages, with hundreds of exhibited pages sitting behind). MPS had 19 days (or 13 working days) to produce its response to the Referral. It claimed at the time, and now, that this was an inadequate period of time. MPS contend that it was unable to properly digest and respond to the material served with the Referral and that this was a breach of natural justice which has led to a material difference in the outcome, and that as such the Decision is unenforceable. MPS does not contend that the dispute was incapable of adjudication *per se*. Rather, it contends that Home Group should simply have provided MPS with a greater opportunity to understand the claim, whether in advance of the Notice of Adjudication or by agreeing to an extended timetable in the adjudication.

4. I am grateful for the efficient and clear way both Mr Thorne, for Home Group, and Mr Neuberger, for MPS, have advanced their clients' cases in both written and oral submissions.

Chronology leading up to the Adjudication

5. Following termination of the Contract, but prior to the conclusion of the first adjudication, on 5 October 2022 the Contract Administrator provided the parties with the Final Account issued pursuant to clause 4.6.3 of the Contract. This assessed that a sum of £7,813,201.89 was due from MPS to Home Group. The calculation included a sum of £7,532,049.48 as the sum Home Group was entitled to recover from MPS as a result of MPS' breaches of contract. The Final Account enclosed a single page spreadsheet setting out the basis on which the amounts had been calculated.

6. Shortly after the Termination Decision, on 23 December 2022 Home Group wrote to MPS requesting payment of £8,297,521.01 plus VAT as applicable, stating that if MPS failed to make payment by 6 January 2023 a dispute would have crystallised and it would have no option but to seek recovery of its losses by way of a third party tribunal. The letter did not give more than a high level breakdown of how the sum of £8,297,521.01 had been calculated and there was no supporting documentation or analysis. The sums claimed by Home Group essentially comprised sums said to have been paid out to third parties to complete works that MPS ought to have completed, less the sums it would have had to pay MPS (plus various other heads of claim).

7. By letter dated 4 January MPS observed that despite claiming in excess of £8m Home Group had not provided either the information or level of detail required to assess and respond to the claim, nor any supporting documents and, as a result, any reference to adjudication would be premature. MPS proposed a methodology for resolution of the claim and requested that certain documents (listed in a schedule to the letter) were provided by Home Group. It was suggested that following the provision of the requested information, MPS would require 8 weeks to respond.

8. In response, on 6 January 2023, Home Group rejected the suggested timetable and proposed an alternative way forward which involved the agreement of a random 5% sample of Orders which had been placed by Home Group with third parties for work which was otherwise required under the Contract as a proportionate and representative sample, following which MPS would attend Home Group's office to review the information and evidence in relation to the agreed sample. Home Group stated that within 7 days of MPS review of the information, it would require MPS to provide it with an offer of payment of Home Group's losses, as set out in its letter dated 23 December 2022. It gave a short timetable for the agreement of a sample and attendance at its office.

9. On 10 January 2023, MPS did not agree to the sampling proposal, and requested instead a spreadsheet which showed for each work order 8 categories of information as a minimum. On 12 January 2023, MPS appears to have commenced its assessment of the claim, in light of the data on a spreadsheet appended in due course to its Response. Home Group responded to MPS' 10 January 2023 letter (and a chaser on 23 January 2023) on 26 January 2023, revising its claim upwards by £478,087.812 and providing eleven spreadsheets to support its claim. In its letter, Home Group asserted that MPS was in possession of all details for the pre-termination losses and a significant amount of information in relation to the post-termination losses, and repeated its offer that MPS attend Home Group's offices to review a sample. MPS responded on 1 February 2023. Its position was that Home Group had still not provided the bare minimum of information required, contended that the spreadsheets were inadequate as essential detail was missing and noted that a number of the claimed heads of loss had not been broken down at all.

10. On 10 February 2023 Home Group provided a copy of a draft of the expert report on a '*without prejudice save as to costs basis*'. This was materially the same expert report on which it would rely in the adjudication in due course, and was provided therefore almost two months before MPS would be required to serve its responsive evidence. On 24 February 2023, Home Group provided, on a without prejudice basis, revised appendices to the draft expert report. These were the same appendices ultimately served with the Referral.

11. On 16 February 2023, MPS indicated that it would need until 19 May 2023 to provide a formal response. It refers in its letter to 'our own expert', but Mr Neuberger on instructions informed the Court that Mr Porter was not in fact instructed until 27 February 2023. On 24 February 2023, after Home Group had refused to permit such an extended period prior to the commencement of an adjudication, MPS contended that, '*it was impossible for us to commence any meaningful review (or ultimately for an adjudicator to properly consider the position) in the absence of a full and detailed description of the work that was undertaken against each and every work order* '. I regard this as a wholly unrealistic position. In no case – whether in adjudication or in court – would it ever be proportionate for a full evaluation of each of many thousands of small value work orders to take place. The analysis would always be undertaken by way of sampling and/or categorisation against an assessment of the representative nature of the exercise, as indeed MPS own expert accepted in his responsive report in the adjudication. It was not correct that it was impossible for MPS to undertake a '*meaningful*' review without all the information sought. Whilst MPS maintained that it needed 3 months to review the report, as noted above, MPS was ultimately given almost 2 months from the date of the provision of the draft report to do so.

12. On 28 February 2023, Home Group responded, and again repeated its offer for MPS to attend Home Group's office in order to access the various systems. This offer was not taken up at any time before the commencement of the adjudication.

The Adjudication Submissions including Jurisdictional Challenges

13. The Notice of Adjudication was issued on 13 March 2023. Mr Pye, an experienced adjudicator, was nominated by the RICS on 15 March 2023. MPS raised three jurisdictional challenges on 15 March 2023: (1) no dispute had crystallised; (2) the case referred to was too large and/or complicated to be suitable for adjudication; and (3) two different disputes had been referred. The Adjudicator reached a non-binding view on 16 March 2023 that he had jurisdiction.

14. On 17 March 2023, Devonshires (on Home Group's behalf) served the Referral Notice. The supporting documents to the Referral Notice were provided by way of an online portal. By email of the same date, Mr Pye acknowledged receipt of the Referral and confirmed that he had downloaded the electronic files. Access to the data room was provided to MPS' solicitors on 17 March 2023 and directly to MPS on 18 March 2023. The Referral included the formal version of the draft report previously provided, the size of which is summarised in paragraph 3 above. There is no suggestion that the substance of this report was not in materially the same form as the draft provided some 5 weeks earlier. MPS make the point that it is apparent from the quantum expert report that Mr Hughes-Philips, Home Group's expert, had been instructed since at least June 2022, had the assistance of at least five assistants and had undertaken multiple site visits.

15. By letter on 20 March 2023, MPS invited the Adjudicator to reconsider his decision on jurisdiction on the grounds of complexity. MPS requested that the Adjudicator either resign or give MPS sufficient time to consider and analyse the Referral and prepare its response. As set out in the letter to the Adjudicator, Mr Porter, MPS' expert, considered that he needed 10 weeks to produce a report, and so MPS needed 14 weeks to respond. MPS stated:

'*We are advised by Mr Porter that:*

7.1 It will take at least 3 weeks for him to fully understand the substantial report prepared by Mr Hughes- Phillips and his team to enable him to be able to undertake a useful review of the Referring party's documents.
7.2 He, and his team, will require to attend at the Referring Party's offices for at least 3 days to inspect the source material on which Mr Hughes-Phillips' report is based and to have access to the software that Mr Hughes-Phillips and his team were provided with.
7.3 It would then be useful for him to meet with Mr Hughes-Phillips in order to fully understand the basis upon which his report has been written, and to try and narrow the issues in dispute.
7.4 Thereafter it would take at least 4weeks for him to prepare his report.'

16. Various communications between the adjudicator and the parties, and between the parties, then followed. On 22 March 2023, Mr Pye wrote:

'*Ms Morean/Mr Gerstein,*

I acknowledge receipt of your further emails of this afternoon.

I note that Home Group's change in the quantum was over one month ago.

I also note that MPS has not yet taken up Home Group's previous invitations to visit Home Group's offices to inspect the electronic data.

The current situation is that Home Group is, subject to final confirmation, prepared to keep open its offer of an extended timetable as set out below:

Date for Response	*11 April 2023*
Date for Reply	*21 April 2023*
Date for Rejoinder	*28 April 2023*
Date for Decision	*22 May 2023*

The alternative position is for a 14 day extension to the date for my Decision to 2 May 2023.

If the alternative position is the one implemented, I would be prepared to extend the date for the Response from 30 March 2023 to 5 April 2023 with the date and permission for further submissions to be decided by me at a later stage.

I, therefore, request both Parties to confirm by noon tomorrow whether they accept the timetable set out in the box above with a revised date for my Decision of 22 May 2023.

Failing agreement by both Parties, the alternative timetable with a Response date of 5 April 2023 and a Decision date of 2 May 2023 will apply.

For the avoidance of doubt, I advise the Parties that I do not consider resignation to be warranted whichever timetable is adopted.'

17. On 23 March 2023 Home Group confirmed its agreement to the timetable concluding on 22 May as set out in letter quoted immediately above. On the same day, MPS confirmed that it was not prepared to agree to the proposed timetable and said its position was maintained that:

    a) The dispute had not crystallised when the Notice was served;
    b) Multiple disputes have been referred to you; and
    c) The case is too complex to be resolved in adjudication.

18. As confirmed by the Adjudicator the following day, as a result of a strategic decision to maintain its jurisdictional objections, the Response was to be served on 5 April 2023 (rather than 11 April 2023).

19. MPS served its Response in accordance with the Adjudicator's timetable on 5 April 2023, accompanied by witness statements and a quantum expert report from Mr Porter. Mr Porter gave evidence about the impact of what he said was inadequate time to prepare the report on his evidence:

> '*13. The timescale for producing my report has been to say the least, extremely challenging. Given the amount of data and material, in order to form a detailed and complete assessment of the losses and accompanying expert report, I would have needed a period of 10 to 12 weeks, with some assistance. This would have been on the basis of remote or supported access in person to the raw data contained in the spreadsheets which was provided by HG to DHP. In contrast, I am advised that DHP and his team had 9 months to prepare their assessment and accompanying report. This included remote access to the various IT systems, which has been denied to me and my assistants.*
>
> *14. As a result of the limited time available I have been unable to provide a complete assessment of the loss. There are some elements of the loss I have simply not had time to review and others I have had limited time to review the detail. Accordingly, I have not been able to arrive at opinion on the quantum of loss. Under such circumstances, in order to best assist the Adjudicator, which is where my primary duty lies, I have provided a detailed commentary on DHP's report, in particular his approach, methodology and assessment, highlighting the points I consider incorrect and / or I disagree with and have an alternative opinion and why.*'

20. In addition to the evidence of Mr Porter, MPS relied upon five factual witnesses. These

included Mr Smith, the Chief Financial Officer of Mears Group plc. As pointed out at paragraph 107 of the Decision, Mr Smith's evidence was more a combination of a further Response containing legal submissions, opinion evidence on quantum and general comment. As tabulated in the Decision, MPS was through the combination of witness evidence able to advance the following positive case as to the required adjustments to Home Group's claim (taken from the witness statement of Mr Smith):

	Witness Statement Reference	Required Adjustment
TOTAL CLAIM VALUE PER HOME GROUP		**9,329,360**
Data quality - duplications	GB 4.2, GB 4.5, AS 2.8.2	(366,339)
Orders not received	GB 3.3, AS 2.8.4	(41,001)
Remove residual forecast costs integrity)	GB 4.15, AS 2.8.5	(357,225)
Amounts claimed subject to tenant recharges	GB 5.14, AS 2.11.2	(170,384)
Amount claimed recovered through service charges	GB 5.29, AS 2.11.3	(234,641)
PPP Top Up Payments	AS 3.6, AS 2.9.2	(626,349)
TUPE	AS 2.16	(297,106)
Application of Administration fee	AS 4.1.17, AS 2.10.4	(1,160,533)
Application of Plentific fee	AS 4.2.4, AS 2.10.5	(64,217)
Appliance Servicing	AS 5.37, AS 2.12.1	(423,940)
Response exclusions	JL 2.16.2, AS 2.9.3	(585,755)
Loss 3 Administration costs	JL3.6, AS 2.19	(189,001)
Void exclusions	JL 4.9, AS 2.9.4	(141,803)
Unliquidated damages - voids	JL 5.4, AS 2.18	(82,013)
Outstanding debt	JL 6.7, AS 2.9.6	(707,784)
Home Group Repairs Service	CM 39.1-39.3, AS 2.13	(75,000)
Planned – Cancelled, Orders not received, Completed	CN 56, AS 2.17.5	(1,421,048)
Planned - Indexation	CN 60, AS 2.15	(83,608)
Class 1 Materials	CN 71, AS 2.24	(127,724)
Emergency Repairs	CN 72-76, AS 2.22	(36,383)
Works issued requiring EOT beyond 25/10/22	CN 16, AS 2.14.3	(491,621)
TOTAL ADJUSTED CLAIM VALUE		**1,645,885**

21. In its Reply served on 14 April 2023, Home Group conceded in its entirety one of MPS' proposed significant deductions relating to 'Duplications' and proposed alternative reductions for certain other categories. In its Rejoinder MPS made clear that it did not accept that it was liable to pay Home Group the amount of £1,645,885 from its Response but that further adjustment should be made by the Adjudicator. In particular, it contended that its adjustments did not reflect the more significant concerns expressed in the Response concerning duplication and data integrity, and that Home Group's claim remained poorly analysed and evidenced.

The Decision

22. In a decision running to 74 pages, Mr Pye concluded that MPS was liable to Home Group in the sum of £6,565,831.94 excluding VAT and interest. From his claim for fees, it is clear that Mr Pye spent 92.2 hours on the adjudication.

23. Paragraphs 83 to 94 dealt with jurisdictional issues. He recited the various communications. He concluded:

> '*I have kept my jurisdiction under review throughout the adjudication and there is nothing which changes my non-binding view expressed in my emails of 16 March and 20 April 2023 and, as also set out above, whilst the strict timetable of adjudication may have been a challenge for both Parties, for my part I have had sufficient time to appreciate the dispute and, at least, do broad justice between the Parties in this temporarily binding Decision.*'

24. Before dealing with each of the sub-issues upon which money turned within the account, the Adjudicator included a general section which dealt with expert opinion evidence and quantum generally.

25. In relation to expert evidence, he pointed out that there had been an acceptance by Mr Hughes-Phillips in his Second Report that there were errors in his First Report because of matters such as duplication of claimed items (double counting), incorrect allocation of costs and, more significantly, an apparent willingness on Mr Hughes-Phillips' part to accept data provided to him by Home Group as factually correct without carrying out any or any sufficient verification of that data. Whilst the Adjudicator said that this was a potentially significant shortcoming in Mr Hughes-Phillips' evidence, he considered but rejected the contention that this was indicative of a lack of impartiality. The willingness with which Mr Hughes-Phillips was prepared to change his opinion after considering Mr Porter's opinion evidence indicated to the contrary.

26. The Adjudicator noted that MPS accepted that a sampling process was appropriate, and recognized that Mr Porter was maintaining that he may have used a different selection basis if he had been given more time than was available to him in the adjudication. He then stated, in a paragraph relied upon by Mr Neuberger in written and oral submission:

> '*The problem with Mr Porter's First Report is that he does not arrive at an alternative valuation in respect of Mr Hughes-Phillips quantum and it is clear that his reluctance to do so, from reading his report, is the time available to him and his team within the strict timetable of adjudication.*'

27. Noting this, the Adjudicator continued:

> '*123. Mr Porter says that if he had been afforded the necessary time to undertake a full and detailed assessment his opinion of the quantum of Home Group's loss would be "substantially different and lower than DHP's view."*
>
> *124. Notwithstanding Mr Porter's reluctance to offer an alternative valuation in his 112- page First Report, MPS has, through its witness of fact statements and the Response, proposed alternative valuations albeit heavily caveated. MPS provided a structured spreadsheet of proposed deductions to enable a comparison with Mr Hughes-Phillips production in the H-P First Report, albeit that the setting out of the MPS table does not follow the same detailed format.*
>
> *125. MPS' table in respect of its valuation totals £1,645,885, being a reduction of some £7.7m from Home Group's claim.*'

28. In this section, the Adjudicator also set out 7 respects in which, in general terms, the criticisms made of Mr Hughes-Phillips' approach by Mr Porter were accepted; he also indicated that certain personal unsubstantiated submissions about Mr Hughes-Phillips by Mr Porter were not accepted.

29. The Adjudicator then, in his section on quantum generally, included a table which effectively set out the structure for the remainder of his Decision. This identified the various contended-for adjustments, the extent to which the adjustments were accepted (in whole or in part) by Home Group and thus the key areas of dispute.

30. Whilst it is not necessary for the purposes of this Judgment to describe in detail the approach of the Adjudicator to each issue (save in respect of duplication, to which I will return), it is plain that the Adjudicator took each category of claimed adjustment, and considered the relevant factual and expert evidence. It is to be noted that a number of the issues turned on either points of principle (i.e. whether a head of loss was properly recoverable) or factual issues rather than 'quantum expert' evidence. Ultimately, a significant reduction was made in the claimed sums by the Adjudicator having considered MPS' factual and expert evidence.

31. In relation to duplication, the Adjudicator recognised at paragraph 179 that MPS were contending that the figure which had been identified as duplicative was the '*low watermark*' of the likely level of duplication. In contrast, Mr Hughes-Phillips, in accepting the adjustment (of £366,339), contended that this was the '*high watermark'*. The Adjudicator stated in terms that he did not accept this.

32. The Adjudicator then noted MPS' case, advanced by Mr Brewer (a factual witness) that his initial calculation to arrive at the figure of £366,339.00 was based on the 709 Orders or Sample Orders for only 149 properties out of a total of 14,083 Orders and because of this now proposed that an extrapolated increased total of at least £888,081.78 should be allowed as a deduction for likely duplication. The Adjudicator considered that this was initially attractive, but ultimately rejected the submission. Given the emphasis placed on the duplication issue in argument as an illustration of the materiality of the alleged breach of natural justice, I set out in full the paragraphs of the Decision dealing with this subject:

> "*182. I accept this proposal by Mr Brewer in principle as being logical given the actual findings in respect of the 149 properties. The fact that Mr Hughes-Phillips accepted the initial figure of £336,339.00 without variation suggests that a further duplication reduction might be warranted.*
>
> *183. However, Ms Barkes explanation in her fourth witness statement in respect of duplication was persuasive as to why:*
>
> *• A cancelled Order does not mean the works were not required.*
>
> *• Duplicate Order numbers do not mean duplication or that the same work was claimed twice.*
>
> *• Home Group did interrogate the quotations after Home Group received after the surveys were carried out via Plentific.*

184. Mr Brewer's response to the above was to say that Ms Barkes' explanation misrepresented the situation, but I do not agree. Ms Barkes' explanation is more detailed and plausible and demonstrates her knowledge of how the Home Group system works.

185. Additionally, there is no real verifiable basis to Mr Brewer's proposal of an £888k reduction.

186. Doing the best I can, I decide that Home Group's claim, is to be subjected only to the concession already made by Home Group in the amount of £366,339.00. This amount is exclusive of the amount of £12,484.00 conceded by Home Group in respect of the 'Application of Administration Fee' item below."

The Law

33. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("**the Act**") provides:

> '*(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.*
>
> *For this purpose 'dispute' includes any difference.*
>
> *(2) The contract shall include provision in writing so as to*
>
> *(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication; ...'*

34. The Scheme (which, by clause 9.2 of the Contract, was expressly applicable) also provides:

> '*1(1) Any party to a construction contract (the 'referring party') may give written notice (the 'notice of adjudication') at any time of his intention to refer any dispute arising under the contract, to adjudication.'*

35. Having referred a crystallised dispute in accordance with these provisions (which is now accepted to be the case by MPS), the Adjudicator was, by paragraph 19(1) of the Scheme, thereafter required to reach his decision within 28 days of receipt of the referral notice or 42 days if the referring party so consents (as happened in this case).

36. Notwithstanding the way in which some of the submissions before the Adjudicator seemed to focus on the complexity of the dispute *per se*, Mr Neuberger rightly does not press a submission before me that the dispute was intrinsically so complicated or heavy that in no circumstances could it have been subjected to adjudication. Such a contention would, in any event, have failed. As pointed out by Akenhead J in HS Works Limited v Enterprise Managed Services Limited [2009] EWHC 729 (TCC), at [56] that, "*Parliament provided for 'any' relevant dispute to be referable to adjudication and must*

have envisaged that there would be simple as well as the immensely detailed and complex disputes which can arise on a construction contract."

37. Similarly, in Amec Group Limited v Thames Water Utilities Limited [2010] EWHC 419 (TCC), Coulson J (as he then was) held:

> '*60. In my judgment, therefore, the law on this subject can be summarised as follows:*
>
> *(a) The mere fact that an adjudication is concerned with a large or complex dispute does not of itself make it unsuitable for adjudication: see CIB v. Birse.*
>
> *(b) What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator had: (i) sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (ii) was satisfied that he could do broad justice between the parties (see CIB v. Birse).*
>
> *(c) If the adjudicator felt able to reach a decision within the time limit then a court, when considering whether or not that conclusion was outside the rules of natural justice, would consider the basis on which the adjudicator reached that conclusion (HS Properties). In practical terms, that consideration is likely to amount to no more than a scrutiny of the particular allegations as to why the defendant claims that the adjudicator acted in breach of natural justice.*"
>
> *(d) If the allegation is, as here, that the adjudicator failed to have sufficient regard to the material provided by one party, the court will consider that by reference to the nature of the material; the timing of the provision of that material; and the opportunities available to the parties, both before and during the adjudication, to address the subject matter of that material.*"

38. At [61], the Judge stated in terms that, "*size/complexity will not of itself be sufficient to found a complaint based on a breach of natural justice*". In the present case, the Adjudicator correctly kept under review the question of his ability to do broad justice between the parties, notwithstanding the substantial quantity of material he had been presented with. Having determined that he could, this Court will be extremely slow to interfere with that conclusion.

39. Instead, the question in almost all cases where the Adjudicator has considered the position but expressed the clear ability to render a fair decision, will inevitably centre upon the timing of the provision of the material to the responding party, and its ability to fairly put its case, rather than the complexity of the material *per se*.

40. In this context, it is abundantly clear on the authorities that the Court must look to wider considerations when considering whether, on the facts of any particular case, a breach of natural justice may have occurred by reason of an ability of a party to fairly put its case. Both sides have rightly reminded the Court of the presumed intention of Parliament, discussed by Chadwick LJ in Carillion v Devonport Royal Dockyard [2005] EWCA 1358:

> "*85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which ... may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".*
>
> *86. ... The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. ... The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions…*
>
> *87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense — as, we suspect, the costs incurred in the present case will demonstrate only too clearly.*"

41. The authorities demonstrate that arguments based upon time constraints impacting the ability to respond fairly have enjoyed little success. See for example, in chronological order:

    (1) Edenbooth Limited v Cre8 Developments Limited [2008] EWHC 570 (TCC), in which Coulson J held:

> "*17. The other point taken by Mr. Mencer, that is to say the question of the speed with which he was obliged to produce information, is, I am afraid, a complaint often heard on adjudication enforcement applications. It is an inherent feature of adjudication that the Adjudicator is obliged to produce his decision quickly. That means he has to put pressure on the parties to ensure that they provide the necessary information to him just as promptly. Adjudication does not work if the parties*

> *take too long to provide information to the Adjudicator. The corollary of that is that parties often feel under pressure to do things more quickly than they would like. However, as I have said, that is simply an inevitable consequence of the adjudication process."*

(2) The Dorchester Hotel Limited v Vivid Interiors Limited [2009] EWHC 70, in which the Referral Notice included 37 lever arch files, two expert reports (one of 20 and another of 30 pages) and six witness statements. An extension of the 28 day period was agreed, but the responding party argued that the time available was inadequate and there was a very real risk of a breach of natural justice. Coulson J refused to grant the injunctions sought during an ongoing adjudication. He stated:

> "*18. ... I take it to be settled law that the rules of natural justice do generally apply to the adjudication process…*
>
> *19. But these and other authorities have stressed that there are obvious limits on the application of these rules to the adjudication process. As HHJ Bowsher QC pointed out in Discain , "The adjudicator is working under pressure of time and circumstance which make it extremely difficult to comply with the rules of natural justice in the manner of a court or arbitrator." Or, as HHJ Lloyd QC put it in Balfour Beatty Construction Ltd v London Borough of Lambeth [2002] EWHC 597 (TCC), the purpose of adjudication is not to be thwarted "by an overly sensitive concern for procedural niceties".*
>
> *20. Accordingly, a Court has to approach an alleged breach of the rules of natural justice in an adjudication with a certain amount of scepticism. The concepts of natural justice which are so familiar to lawyers are not always easy to reconcile with the swift and summary nature of the adjudication process; and in the event of a clash between the two, the starting point must be to give priority to the rough and ready adjudication process. ...*
>
> *23. ...the Courts have long accepted that the 1996 Housing Grants (Construction and Regeneration) Act, and the standard forms of building and engineering contracts amended in its wake, permit such claims to be made, and what is more those claims can be made "at any time".*'

Mr Neuberger points to the fact that, whilst the Judge pointed out that the refusal to provide relief did not prevent the responding party from attempting to resist enforcement in due course if breaches of natural justice could be made out, this is in effect no more than a submission that the question of timing of material could, in principle, give rise to a breach of natural justice. That is not in dispute. The case does demonstrate that merely pointing to a large quantity of material, some of which is seen for the first time in the adjudication itself (such as the expert reports – unlike this case) is not of itself sufficient;

(3) Bovis Lend Lease Ltd v The Trustees of the London Clinic [2009] EWHC 64, in which one of the arguments raised by the responding party on enforcement was that the nature and volume of new evidence served, and the timetable imposed, did not give it a fair or effective opportunity to respond to the case (which was new), and accordingly the decision was in breach of the rules of natural justice. Akenhead J rejected the argument. It is undoubtedly right, as Mr Neuberger contends, that Akenhead J considered the argument lacked credibility principally because the responding party had failed to raise the point during the adjudication. However, this makes the case at best neutral. The judge certainly does not express the view that, but for the failure to have raised the point, it would have given rise to a successful challenge;

(4) CSK Electrical Contractors Limited v Kingwood Electrical Services Limited [2015] EWHC 667 (TCC), in which Coulson J held that:

> *"14. The defendant's third challenge is the suggestion that the adjudicator's timetable was too quick and put too great a strain on their resources.*
>
> *15. Again, this point has been taken in a number of the authorities. It has never to my knowledge been upheld. Cases in which the point has been rejected include Bovis Lend Lease Ltd v Trustees of the London Clinic Ltd [2009] EWHC 64 (TCC) and Dorchester Hotel Ltd v Vivid Interiors Ltd [2009] EWHC 70 (TCC). The plain fact is that adjudication is a rough and ready process because it has to be carried out within a very strict timetable. That often causes particular pressure for the responding party. That is, I am afraid, a fact of adjudication life; it is inherent in the whole process."*

(5) HS Works (above), in which Akenhead J considered an enforcement application that was resisted on, amongst other things, the basis of the size of the claim originally referred, in particular that the responding party or adjudicator could not easily deal with it in the prescribed period . At paragraph 49, he stated:

> "*49. I have been referred to no case however (and can find none) in which this approach has ever been applied to refuse enforcement of an otherwise enforceable adjudication. What can be had regard to is the following:*
>
> *(a) A most important factor in the consideration by the Court is whether and if so upon what basis the adjudicator felt able to reach his decision in the time available.*
>
> *(b) In terms of the opportunity available to the defending party in an adjudication, the Court can and should look at the opportunities available to that party before the adjudication started to address the subject matter of the adjudication and at what that party was able to and did do in the time available in*

> *the adjudication to address the material provided to it and the adjudicator.'*

42. Summarising the position, in *Coulson on Construction Contracts* (4th Ed), the editor states the position under the law of England and Wales at 13.23:

> "*It is often argued that the timetable unreasonably favoured the referring party or did not allow the responding party proper time to respond. However, because complexities are an inherent part of the adjudication procedure, these complaints are generally given short shrift by the courts.*"

43. Mr Neuberger also relied in his written submissions upon the Scottish case of Whyte & Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd [2013] CSOH 54, the only reported case in which a court unequivocally refused to enforce the adjudicator's decision because of the size and nature of the claim. The pursuer had employed the defender to advise and prepare a design for construction works. An adjudication award was obtained for £3,000,000 of which £894,674.00 was the assessed cost of future loss in carrying out underpinning to the property. The pursuer applied to enforce the award and the defender sought the reduction of the award on several grounds. The decision was not enforced due to the failure of the adjudicator to deal with certain issues, and Lord Malcolm expressed the view that:

> "*(T)he adjudicator was presented with a next to impossible task. Even a judge would struggle to identify a procedure which would allow the complex issues of fact and law arising between the parties to be determined in any semi-satisfactory manner within six weeks. In the circumstances of the present case, the well known problems, disadvantages and potential injustices of an adjudication are not counter balanced, let alone outweighed, by any of the aims and purposes lying behind the 1996 Act. It is those public interest benefits which justify enforcement of an adjudicator's award, even a substandard and obviously wrong award…, but they are more or less wholly absent in the present case. It follows that it would be disproportionate and wrong to enforce the award…"*

44. In the commentary on this case in *Coulson on Construction Contracts*, the editor does not take issue with the determination of the Court in any way, describing the decision as careful and well-reasoned. It explains how, in that particular case, adjudication was an inappropriate process. '*Finally*', the editor observes, '*there is a case that concludes that, sometimes, a claim will be too large and/or too complicated and/or raised too long after completion to be suitable for adjudication*.'

45. Whilst paragraphs [37] to [54] of the judgment which deal with the question of whether enforcement would be in breach of Article 1, Protocol 1 of the ECHR on (in the words of Lord Malcolm) '*the very particular circumstances of this case*' undoubtedly make for interesting reading, they do not provide any direct assistance to MPS in the present case. The issue in *Whyte* did not turn on questions of volume of complex material and constraints of time to respond, as they do in the present case. The driving concerns of the Court when considering the proportionality of enforcement (which amounted to an interference with the defenders' entitlement to peaceful enjoyment of their possessions) were the fact that that the adjudication, relating to issues of professional negligence, had

been brought more than 6 years after completion of the works, and that the pursuer would suffer no loss for many years into the future. Both of these fundamentally were at odds, it was held, with the rationale behind the statutory regime for speedy, non-binding determinations.

46. This is a far cry from the present case which, notwithstanding the significant number of low value items requiring determination, is in reality a vanilla 'final account', which is only different from most in that the claim is brought by the employer against the contractor, following the latter's repudiatory breach, rather than the other way around. It would also be fair to say that some elements of the claim which related to the post-termination work would have been, by definition, something upon which MPS was dependent on information provided to it in order to interrogate the claims. However, the complexity should not be overstated. As is plain from a review of the Decision, and those elements of the underlying submissions and evidence provided to the Court in the context of this enforcement hearing, the dispute revolved around a relatively small number of categories (21) of factual or expert dispute. This was, in many ways, significantly more straightforward than many 'kitchen sink' final account adjudications involving not just a money claim, but complex disputes relating to extensions of time and requiring chronological investigation of the lifespan of a construction project and critical path analysis. There has been no delay on the part of Home Group in bringing the claim. The Notice of Adjudication followed the service of the Contractor's Final Account which recorded the significant sums considered to be owed to Home Group, and was brought promptly after the first adjudication on the question of termination as a matter of principle. On the assumption that the Decision is broadly correct, Home Group has incurred considerable sums and is, until payment, considerably out of pocket.

47. Finally, in the context of this dispute, Mr Thorne for Home Group draws to my attention those cases which deal with spot checks and sampling. This is an entirely permissible way for an adjudicator to proceed (and to proceed in a way, driven by the constraints of time, that might not be adopted in due course by a Court or Arbitrator). For example, in *HS Works*, the Adjudicator had approached the dispute as follows:

> *"14. The matters referred to me in this adjudication were of a complicated nature and during the course of the reference, I have been provided with a total of 38 large lever arch files and a number of smaller files. In addition, I have been provided with three compact disks of data. The task of making this decision has been particularly onerous, taking into account the volume of documentation provided and the fact that from the meeting on 18/02/09 to the date of this Decision, I had 17 working days.*
> *15. It is therefore appropriate that I make some general comments in relation to the methods used by me to reach my Decision.*
> *16. The dispute concerns the total of some 51,000 separate jobs not all of which are disputed. The Parties had conveniently sub-divided the disputed items into categories, where one principle applies to a number of like disputed items. This has been extremely helpful.*
> *17. In respect of each separate category, I have taken into account the Parties' representations and depending on the volume of the supporting documentation, either checked all the information, or in the case of a large disputed item, carried out a series of spot checks, to verify the sums claimed.*
> *...*

> *21. Due to the fact that I was unable to verify the valuation of each individual job, I formed a view based upon the checks carried out, that on the balance of probability the checks carried out by me, were representative of the entire section of the account."'*

48. Akenhead J explicitly rejected the submission that this approach lacked fairness. In this context he said:

> '*I also bear in mind, in considering these last two topics, that one should remember that this 28 day adjudication period called for in statute, and provided for here contractually by the parties, provides a tight timescale for disputes. Parliament provided for "any" relevant dispute to be referable to adjudication and must have envisaged that there would be simple as well as the immensely detailed and complex disputes which can arise on a construction contract. It is often said, with some justification, that construction adjudications provide in many cases only "rough" justice but Parliament and the contractual parties here have expressly legislated for the potential for such justice. One should not equate necessarily an adjudicator's approach over 28 days with that of a judge or arbitrator who tries the final version of the dispute after exchange of pleadings, evidence and reports over a period of often 6 to 18 months. One has to judge what an adjudicator does against the context of the period provided by the statute or the contract.*'

49. Whilst Mr Neuberger does not contend that the Adjudicator's approach of spot checking was itself inherently unfair, it remains relevant to the assessment of whether the time provided to a responding party is, in all the circumstances, a breach of natural justice.

50. In conclusion, the relevant legal position can be distilled as follows:

    (1) Adjudication decisions must be enforced even if they contain errors of procedure, fact or law.

    (2) An adjudication decision will not be enforced if it is reached in breach of natural justice and the breach is material, in that it has led to a material difference in the outcome. However, the Court should examine such defences with a degree of scepticism;

    (3) Both complexity and constraint of time to respond are inherent in the process of adjudication, and are no bar in themselves to adjudication enforcement. Whilst it is conceivable that a combination of the two might give rise to a valid challenge, in circumstances where the Adjudicator has given proper consideration at each stage to these issues and concluded that he or she can render a decision which delivers broad justice between the parties, the Court will be extremely reticent to conclude otherwise;

    (4) In cases involving significant amounts of data, an adjudicator is entitled to proceed by way of spot checks and/or sampling. The assessment of how this should be carried out is a matter of substantive determination by the adjudicator and an argument that the adjudicator has erred in his or her approach, absent some particular and material related transgression of natural justice, will not give rise to a valid basis to challenge

enforcement. It would, even if correct, merely be an error like any other error which will not ordinarily affect enforcement.

Analysis

51. Mr Neuberger makes three interrelated submissions.

52. The first is founded upon the sheer volume of material. In advancing its submission, MPS presented a series of calculations seeking to 'convert' the electronic material provided into printed files. Having carried out this '*arduous and difficult*' task, MPS contended that (for example) the Referral amounted to 127 double sided lever arch files, which would fill approximately 32 standard boxes. Mr Thorne notes that the Referral was, in fact, provided in a complete printed hard copy to the Adjudicator in 7 boxes, and therefore questions MPS' calculation. Irrespective of whether the correct number is 7 boxes or 32 boxes, as set out above, the quantity of information of itself does not present a valid basis for challenging enforcement. I would add that in the modern day, conceptualising the extent of electronic data by what it would look like printed will rarely be particularly persuasive or helpful, particularly so where a large quantity of the 'documentation' is in spreadsheets which are not designed to be printed.

53. The complaint about quantity of material, in fairness to Mr Neuberger, is nevertheless a submission which can be considered in conjunction with his second and third submissions which are that (2) Home Group unreasonably refused to provide MPS with data or access to the underlying documents until the last moment and (3) in light of the absence of underlying documents and lack of time, MPS and its expert were unable fairly to interrogate and respond to the material in the Referral. In making these submissions, MPS draws a comparison with what it says is the 9 months of preparation time and unfettered access to material enjoyed by Home Group.

54. I consider these submissions to be without merit.

55. It was never realistic to insist, particularly in the context of an imminent adjudication, that it would be necessary to provide detailed information on each and every line item, and to use this as a reason not to engage in any analysis of the material provided on a sampling basis. Whilst there was, in January and February, the potential for a legitimate debate about the nature and extent of sampling, there was in my judgment little excuse not to take up Home Group's offers of access to underlying information based upon (at least) an incremental approach to such an exercise. From 10 February 2023 at the latest, when the draft report was provided, MPS could and should have been actively engaged in analysing the material including the underlying material to which they had been offered access. Whilst the access was said to be conditional on agreeing a sampling process, there is little doubt in my mind that had MPS responded by (1) reserving its position in the first instance on the nature and extent of sampling but (2) nevertheless requesting access to review the underlying records, it would have been extremely difficult for Home Group reasonably to refuse. Had they done so in such circumstances, the submission made before me – that Home Group's position in relation to access was unreasonable – might have had some traction. As it is, it seems much more likely to me that MPS responses in the correspondence leading up to the adjudication were strategically driven in an attempt

to create a jurisdictional challenge that no dispute had crystallised (a point which was taken before the Adjudicator but has, realistically, not been taken before the Court).

56. It is notable that, at the time of the service of the Referral, some five weeks had already passed since the provision of Mr Hughes-Phillips' draft expert report, and three weeks had elapsed since the revised appendices had been provided. On 20 March 2023, in setting up its jurisdictional challenge, MPS contended on instructions from Mr Porter that '*It will take at least 3 weeks for him to fully understand the substantial report prepared by Mr Hughes- Phillips and his team to enable him to be able to undertake a useful review of the Referring party's documents.'* Taking this at face value, sufficient time (i.e. three weeks) had already elapsed since the provision of the revised (and final) appendices to Mr Hughes-Phillips' Report in order for Mr Porter (and his three experienced assistants) to '*fully understand*' it. Even longer had elapsed from the service of the draft report, on which the wider MPS team were (or, if they were not, could and should have been) working from its receipt. I might add that it is unclear why the independent expert was not instructed until over 2 weeks from receipt of the draft quantum report.

57. Mr Neuberger focuses on the Decision at paragraph 119 which records '*the problem*' with Mr Porter's report, in that he did not arrive at an alternative valuation. However, this ignores the fact that (as is often the case in adjudication, and sensibly so) the burden of a response is shared amongst the expert and the factual (/quasi-expert) witnesses. This was the approach MPS took and it is to their credit that they produced a comprehensive response which provided a clear agenda for determination of the dispute. Moreover, in many cases, the argument advanced by MPS was that there was an absence of substantiation from Home Group. In some circumstances this was accepted by the Adjudicator, others not. However, this fact does not readily sit well with a submission now that MPS was materially prejudiced in its response. In the time available MPS was able to identify significant areas of dispute and advance arguments based upon a sample of the material which drew attention to what it said were significant deficiencies in the claims. Whilst MPS's expert and factual witness evidence was clearly drafted in such a way so as to preserve the present jurisdictional arguments, my review of the material leads me to conclude that MPS were able to and did properly and thoroughly engage in the substance of the claim, and indeed enjoyed relatively significant success in undermining a number of high value aspects of the claim. Of course the response was less comprehensive than would be expected in litigation or arbitration, but that is plainly not the test.

58. The principal area Mr Neuberger focussed on to demonstrate the materiality of the asserted breach of natural justice was the issue of duplication. It is said that having rejected Mr Hughes-Philips' contention that £336,339 was the 'high watermark' of duplication, it was inconsistent for the adjudicator not to reduce the claim by any more. Had MPS had more time, it is said, they would have been able to provide even more analysis of duplication and increased the sum to be deducted.

59. Quite apart from the fact that they do not present today the evidence which they say they would have been able to produce given more time, the fundamental difficulty with this submission is that it entirely ignores the fact that the Adjudicator went on to consider the competing factual evidence relating to the extent of duplication. Although he expressed a lack of confidence in Mr Hughes-Phillips' evidence on this point, the Adjudicator accepted the explanatory evidence of Home Group's factual witness, and rejected the

factual 'evidence' (/submission) of MPS witness. The Adjudicator was plainly entitled to do so, and the manner in which he approached duplication is, far from evidence of a breach of natural justice on the part of the Adjudicator, demonstrative of the thorough way in which he approached the significant body of evidence in the limited time available.

60. In the circumstances, I reject MPS submission that, whether by reason of the volume of material, constraints of time, and access to material, and whether taken separately or in aggregate, there has been any, or any material, breach of natural justice.

61. As such, the Decision falls to be enforced by way of summary judgment. I give judgment for the Claimant in the sums of

    (1) £6,565,931.94

    (2) Interest thereon in the sum of £197,676.51, plus £593.62 daily from the date of the Decision;

    (3) £41,259.66 in respect of the Adjudicator's fees, plus interest to be calculated by the parties.