Neutral Citation Number: [2019] EWHC 1188 (TCC)

Case No: HT-2019-000012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2019

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

RGB P&C LIMITED	**Claimant**
- and –	
VICTORY HOUSE GENERAL PARTNER LIMITED	**Defendant**

- -
- -

Gideon Shirazi (instructed by **Bell Lax Ltd.**) for the **Claimant**
Alexander Hickey QC and Sanjay Patel (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing date: 11 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE JEFFORD

Insert Judge title and name here :

Background

1. This is an application for summary judgment to enforce the decision of an adjudicator, Dr Franco Mastrandrea, made on 17 December 2018.

2. The dispute between the parties arose out of the conversion of an office building, Victory House in Leicester Square in London, into a hotel. The hotel comprises 5 upper floors of bedrooms and 3 lower floors containing reception, restaurants, the kitchen and other working areas.

3. The contract between the parties was entered into in about October 2015 with Victory House General Partner Limited ("Victory House") as Employer and RGB P&C Limited ("RGB") as Contractor. The contract was made on the JCT standard form Design and Build Contract 2011 edition. Work started on 2 June 2014 under a letter of intent. The original date for completion was 16 May 2016 but there were significant delays to the progress of the project and the works were not practically complete until 1 September 2017.

4. There have been in total 4 adjudications between the parties. This application concerns adjudication no. 4 which was commenced by Victory House seeking a decision on the proper assessment of the Final Statement. As set out in the Notice of Adjudication dated 3 October 2018, RGB's Final Statement dated 4 April 2018 gave an adjusted Contract Sum of over £11 million whereas Victory House's assessment was that RGB was entitled to less than £6 million.

5. RGB's Final Statement included claims for loss and expense and the Final Statement was accompanied by a report of Helen Turner of the Vinden Partnership dated 4 April 2018. The report identified 4 Relevant Events as a result of which RGB claimed to be entitled to an extension of time of 67 weeks and 4 days to 1 September 2017. On the other hand, Victory House claimed to be entitled to deduct liquidated damages. As Victory House said in its Referral, it was therefore necessary to form a view on "the correct adjustment to the Completion Date", that is, any extension of time for completion. In support of its case, Victory House relied on a report of Nik Sekulic of Navigant Consulting.

6. During the hearing before me, the detail of the reports took on rather greater significance than might have been anticipated but the sequence of the reports remained unclear to me and I invited the parties to provide me with a list of the documents served in the adjudication and the relevant reports. It is convenient to set that out here:

   (i) 5 December 2017: the first report of Nik Sekulic. I note that this addressed 7 alleged delay events and concluded that they had caused 78 calendar days delay. As I understand it from Mr Sekulic's later reports, it was produced for the purposes of an earlier adjudication.
   (ii) 4 April 2018: the first report of Helen Turner
   (iii) 16 July 2018: the Second Report of Nik Sekulic
   (iv) 3 October 2018: Notice of intention of refer to adjudication (entitled "Notice of Adjudication")
   (v) 10 October 2018: Victory House's Referral Notice
   (vi) 19 October 2018: Supplementary Report of Helen Turner
   (vii) 26 October 2018: RGB's Response

(viii) 31 October 2018: Adjudicator's questions
(ix) 5 November 2018: Third Report of Nik Sekulic
(x) 7 November 2018: Victory House's Reply
(xi) 8 November 2018: Helen Turner's Responses to adjudicator's questions
(xii) 19 November 2018: RGB's Rejoinder
(xiii) 23 November 2018: Victory House's Surrejoinder

The adjudicator's decision and Victory House's case on enforcement

7. The adjudicator decided that the value of the adjusted Contract Sum to be included in the Final Statement was £9,762,141.63 (including loss and expense); that Victory House was entitled to deduct £62,142.86 by way of liquidated damages; and that Victory House was to pay to RGB a further sum of £1,161,123.57 (plus VAT). That sum has not been paid and is the subject matter of this claim.

8. Victory House's defence to this application is twofold. Firstly, one element of the adjudicator's decision was the extension of time to which RGB was entitled which had financial consequences in terms of liquidated damages payable to Victory House and was material to RGB's claim for loss and expense. Victory House submits that, on this issue, the adjudicator acted in breach of natural justice in that he undertook his own analysis without any reference to the parties and without affording them any opportunity to advance their own cases as to the course he proposed to take. Secondly, Victory House contends that in respect of claims made by sub-contractors and included in RGB's claims, the adjudicator has also acted in breach of natural justice but, in this instance, because he has failed to address key aspects of Victory House's defence.

The law

9. In relation to both limbs of that defence, the relevant principles are set out in the decision of Akenhead J. in *Cantillon Ltd. v Urvasco Ltd.* [2008] EWHC 282 (TCC). He cited from the Court of Appeal's decision in *Carillion Construction Ltd. v Devonport Dockyard Ltd.* [2005] EWCA Civ 1358, Akenhead J. continued:

"53. ... Whilst that case is, obviously, not authority for the proposition that a "good" challenge to a decision on jurisdiction or natural justice grounds will be excluded on some statistical basis, a challenge on these grounds must be plain, clear and relatively comprehensible. In a case such as the present, the Adjudicator, albeit experienced, had a mass of conflicting evidence and argument to take on board. The Court should not take an over-analytical approach to questions of jurisdiction and natural justice arising in adjudications under the HGCRA 1996."

10. At [56] he then referred to cases in which judges of the TCC have considered the conduct of adjudicators, including *Balfour Beatty Construction Company Ltd. v The London Borough of Lambeth* [2002] EWHC 597. In that case, the claim referred to adjudication included an extension of time claim. Each party put in expert programming evidence, but, without informing the parties of what he intended to do, the adjudicator carried out his own analysis of the critical path, resulting in an award to the contractor of the bulk of the extension of time sought and a decision that liquidated damages should be repaid. HHJ LLoyd QC declined to enforce the decision saying this:

"28. Is the adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and of the conclusions which he might reach, taking those sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies, at least in part, in the requirement that the adjudicator should act impartially ....
29. Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable in adjudication but, in determining whether a part has been treated fairly or in determining whether an adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one .... which is either decisive or of considerable importance to the outcome and not peripheral or irrelevant...."

11. Akenhead J continued:
"Because in the Balfour Beatty case the adjudicator did not inform the parties of his methodology and seek their observations on its suitability and because if the losing party had had the opportunity to comment it might well have made a difference, he refused to enforce the decision.
57. From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:
(a) It must first be established that the adjudicator failed to apply the rules of natural justice;
(b) Any breach of the rules must be more than peripheral; they must be material breaches;
(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is nor peripheral or irrelevant.
(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by the judge in a case such as this.
(e) It is only if the adjudicator goes off on a frolic of this own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd. v The London Borough of Lambeth was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

12. Victory House also relied on *Herbosh-Kiere Marine Contractors Ltd. v Dover Harbour Board* [2012] EWHC 84 (TCC) another decision of Akenhead J. In that case, the adjudicator had assessed quantum on the basis of a composite overall rate - a case which had never been advanced by either party – resulting in an award of over £350,000 more than had been claimed. The issue was approached both as a matter of jurisdiction (that is, that no such dispute had been referred to the adjudicator) and as one of breach the rules of natural justice. Akenhead J concluded that the adjudicator had "gone off on a

frolic of his own" (a phrase disapproved of by Coulson LJ in Construction Adjudication, 4th edition) in using a method of assessment that neither party had argued and which he did not put to the parties. Summary judgement was refused.

The extension of time claim

13. As I have indicated above, in its Referral Notice, Victory House identified RGB's case on extension of time as being set out in the report of Ms Turner dated 4 April 2018. Ms Turner identified 4 Relevant Events the effect of which was summarised in a table with 5 columns: (i) Delayed Activity; (ii) Cause; (iii) Effect in calendar weeks; (iv) Period of delay; (v) Revised Project Completion Date.

14. RE1 was a delay in providing access of 13 weeks and 1 day from 30 November 2015 to 15 March 2016. RE2 was a delay in giving instructions for the purchasing of sanitaryware with a long lead in time: under "effect in calendar weeks" the table gave 32 weeks and the "period of delay" was 20 October 2015 to 24 March 2017. RE3 arose out of M&E works on the lower floors and which were said to be delayed by the absence of "reflected ceiling" designs: the "effect in calendar weeks" was 12 weeks but the period of delay was 31 March 2016 to 8 May 2017. RE4 was described as "Employer delays and instructions for additional works" causing delay of 12 weeks and 3 days to the lower floors.

15. Ms Turner's report, at section 4 headed "Baseline programme for assessing delay", explained that she had been provided with RGB's baseline programme in its native Asta Power Project file format and assessed its suitability for the purposes of delay analysis. She said that she had rescheduled RGB's "baseline file" to assess the critical path and its suitability for delay analysis and had found that it was not suitable for delay analysis because it was not adequately linked and because the critical path appeared to be incomplete. She then said (paragraph 4.4):

    "To correct this I have made a number of additions to the RGB logic by adding the deficient successor links which I have listed in detail in Appendix 4 in addition to showing the additional links, on the programmes, in blue for absolute transparency …"

16. She then explained her approach to the baseline programme and her methodology further and addressed each of the Relevant Events. In respect of RE3, she concluded (paragraph 6.3.4):

    "The impact of the Employer's late design to enable RGB to make a meaningful start to the lower floors is a further delay of 12 weeks, resulting in the total forecasted delay of 57 weeks 1 day and a revised forecasted completion of 20th June 2017."

17. Victory House relied on the Second Report of Mr Sekulic. His conclusions were set out at paragraph 68 of the Referral as follows:

    "i. Delay due to Relevant Event 1 was 93 days;
    ii. No delay accrued due to Relevant Event 2;
    iii. 55 calendar days of delay accrued due to Relevant Event 3;
    iv. Delay due to Relevant Event 4 was 26 calendar days."

18. In his report, he made it clear that he had limited instructions. He did not characterise his report as an independent expert report but rather as his best attempt to stand in the shoes of the Contract Administrator assessing an extension of time claim at the end of

the project. He had not had access to the original native software programme and he had not carried out an independent analysis but he commented on Ms Turner's analysis and argued that it should be rejected.

19. At paragraph 4.1.3, which is referred to below, he said:

"Turner report impacted each delay events (sic) directly in to the baseline programme without taking on board the actual progress achieved on site at relevant times and any potential changes in the planned intent. Omitting the achieved progress and other significant events that may have impacted the programme also means that any potential changes in the project's evolving critical path cannot be identified and considered."

20. At paragraph 4.1.5, he set out his opinion that the baseline programme used by Ms Turner was meaningless because of the extent of the changes she had made to the programme and because it was "an after the fact comprehensive revision of the baseline programme". At paragraph 4.1.6, he said that a different method of analysis ought to have been used rather than fundamentally revising the baseline programme to allow an impacted as-planned analysis to be executed.

21. In respect of RE2, he concluded that it was predicated on a subjective change to the baseline programme logic; it was inconsistent with his review of actual progress; and it was inconsistent with the logic of RE3. He, therefore, concluded that it could not have caused any delay. In respect of RE3, he pointed out that this was a new matter relied on as a Relevant Event. He said that the event was: *"… introduced in to the preadjusted baseline programme (including RE1 and RE 2 impacts) by linking the planned start of fit out to lower basement, basement and ground levels to the milestone date of 14 February 2017 (issue of reflected ceiling plans)."* He then argued that fit out was in progress earlier than 14 February 2017 and that a level of completion must have been reached before the alleged impact of the event so that Ms Turner had overestimated the likely impact of the event. Mr Sekulic's estimate of the impact of the event was no more than 55 days.

22. RGB's Response set out its case in respect of the causes of delay and its entitlement to an extension of time. In this respect, RGB relied on Helen Turner's report and her Supplementary Report in response to Mr Sekulic.

23. In the Supplementary Report and in respect of RE1, Ms Turner was happy to agree Mr Sekulic's figure of 93 days. That, in consequence, added a day to her assessment of the impact of RE2 which was now 223 days. As she said at paragraph 2.3.6 of that report, that period came from adding the delivery of the sanitaryware "to the RGB baseline which had been rescheduled to take account of Relevant Event 1". She maintained her position on Relevant Event 3 and Relevant Event 4.

24. As Mr Shirazi, on behalf of RGB, pointed out, it was evident on the face of those reports that both RE2 and RE3 were said to cover lengthy periods of delay which to a considerable extent overlapped. The 12 weeks delay which in Ms Turner's opinion had been caused by RE3 was an additional 12 weeks after the effects of RE2 had been taken into account. That was the product of her approach to the baseline programme and identification of the critical path. Indeed Mr Sekulic's report expressly made the point that RE3 had been inserted into the baseline programme after the effects of RE1 and RE2.

25. At that point in the adjudication, the adjudicator asked various questions in advance of the Reply. He did so by e-mail sent on 31 October 2018 as follows:

"….. a number of queries arise on the delay reports, as set out in the attached schedule, to which I would appreciate answers. …. Albeit reference is made in the attachment to individual programmes, I would appreciate soft copies of all the programmes in Power Project created and for (sic) relied on in the Response."

26. The attached schedule referred to paragraphs in the Turner and Sekulic reports and made requests or set out queries with a column identifying the party to which that request or query was directed. Amongst the queries raised were these:

(i) By reference to paragraphs 4.4 and 4.5 of Ms Turner's report:
"Regarding the schedule of additional successor logic, please explain in each instance why a particular successor activity has been selected and why the particular type of logic link with lag (when included) is appropriate."
"Other than closing "open ends", does Appendix 4 include logic changes to prevent start/ finish dates changing when rescheduling; if so, what changes have been made in this respect."

(ii) The adjudicator requested copies of the programme impacted with relevant events 2, 3 and 4 in native software.

(iii) In relation to paragraphs of Mr Sekulic's report in which he said that he did not have the Asta Power Project programmes in native format, the adjudicator asked for them, that request being directed in the relevant column to RGB.

(iv) In relation to paragraph 4.1.3 of Mr Sekulic's second report quoted above, he asked:
"What was the state of progress/project delay at the point in time the Turner report identifies each of the 4 events started to impact on progress; identify other causative issue of delay other than the four events relied on in the Turner Report."

(v) In relation to paragraph 4.1.5, he asked:
"What is the basis for the assertion that the baseline used in the Turner report should be considered meaningless in that it was prepared after the fact."

(vi) In relation to paragraph 4.1.6, he asked:
"What alternative method of analysis should have been used if not the "Impacted As-Planned".
If it is the position of VH that some or all of the amendments made to the "original baseline" were inappropriate, explain the basis of reaching this conclusion, and by references to specific changes introduced by Ms Turner.
What method for assessing delays should be adopted; what method of analysis has Mr Sekulic arrived at in order to form his own conclusion as per EOT?"

27. Victory House's Reply on 7 November 2018 responded to those queries through the Third Report of Mr Sekulic. Mr Shirazi draws attention to the fact that, in his response to the adjudicator's question on paragraph 4.1.3 of Mr Sekulic's Second Report, Mr Sekulic's response was that the answer to the question was beyond the scope of his instructions.

28. In relation to paragraph 4.1.5, Mr Sekulic said that he had not asserted that the baseline programme used by Ms Turner was meaningless because it was prepared after the fact but because it was not RGB's document used during the project. He gave an example where RGB's planned critical path was through the Town House bedroom levels but Ms

Turner's changes to the programme logic placed the critical path through the lower levels so that RE3 caused 85 days delay. He repeated that he did not have the Asta Power Project native files.

29. In relation to paragraph 4.1.6, Mr Sekulic's answer to the first question was this: *"From RGB's perspective, my view is that any method that applies as-built information and is grounded in fact would be likely to produce stronger demonstration of potential entitlement."* He gave the general response that Ms Turner's changes were inappropriate because they were not a contemporaneous expression of the planned intent and the changed programme was not one RGB worked to. As to the final question, he responded:

"It is important to bear in mind that I did not carry out a delay analysis, but I evaluated the claims for time extension provided by RGB at various times. I did this primarily by putting the claims made in their proper programming, factual and logical context given the available information."

30. Ms Turner gave her responses in schedule form. She said that the successor links were drawn to hold the start of completion date of the successor activity and that the logic was added to deal with open ends. All the delay analysis programmes were provided.

The adjudicator's decision on extension of time

31. In this decision, the adjudicator set out the respective positions of Ms Turner and Mr Sekulic. For reasons that he gave, he concluded that the modifications to the baseline programme made by Ms Turner had not been adequately explained and lacked rigour. He reinstated the original programme logic in respect RE2 and took into account, as Mr Sekulic said he should, the date on which sanitaryware installation actually started, and concluded that RGB would be entitled to an extension of 28 days only in respect of this event.

32. He then turned to RE3. From paragraph 5.39 he said this:

"5.39The cause identified by Ms Turner at paragraph 6.3.3 of her 4 April 2018 report (and the associated charts) is the absence of the reflected ceiling plans, which were not issued until 14 February 2017, and thus prevented works at Sub-Basement level from progressing. I have difficulty in accepting this …… It seems, and I conclude, that Ms Turner has mistakenly linked delivery of the Ground Floor RCP to the Sub-Basement M&E Installation rather than the Ground Floor, which work was planned to start two weeks later.
5.40….. Ms Turner has not satisfactorily demonstrated that Commissioning would not have been able to start until all M&E works at ground floor level had been completed, and irrespective of progress made to works on other floors or parts of the building. I do accept it as obvious, however, that commissioning could not be ***completed*** *until the relevant M&E works were completed and that a link should be introduced which reflects that constraint. By way of reference point, I note that RGB had applied a "Finish-Finish +15 day lag" relationship between the completion of the 6th floor corridor fit out and commissioning; in my view this would be an appropriate relationship to use instead."*

33. This led to a decision that RGB would be entitled to a further extension of time for RE3 of 50 days. However, the adjudicator then said that, following his review of the facts and his specific requests to the parties, he determined that the true extent of the impact of the

later release of information, and in particular the reflected ceiling plans, upon the planned start of M&E works at ground floor level was significantly longer than either Ms Turner or Mr Sekulic contended for:
"5.44That is because whilst both delays to progress to sanitary ware installation due to late procurement (Ms Turner's Relevant Event No. 2) and M&E installations at Ground Floor due to lack of design information (Ms Turner's Relevant Event No. 3) started to accrue from the planned start dates of these works on 25 January and 28 January 2016 respectively, Ms. Turner's Relevant Event No. 3 was (once the error in logic linking noted at 5.39 above is corrected) at all times the critical delaying event (containing the least float). Thus, even if RGB were to fail on Mr Turner's Relevant Event No. 2 ..... RGB succeeds on Ms Turner's Relevant Event No. 3."

34. The adjudicator, therefore, decided that RGB was entitled to no extension of time for RE2 because it was sub-critical but to 272 days extension of time for RE3.

Victory House's case on breach of natural justice

35. As I have said, Victory House's position is that he reached that conclusion though his own analysis of delay which he did not share with the parties or on which he did not give them an opportunity to make submissions and that that is a breach of natural justice. The nub of that case is that the adjudicator not only rejected Ms Turner's logic links but inserted his own and found a different critical path from that contended for by RGB.

36. At first blush, given the way in which RGB's extension of time claim was put in reliance on the reports of Ms Turner, the adjudicator's decision might seem surprising, and Victory House's complaint might seem to have merit. The particular critical path and consequent critical delay caused by RE3 on which the adjudicator founded his decision did not form part of either party's case; it was clearly material; and the situation might well appear to be one in which the parties ought to have had an opportunity to comment on the adjudicator's approach.

37. That is, however, why, somewhat unusually, I have set out in a degree of detail the evidence of Ms Turner and Mr Sekulic as provided to the adjudicator.

38. Firstly**,** RGB's case was always that there were two significant periods of delay caused by RE2 and RE3. However, on Mr Turner's delay analysis as to where the critical path ran it was RE2 that had the most significant impact and RE3 caused an <u>additional</u> period of delay. The adjudicator took a different view of where the critical path ran and consequently of the criticality of the delaying events. His decision did not, therefore, involve the substitution of his own view for RGB's case that RE3 only caused 12 weeks delay. It was rather the product of his decision as to the changes to the baseline programme that Ms Turner has made, and which he rejected, and the subsequent re-running of the programme. The overall extension of time claim was no different but the difference lay in the criticality of relevant events.

39. Mr Hickey QC, on behalf of Victory House, submitted that there was no notice from the adjudicator that he might determine that the critical path was different from that contended for by RGB and that, accordingly, Victory House was, in breach of natural justice, deprived of the opportunity to put its case as to where the critical path lay and/or in response to the adjudicator's views as to where the critical path lay. In particular, and

in answer to RGB's submissions, Victory House submitted that, despite what was said in the decision, the adjudicator's questions gave no indication as to the path he might be intending to go down.

40. Taking that latter point first, what can be seen from the sequence of the reports up to the point of the adjudicator's questions is as follows. Ms Turner had produced a report which underpinned RGB's claim for an extension of time and which set out very clearly that, in order to do so, she had worked on the baseline programme in its native electronic format, she had made substantial changes to the logic links, and she had done so, properly in her view, to identify the critical path and impact of relevant events on the critical path. Mr Sekulic had taken issue with what Ms Turner had done with the baseline programme to the extent that he contended that the changes made rendered it meaningless. Mr Sekulic, however, as he said, did not have access to the programme or impacted programmes in native format. The adjudicator then asked for further detail as to the logic links Ms Turner had introduced and for the programmes in native format.

41. It must have been self-evident, that the adjudicator was asking those questions and asking for those programmes so that he could interrogate the logic links and the programmes and have the facility to modify and/or impact the programmes, if he considered that Ms Turner had got it wrong, in order to examine the impact of delay events. It is right that he did not say so in express terms or ask questions addressed to the specific change in logic which he may have had in mind (and subsequently decided on) but he would not have known at that stage where the exercise might lead him.

42. Therein, in my judgment, lies the answer to the broader point. As set out at paragraph 5 above, the adjudicator had been asked to determine the relevant extension of time. Given the way in which RGB's claim was put (that is, by reference to Ms Turner's report), inherent in that was the validity of the adjusted baseline programme and the analysis of the critical path. Those were issues on which Mr Sekulic expressed firm views, albeit he did so without any analysis of this own and without the programmes in their native format.

43. If it was not obvious already, the adjudicator's questions about the added logic links and his requests for the programmes in native format, made it abundantly clear that he was seeking to put himself in a position to form a view about the adjusted baseline programme and, if he rejected Ms Turner's logic links, to change them and re-run the programme accordingly.

44. What the adjudicator did could not properly be described as adopting a methodology which he had given the parties no opportunity to comment on. He adopted the methodology on which RGB's case was based but did so, having made decisions which were, in my view, well within his jurisdiction, as to the changes in logic links which Ms Turner had made. Victory House's case amounts to saying that the scope of the adjudicator's legitimate decision making, in this respect, was severely constrained. For example, if he had decided that even a single Turner logic link was invalid, he would either have had to reject the baseline programme and the RGB claim in its entirety or go through a process of notifying the parties of the view he had formed and seeking further submissions. The adjudicator went somewhat further in imposing his own logic link but that, in my view, was within the bounds of what he had been asked to do and what, it

followed from the criticisms levelled at the Turner report, it would have been anticipated he would do.

45. Further, the adjudicator had expressly asked for Victory House's case, through Mr Sekulic's reports, as to the baseline programme and the proper method of delay analysis. Given the limited extent of Mr Sekulic's instruction and the nature of his responses set out above, I very much doubt that, if the adjudicator had given Victory House to the opportunity to comment on his proposed approach to the logic links, they would have made any substantive or material response.

46. It is, of course, a question of fact and degree but, in this case, there were express issues as to the validity of the baseline programme, the logic links that had been added by Ms Turner, the critical path that followed and the impact of the relevant events depending on the critical path. The adjudicator did not embark on some wholly unrelated delay analysis of his own. What he did, in my view entirely properly, was reach his own conclusions on the issue of logic links, the programme and the critical path, and then ascertain the impact of the relevant events (as he found them). This is far removed from the factual scenario in *Balfour Beatty v Lambeth* or *Herbosh-Kiere v Devon Harbour Board* and well within the remit of what the adjudicator was properly entitled to do to decide the dispute referred to him.

Victory House's case on breach of natural justice and the sub-contractor claims

47. The second aspect of the adjudicator's decision which Victory House argues gives rise to a basis on which to resist enforcement relate to sub-contractors' claims for loss and expense which in turn formed part of RGB's claim against Victory House.

The sub-contractor claims and Victory House's position

48. RGB's claim included a sum of £827,320.95 for claims by sub-contractors which formed part of its claim for prolongation costs. The relevant section of the adjudicator's decision (from paragraph 5.82) starts by reciting the generic criticisms of these claims made by Victory House in the Referral:

> *"(a) The four sub-contractor claims all come as letters of one or two pages that are suspiciously similar;*
> *(b) None of the sub-contractor claims provide any evidence that the subcontractor has actually incurred any of the costs claimed;*
> *(c) No evidence has been submitted verifying that the costs claimed have been paid by RGB;*
> *(d) None of the costs claimed have been sufficiently explained;*
> *(e) All of the sub-contractor claims have applied exactly the same use of the Emden formula. No proof of alternative work has been provided in support. The Emden formula requires the original subcontract value to be input into the formula. However, the subcontract sum values used not reflect what is contained in the supporting information. RGB's subcontractors have incorrectly input their adjusted subcontract value, inclusive of variations. The claims submitted are in consequence greatly inflated due to double claiming for variations works.*
> *RGB has responded that it has paid its subcontractors significant percentages of the sums due (usually around 70%), with any sums not paid identified as sums remaining owed to the sub-contractors, and attaches the invoices and proofs of payment …. The exception is the JEM Group Limited, which fell into liquidation six months after Practical Completion. JEM's liquidator has reserved his/ the company's right to claim against*

RGB, as RGB has not paid JEM Group Limited (RGB says that it was unable to do so before JEM went into liquidation).
RGB contends that it has paid the sums for individual subcontractors' loss and expense that it sets out in the Scott Schedule ….. I note that that is obviously not so, on its own admission, in respect of JEM Group Limited."

49. The adjudicator then addressed the claims in respect of JEM Group Limited (£436,684.38), JA Mechanical (£202,610.08), AM Carpentry & Building Welwyn Ltd. (£95,036.67), and David James Contract Services Southern Ltd. (£92,989.82). He decided that some amount, but in each case a significantly lesser sum, was due in respect of the sub-contractor.

50. Victory House's case is that the adjudicator's determination of each of those claims ignored Victory House's defence that the claims were not genuine but were "manufactured", a defence that Victory House had raised in all its submissions in the adjudication. In their skeleton argument, Mr Hickey QC and Mr Patel submitted that: "Dr Mastrandrea did not deal with the argument or even refer to it at all. This too amounts to a breach of natural justice." They made clear that Victory House's case was that the claims were fraudulent. Mr Shirazi submits that a fundamental problem with Victory House's case is that the word fraud or fraudulent was never used in any one of Victory House's submissions in the adjudication. Victory House submits, however, that it would have been clear to the adjudicator that that was Victory House's case but, in any case, the substance of the defence ought to have been dealt with and it was not.

Principles

51. This sort of defence of breach of natural justice is one in which a number of scenarios may appear and need to be differentiated because they may lead to very different results. The adjudicator (i) may deliberately fail to deal with an issue or defence (for example, because he has taken a particular view as to what is within his jurisdiction); or (ii) he may have inadvertently failed to deal with a defence or issue; or (iii) he may have failed to deal with some sub-issue (from which it may be inferred or concluded that he has failed to deal with the overarching issue either deliberately or inadvertently); or (iv) he may have failed to deal with some aspect of the evidence going to a defence or issue, again deliberately or inadvertently.

52. In *Pilon Ltd. v Breyer Group plc* [2011] EWHC 2846 (TCC), Coulson J. held that the adjudicator's deliberate decision not to take into account a defence of set-off rendered the decision unenforceable. The contract in issue had involved works divided into two batches. The adjudicator wrongly considered that he did not have jurisdiction to consider a defence of set-off between the two batches. Coulson J summarised the applicable principles as follows at [22] (with cross-references omitted):

"22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question, then, whether right or wrong, his decision is enforceable …
22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to

consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice ….
22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such failure will not ordinarily render the decision unenforceable …
22.4 It goes without saying that any such failure must also be material …. In other words the error must be shown to have had a potentially significant effect on the overall result of the adjudication …
22.5 A factor which may be relevant to the court's consideration of this topic un any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to take a tactical advantage."

53. Where the adjudicator has deliberately but wrongly declined to address an issue, particularly a crucial defence, it may well be that he has not decided the dispute referred to him. Where he has not expressly taken such a deliberate decision but may appear not to have addressed every issue, the more likely conclusion is that the issue is subsumed within his consideration of the dispute as a whole. As Coulson LJ puts it, in his capacity as the author of *Coulson on Construction Adjudication 4th ed.*, at paragraph 13.55:

"Dawnus Construction Holdings Ltd. v Marsh Life Ltd. [[2017] EWHC 1066 (TCC)] is a clear example of the court's approach: the judge will not put a fine tooth comb through the adjudicator's decision, seeking to ensure that every single point has somehow been addressed. The court's approach is broad-based, looking first at the dispute referred, and then second as to what the result was. It is not a breach of the rule of natural justice if one particular sub-issue is not specifically referred to in the adjudicator's decision."

The analysis in *Pilon v Breyer* left open the possibility that an inadvertent failure to consider one of a number of issues might render a decision in breach of natural justice, but it would not ordinarily do so and it is difficult to identify any case in which a decision has not been enforced for such a reason. The only example identified in *Construction Adjudication* is the decision of the Outer House in *Whyte and MacKay v Blyth and Blyth Consulting Engineers* [2013] CSOH 54. The rarity of such cases seems to me to be for two reasons. Firstly, an inadvertent failure to address a particular issue is in the nature of an error within the adjudicator's jurisdiction rather than a breach of the rules of natural justice. Secondly, and if that is wrong, it would be an unusual case where the court would both draw the inference that an issue had not been addressed and conclude that the failure to address the issue was so significant that it meant that the adjudicator had not decided the dispute referred to him and/or that the conduct of the adjudication was so unfair that the decision should not enforced. The more significant the issue, the less likely it is to be inadvertently overlooked; the less significant it is, the more likely it is that it has been taken account of in the round.

54. Mr Hickey QC also relied on the decision of Akenhead J in *Jacques v Ensign Contractors* Ltd. [2009] EWHC 3383 (TCC). In that case, the adjudicator dealing with adjudication no. 5 had declined to take into account the decision in adjudication no. 4 which the parties had agreed was null and void. It was argued that the court could infer from that, on the particular facts of the case, that the adjudicator had failed to take into account the evidence and arguments put forward by the defendant (an argument which ultimately failed). On this particular issue, Akenhead J said this:

"25. Ms Rawley for the Contractor in this case also argued that it was open to the court to infer from what was put before the Adjudicator and what was said or not said in the adjudicator's decision that the adjudicator had not considered or addressed the defence properly put forward by the defending party. I agree that the Court can so infer; indeed, it may be a rare case …. that the adjudicator will admit that he or she has not considered a proper defence. Accordingly, where the breach of natural justice is the failure to consider defences properly put forward, the court will often have to infer whether there has been such a failure."

55. The judge then set out at [26] the principles on which Mr Hickey QC relied:

"26 In the context of this case, I draw the following conclusions:

(a) The Adjudicator must consider defences properly put forward by a defending party in adjudication.

(b) However, it is within an adjudicator's jurisdiction to decide what evidence is admissible and, indeed, what evidence is helpful and unhelpful in the determination of the dispute or disputes referred to that adjudicator. If, within jurisdiction, the adjudicator decided that certain evidence is inadmissible, that will rarely (if ever) amount to a breach of natural justice. The position is analogous to a court case in which the Court decides that certain evidence is either inadmissible or of such little weight and value that it can effectively be ignored: it would be difficult for a challenge to such a decision on fairness grounds to be mounted.

(c) Even if the adjudicator's decision (within jurisdiction) to disregard evidence as inadmissible or of little or no weight was wrong in fact or in law, that decision is not in consequence impugnable as a breach of the rules of natural justice.

(d) One will need in most and possibly all "natural justice" cases to distinguish between a failure by an adjudicator in the decision to consider and address a substantive (factual or legal) defence and an actual or apparent failure or omission to address all aspects of the evidence which go to support that defence. It is necessary to bear in mind that adjudication involves, usually the exchange of evidence and argument over a short period of time and the production of a decision within a short time span thereafter. It is simply not practicable, usually, for every aspect of the evidence to be meticulously considered, weighed up and rejected or accepted in whole or in part. Primarily, the adjudicator, needs to address the substantive issue, whether factual or legal, but does not need (as a matter of fairness) to address each and every aspect of the evidence. The adjudicator should not be considered to be in breach of the rules of natural justice if the decision does not address each aspect of the evidence adduced by the parties."

56. The emphasis in this paragraph is very much on this question of the adjudicator's jurisdiction to determine what evidence to take into account and the relevance of the adjudicator's failure or apparent failure to take into account particular aspects of the evidence. The references to the adjudicator having to consider defences properly put forward or needing to address the substantive issues have to been seen in this context and are not, in my judgment, to be taken as meaning that the failure of the adjudicator to address a particular defence or particular sub-issue necessarily means that there would be a breach of natural justice. That was the issue which Coulson J addressed in *Pilon v Breyer* and which I have considered above.

57. The questions for the court are, therefore, (i) whether it was Victory House's case that the claims were fraudulent; (ii) whether the adjudicator did, in fact, fail to take into account Victory House's defence that the claims were fraudulent or, alternatively, failed to take into account the substance of the defence that the claims were manufactured; and (iii) since it is not suggested that he did so, for some reason, deliberately, whether his inadvertent failure renders the decision so unfair that this is one of the rare cases where it should not be enforced.

58. What is submitted in this case is that there is no question of putting the fine tooth comb through the adjudicator's decision, nor of the adjudicator failing to consider some sub-issue or some particular aspect of the evidence, but rather that there was a clear defence that was front and centre of Victory House's case on RGB's loss and expense claim which was not considered at all, and the failure to consider that defence is so serious that it would be unfair to enforce the decision.

The arguments in the adjudication

59. Before me Victory House submitted that its position was clear from its submissions in the adjudication and was as follows:
    (i) As set out in the Referral, the claim letters were suspiciously similar: (a) they were all of the same format and roughly the same length; (b) at the start of each, reference was made to a recent meeting; (c) none of the sub-contractors provided any supporting material for its claims; (d) none of the sub-contractors identified the start and end dates of the periods of delay for which loss and expense was claimed; and (iv) the claims advanced were calculated in very similar ways.
    (ii) In the course of the adjudication, Mr Jeremy Johnson, Managing Director of JEM Group Ltd. admitted that RGB provided him with a template claim letter.
    (iii) In the course of the adjudication, Victory House discovered that two directors of the sub-contractors, David James Contract Services (Southern) Ltd., were members of RGB's own management team on the same project, and featured in RGB's claim for loss and expense, so that one of them (a Mr Tyrer) would be drafting the claim to be considered by the team of which he was part.
    (iv) In relation to three of the sub-contractors (JEM Group Ltd., JA Mechanical Services Ltd. and David James Contract Services (Southern) Ltd.) the subcontractors' claims for loss and expenses included claims for losses incurred either prior to the company's incorporation or after the company's dissolution. David James Contract Services (Southern) Ltd. had, it was said, been dissolved before the project even started.

60. Before I consider the adjudicator's decision, I make the following observations:
    (i) Firstly, I note that the paragraphs of Victory House's Referral which are summarised in paragraph 59(i) above and referred to in paragraphs of the decision quoted above, are preceded by a paragraph which said: *"Victory House does not deal with subcontractor claims individually, but due to the incredible similarity between them, it makes brief general comments on their inadequacy as follows."*
    (ii) The statement of Mr Kemp, of Victory House's solicitors, made on this application deals with the circumstances in which Mr Johnson came to give evidence in the adjudication about how his company's claim came to be made with assistance from RGB. Mr Kemp says that he has never before encountered a main contractor assisting a sub-contractor to make a claim and that that was "in fact suspicious"

and suggested that the claim was "manufactured", to increase RGB's claim, as Victory House had said in the Referral. He further suggested that it was highly unlikely that RGB would have assisted if the claims were genuine.

(iii) In its Reply, Victory House made submissions on the individual claims prefaced by comments that applied to all four sub-contractors. Paragraph 108 read as follows:

"a. RGB has not shown:
i. in what way the sub-contractors were delayed, or
ii. by how much, or
iii. how the period of delay claimed is due to a Victory house relevant Matter.
b. From the similarity between the claims, it seems that the sub-contractor claims have been produced with assistance and collusion and are not genuine and independent claims for additional delay costs.
c. That RGB now supplied payment certificates does not mean that any loss incurred by the sub-contractors is a Relevant Matter under Victory House's Contract with RGB. It is likely that any delay event is due to RGB's action or inaction, and so Victory House would have no liability for the delay or any resultant cost. No evidence has been supplied on that point.
d. None of the payment certificates provided with the Response are signed, which sheds doubt on their veracity."

(iv) It is clear that sub-paragraphs (a) and (c) went to matters of the substance or merits of the claims. The reference in sub-paragraph (d) to the "veracity" of the payment certificates might be thought to go somewhat further but there was no suggestion that they were fabricated rather than there was no evidence of payment. As Mr Shirazi submitted, the high point of the allegation of "fraud" was the argument in sub-paragraph (b) that the claims were not "genuine and independent". I return to this point below.

The adjudicator's decision: discussion

61. The first point that the letters were suspiciously similar is expressly referred to in paragraph 5.82 of the adjudicator's decision which I have set out above. This paragraph similarly refers to the arguments about the absence of supporting documents (which I refer to further below) and the similarity of the claims based on the Emden formula. Victory House submitted that the lack of any reference to its submissions on the different sub-contractor claims gives the impression that the adjudicator had not even read its submissions. That submission is unsustainable given the express recitation of Victory House's case in the decision. It is right that these points are not set out in respect of each sub-contractor claim and indeed that there is no express decision by the adjudicator in respect of the "suspicion" raised by the similarity in the letters. However, it seems to me that the inference must be that he considered these arguments and either dismissed them or regarded them as immaterial, rather than that he did not consider them at all. So far as the specific evidence from Mr Johnson is concerned, that is one aspect of the evidence going to the argument that the claims were manufactured and the absence of an express reference to that evidence cannot, in my view, in itself be sufficient to render the decision unenforceable.

62. In respect of JEM Group Ltd., the adjudicator said that, on the basis of the claim letter, the claim appeared to relate to a period of 50 weeks delay. He set out what was included

in Sub-Contract Valuation no. 2 but said that nothing was included in the relevant payment certificate. The matter was, he said, therefore, left on the unsatisfactory basis that there may be a liability on the part of RGB to pay the liquidator. Then:

"5.87Notwithstanding the foregoing, it is clearly inappropriate in my decision to value this item at nil. I am satisfied from even the material put before me that JEM Group Limited would, in carrying out the electrical work with which it was charged, have suffered substantial delays by reason of the matters found by me to entitle RGB to an extension of time. These matters account for 430 calendar days' delay out of a total overrun of 473 calendar days. A number of the costs claimed in the letter appear appropriately to be time-sensitive costs, albeit that the list was incomplete.
5.88 Having regard to the unsatisfactory material before me, I allow 20% of sum claimed ie. £87,336.88 against this sum." (Emphasis added)

63. What appears from these paragraphs is that the adjudicator was also had in mind the issue of the lack of or inadequacy of the supporting evidence for the claim. The fact that the adjudicator did not expressly state that he was considering that in the context of the broader case that the claims were manufactured cannot, to my mind, make any difference. This is combing through the decision with the fine tooth comb searching for matters on which the adjudicator could have said more but did not. It is not right that the adjudicator, as Mr Kemp argues in his statement, plainly ought to have dealt in his decision with the evidence about the claims being manufactured. This was an aspect of the evidence about the claim and the adjudicator was entitled to form his view about it. If he was addressing the merits of the claim (as on the face of the decision he was), he may well have regarded the alleged manufacturing of the claim as immaterial but he was not obliged to set out every step of his reasoning. The short point is that the absence of further reference to evidence or arguments Victory House relied upon does not, in this case, give rise to the inference that the adjudicator overlooked a key defence.

64. In the Reply, Victory House took a further point that the claim was made on the basis of a total period of work of 90 weeks but that that would have involved the company being on site from 11 December 2015 which was before it was incorporated on 25 July 2016. RGB's response in its Rejoinder was that the contract had been with Mr Johnson and was then transferred to the company. It is obviously right that there is no reference to this argument in the decision but, at the same time, the adjudicator decided that only 20% of the sum claimed was due. The most obvious inference is not that the adjudicator took no account of these discrete issues but that he took account of them in his characterisation of the material before him as unsatisfactory. Mr Kemp's statement is highly critical of the fact that the decision is set out in three paragraphs and the decision based on a percentage of JEM's claim but those are matters going to whether the decision was right or wrong. In my view, this falls within the category of case where the adjudicator has dealt with the dispute referred to him even if he has not dealt with every sub-issue or articulated his reasoning on every sub-issue.

65. In respect of JA Mechanical, the adjudicator identified that the claim (for £202,610.08) was for costs associated with RE3 and RE4. He similarly set out the sums included in the relevant Sub-Contract Valuation and payment certificate and said that it was not clear whether the sum had been paid. He again considered it inappropriate to allow nothing at all and was satisfied both that JA Mechanical would have suffered substantial delays and that the claim included time-sensitive costs. He allowed the sum included in Sub-

Contract Valuation no. 18 being £95,000.00. Again, Victory House is highly critical of the adjudicator's decision and raises similar points about the failure to address the case that the claims were manufactured and as to the date of JA Mechanical's incorporation. For the reasons I have given in respect of the JEM Group claim, these seem to me to be issues going to the merits of the decision and not to evidence a failure of the adjudicator to address, inadvertently or otherwise, a key issue in the case.

66. The adjudicator's consideration of the claims from AM Carpentry & Building Welwyn Ltd. and David James Contract Services Southern Ltd. ("David James") followed a similar pattern and were in similar terms and again the sum included in the last Sub-Contract Valuation was allowed. Despite the similar pattern which the consideration of each of these claims followed, there is nothing to indicate that they were not considered individually. It is also somewhat ironic that, in Mr Kemp's statement, he argues that the similarity in the paragraphs of the adjudicator's decision indicate that he cut and pasted while at the same time accepting that Victory House did not, in the adjudication, advance any arguments specific to AM Carpentry but "relied on the same arguments that it had relied upon in relation to sub-contractor claims".

67. So far as David James Contract Services (Southern) Ltd. is concerned, the adjudicator made no express reference to the relationship between two members of RGB's management team and this company. That was one aspect of the evidence potentially going to the validity of the claim. It was by no means a decisive point and the adjudicator formed his own view of the claim made.

68. The more substantial point made by Victory House relates to the argument, advanced in the adjudication, that the company David James Contract Services (Southern) Ltd. ("Contract Services") simply did not exist during the project, having been incorporated in January 2012 but dissolved on 24 March 2015. This issue is dealt with at considerable length in Mr Kemp's statement. The main points are these:

    (i) A claim for loss and expense was sent by David James Contract Services (Southern) Ltd. to RGB by letter dated 3 April 2018 in the sum of £92,289.82. That claim was included in RGB's claim for loss and expense and in the Scott Schedule attached to RGB's Response in the adjudication referring to the same company.
    (ii) In the adjudication, Victory House raised the issue that this company did not exist. RGB responded that the sub-contractor was, in fact, David James Contract Decorating Ltd. ("Contract Decorating") and provided a subcontract valuation and subcontract payment certificate in the name of that company. Mr Tyrer gave a witness statement relating to his role in both David James companies and said that the use of the David James Contract Services (Southern) Ltd. letterhead for the claim letter was a mistake: *"This is probably because when I first tendered for the job, I did it on that company's letterhead, and therefore I continued out of habit to submit letters on that letterhead in the course of the job …"*.
    (iii) There was evidence to suggest that the value of the Contract Services sub-contract was £36,105.00 (taken from a valuation) but that the value of the Contract Decorating sub-contract was £128,045 (taken from the calculation on the Emden formula) and that these were, in fact, two different sub-contract packages. Further the claim letter made no reference to the payment allegedly made to Contract Services. I note that that argument is not consistent with the case that Contract Services did not exist during the project and, therefore, could not have been the

sub-contractor on some other works package and that, as set out above, it was part of the Victory House's case that the Emden formula was incorrectly applied because the contract sum used was one that included variations.

(iv) Victory House's specific submissions were at paragraph 134 of the Reply. The paragraph stated that on 7 November 2018, Tudor Rose (acting for Victory House) had emailed the Adjudicator with their concerns about the claim. The following sub-paragraphs identified the fact that Contract Services had been dissolved in March 2015; that the payment certificate provided by RGB referred to another company (Contract Decorating) which was an active company; and identified the relationship between Mr Tyrer and Mr Britnell and Contract Services/ Contract Decorating. These matters were also the subject of inter-partes correspondence copied to the adjudicator.

69. The adjudicator's decision, at paragraph 5.97, set out inconsistencies in the figures and said that whether the sum of £45,000 included in sub-contract valuation no. 16 had been paid. At paragraph 5.98, he continued:
"Notwithstanding the foregoing, it is clearly inappropriate in my decision to value this item at nil. I am satisfied from even the material put before me that David James Contract Services Ltd. would, in carrying out the decoration works with which it was charged, have suffered substantial delays by reason of the matters found by me to entitle RGB to an extension of time. The matters falling within Relevant Event Nos. 3 and 4 which form the basis of the claim advanced by David James Contract Services Southern Ltd. account for 337 calendar days' critical delay to the Works out of a total of 473 calendar days. A number of the costs claimed appear appropriate to be time-sensitive costs with some obvious exceptions, such as the disruption claim."

70. He awarded the sum of £45,000 in Sub-Contract Valuation no. 16.

71. Victory House argues (in Mr Kemp's statement) that the liability of RGB to Contract Services was a legal impossibility (since the company did not exist) and the decision was perverse. Further, the adjudicator did not consider whether there were in fact different claims from different companies; he gave no explanation for the sum he awarded; and his decision was based on a longer period of delay than claimed.

72. The bulk of these points are again complaints that the adjudicator was wrong and do not disclose any failure to address a key issue and/or breach of natural justice. The one matter that has given me pause for thought is the finding that RGB was liable to Contract Services for loss and expense when it was, in fact, RGB's case in the adjudication that its sub-contractor was Contract Decorating. On one view, therefore, the adjudicator has wholly failed to address the defence that RGB could not possibly be liable to the company whose claim it said it was liable to pay and had, in part, paid. That, however, seems to me to be the wrong way of looking at the position. RGB's case in the adjudication was that it was liable to its decorating sub-contractor and that that company was Contract Decorating. The references to a claim by Contract Services simply reflected what was said to be an error in the use of that company's headed paper. The amount which the adjudicator awarded, despite his reference to Contract Services, was the sum claimed in Contract Decorating's sub-contract valuation no. 16. The greater claim in the letter dated 3 April 2018 did not succeed.

73. It seems to me that, rather than overlooking the issue of the correct company (which had been canvassed in submissions and correspondence), the adjudicator was simply deciding what RGB was liable for to its decorating contractor. On that basis, the identity of the sub-contractor company was not relevant. The references to Contract Services reflected the claim letter (from the dissolved company) but the amount awarded reflected the payment claim by the extant company. Alternatively, the reference in his decision to Contract Services was an error but it was not an error that indicated that he had failed to deal with a crucial defence. In the circumstances, even if he overlooked the issue that Victory House had raised, it would not have been a material failure. If he had addressed it, he would simply have decided that he was concerned with Contract Decorating and that company's sub-contract valuation.

Conclusions on sub-contractor claims

74. To return to the questions posed in paragraph 57 above it is, firstly, not at all clear that Victory House's case was that the claims were fraudulent. Rather the case seemed to be that the sub-contractors had been encouraged or assisted to make the claims, that the claims were not supported by evidence or made good on the facts, and that the fact that the sub-contractors had been put up to making them was relevant to their merits. As I said above, the paragraphs which set out the suspicious similarities in the letters were preceded by a paragraph which expressly said that Victory House did not deal with the claims individually but made general comments on their inadequacies. That falls far short of an allegation of fraud. The Reply may have gone a little further in submitting that the claims were not "genuine" as well as not independent but, in context, it seems to me that that was an allegation about the merits of the claims. It is certainly an inadequate basis on which to argue that Victory House's case in the adjudication was clearly that the claims were fraudulent and the adjudicator failed to address that defence. The adjudicator clearly considered the merits of each claim and the specific matters that Victory House relies upon are elements of that case. The failure to consider every sub-issue, if there was such a failure, does not render the decision one reached in breach of the rules of natural justice.

75. That also answers the second question but, in any case, on analysis, it cannot be argued that the adjudicator failed to address the substance of the issue of the manufactured claims. He made express reference to it and the only proper inference is that he considered and dismissed it or considered it irrelevant if he was concerned with the merits of the claims.

76. It follows, in my judgment, that, even if the adjudicator inadvertently overlooked either some element of Victory House's defences or some element of the evidence, this did not render the decision so unfair that it should not be enforced or mean that he did not deal with the dispute referred to him.

77. I will, therefore, give summary judgment for the claimant in the sums claimed and invite the parties to draw up the appropriate order.