Neutral Citation Number: [2020] EWHC 945 (TCC)

Case No: HT-2020-000038

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

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Tuesday 21st April 2020

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

PLATFORM INTERIOR SOLUTIONS LIMITED

Claimant

- and –

ISG CONSTRUCTION LIMITED

Defendant

- -
- -

Rupert Choat (instructed through the Licensed Access Scheme) for the **Claimant**
Patrick Clarke (instructed by **Brodies LLP**) for the **Defendant**

Hearing date: 24 March 2020

- -

APPROVED JUDGMENT

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Tuesday 21st April 2020.

Mr Roger ter Haar QC :

1. There is before the Court an application by the Claimant ("Platform") to enforce an adjudicator's decision against the Defendant ("ISG").

2. The Decision which I am asked to enforce was issued by Ms. Lisa Cattanach on 11 December 2019 in which she decided that Platform was due payment from ISG in the amount of £417,541.33 plus VAT.

3. ISG challenges this in two ways:

   (1) By resisting Platform's application to enforce the Decision on the grounds set out below;

   (2) By issuing proceedings under Part 8 in Claim No. HT-2020-000070 seeking declarations as follows:

> "1. That the Decision of an Adjudicator dated 11 December 2019 is wrong and beyond rational justification;
>
> "2. That the Defendant is not entitled to the sums awarded by the Adjudicator; and/or
>
> "3. Insofar as this claim is determined prior to or at the same time as the Defendant's application for summary judgment, that the Defendant is not entitled to judgment enforcing the decision in Claim HT-2020-000038."

4. Following an order made by O'Farrell J., Claim No. HT-2020-000070 will be the subject of a hearing on 24 April 2020.

5. This judgment follows a hearing which took place on 24 March 2020. Originally this was to be a traditional hearing in person. However, following government interventions arising out of the health emergency affecting this country and the rest of the world, the parties agreed that the hearing should take

place by telephone conference. I thank the parties for their considerable co-operation in making this possible.

The Sub-Contract

6. On or about 24 January 2018 ISG engaged Platform to carry out, for the sum of £52,391.20 plus VAT, works forming part of ISG's redevelopment of Erskine House, Queen Street, Edinburgh, as a hotel.

7. By an ISG Variation Instruction to Proceed dated 12 April 2018, Platform's works were extended and/or the Sub-Contract was amended, so that the contract price was increased by £2,274,395.24 plus VAT less 1% Main Contractor's Discount. Platform's works included the provision and installation of partitions, ceilings, doors, ironmongery and associated joinery.

8. The Sub-Contract incorporated ISG's Sub-Contract Conditions (Self Billing) which included the following dispute resolution provisions:

   (1) Clause 30 provided for adjudication governed by Part I of the Scheme for Construction Contracts (England and Wales) Regulations 1998, as amended by that Clause;

   (2) Clause 30(2) specified the Royal Institution of Chartered Surveyors as the adjudicator nominating body.

9. Clause 27 of the Sub-Contractor Conditions was headed "Termination of Sub-Contractor's Employment" and provided:

> "(1) ISG may without prejudice to any other of its rights or remedies immediately terminate the Sub-Contactor's

> employment under this Sub-Contract in respect of the whole or any part of the Works if the Sub-Contractor:
>
> "….
>
> "(h) is in material or persistent breach of this Sub-Contract.
>
> "….
>
> "(4) The Sub-Contractor shall within 14 days of being so notified, submit an application for payment for works executed by him up to the date of termination. Such application shall be treated in all respects as if it was a final account submitted by the Sub-Contractor pursuant to clause 2(12) and the procedures set out in clause 2 shall apply in respect of such an application.
>
> "(5) ISG shall be entitled to recover from the Sub-Contractor all losses, expenses, costs and damages suffered or which may be suffered by ISG by reason of such termination."

The Adjudication Claim

10. The Adjudicator, Ms Lisa H Cattanach BSc, LL.M, FRICS, FCIArb, was appointed Adjudicator on 30 October 2019.

11. By then, Platform had served a Notice of Adjudication.

12. The Notice was headed "Notice of Intention to Refer a Dispute to Adjudication". This said, in part:

> "Platform have submitted Applications for Payment throughout the progress of the works, in particular Application for Payment No. 11 dated 17 January 2019 for the period ending 21 December 2018 (the end of the further 42 week Subcontract period from 12 April 2018) in the gross value of £2,148,893.42 less 1% MCD producing an amount due of £515,445.35 plus VAT, and subsequently Platform submitted Application for Payment No. 12 on 7 February 2019 for the period ending 18 January 2019 in the gross value of £2,191,318.62 less 1% MCD less previous payments to date by ISG of £1,548,137.00 producing an amount due of £556,186.27 and further, as a result of the repudiation of the Subcontract by ISG and the rescinding of the Subcontract by Platform, the retention amount of £65,082.16 is also considered due. Further, ISG have failed to response to Platform's Valuation 12 Application, with neither a Payment Notice or Pay

> Less Notice, and therefore the whole amount due is £621,268.43 plus VAT (£556,186.27 plus retentions of £65,082.16). A spreadsheet schedule of summary difference is attached as part of this Notice of Adjudication, being the crystallised Dispute.
>
> "This crystallised Dispute between the parties is formally that gross valuation balance due to Platform of £621,268.43 plus VAT, as set out in the third paragraph of this Notice, to be decided by an appointed Adjudicator in accordance with the provisions of the Subcontract for an Adjudication to be governed by the Scheme for Construction Contract (England and Wales) Regulations 1998 (as amended in 2011) and with the said Adjudicator to be appointed by the appropriate Adjudicator Nominating Body, and application will be made to the Royal Institution of Chartered Surveyors as per Clause 30(2) of the Subcontract."

13. On 30 October 2019 Ms Cattanach accepted nomination as the Adjudicator in the Dispute.

14. On 31 October 2019 Platform served its Referral Notice. This was accompanied by 14 lever arch files of documents.

15. Paragraph 7 asserted that ISG had repudiated the Sub-Contract:

> "Since entering into the Subcontract arrangement dated 24 January 2018 in a value of £52,391.20 and incorporating, but not limited to, the ISG Sub-Contract Conditions (Self Billing) as modified by mutual agreements, and as further substantially extended in scope and financial value by an ISG Variation Instruction to Proceed dated 12 April 2018 in the sum of £2,274,395.24 less 1% MCD, Platform have undertaken the Subcontract works until repudiations of the Subcontract by ISG, resulting in Platform rescinding the Subcontract on 18 January 2019."

16. Paragraph 13 set out Platform's position on the amount due to Platform from ISG:

> "This lever arch file contains introductory notes wherein Platform have submitted Applications for Payment throughout the progress of the works, in particular Application for Payment No. 11 dated 17 January 2019 for the period ending 21 December 2018 (the end of the further 42 week Subcontract period from 12

> April 2018) in the gross value of £2,148,893.42 less 1% MCD producing an amount due of £515,445.35 plus VAT, and subsequently Platform submitted Application for Payment No. 12 on 7 February 2019 for the period ending 18 January 2019 in the gross value of £2,191,318.62 less 1% MCD less previous payments to date by ISG of £1,548,137.00 producing an amount due of £556,186.27 and further, as a result of the repudiation of the Subcontract by ISG and the rescinding of the Subcontract by Platform, the retention amount of £65,082.16 is also considered due. Further, ISG have failed to respond to Platform's Valuation 12 Application, with neither a Payment Notice or Pay Less Notice, and therefore the whole amount due is £621,268.43 plus VAT (£556,186.27 plus retentions of £65,082.16). A spreadsheet schedule of summary difference is attached to the Notice of Adjudication, being the crystallised Dispute, as enclosed in Volume 14 at Tab 41."

17. Paragraph 35 of the Notice identified the Dispute as follows:

> "The current crystallised Dispute between the parties in terms of Platform's Applications for Payment, principally No. 11 dated 17 January 2019 and subsequently No. 12 dated 7 February 2019 in the gross value of £2,191,318.62 less 1% MCD and with payments to date by ISG of £1,548,137.00 producing a balance due to Platform of £621,268.43 plus VAT, as set out in paragraph 13 of this Notice, which produces the Dispute between the parties to be valued and decided by yourself as the appointed Adjudicator as sought in the Notice of Adjudication and in this Referral Notice in terms of the Redress sought."

18. The principal Redress sought was as follows:

> "1. That Platform are due the payment of the outstanding unpaid value of the Subcontract works from the Responding Party, ISG, in terms of measured works, variations, changes, additional preliminaries and additional expense costs of delays and the extended Subcontract period with reference to the Referring Party's Applications for Payment No. 11 dated 17 January 2019 and subsequently No. 12 dated 7 February 2019 as set out in the third paragraph of this Notice in the outstanding principal sums amounting to £621,268.43 plus VAT as set out in the attached spreadsheet of summary difference, being the crystallised Dispute, or such other sum or sums for the Adjudicator to so decide in respect of the outstanding unpaid financial evaluations in dispute, as set out in the documentation as aforementioned referred to in this Referral Notice."

19. ISG served its Response on 13 November 2019.

20. At section 3 of the Response, ISG challenged Platform's case that it (ISG) had repudiated the Sub-Contract. It contended that, on the contrary, Platform's purported rescission of the Sub-Contract was unlawful and that the Sub-Contract was validly terminated by ISG by a letter dated 24 January 2019.

21. At section 4 of the Response, ISG set out its case as to valuation on the basis that Platform validly rescinded the Sub-Contract.

22. At section 5 ISG set out its case as to valuation on the basis that Platform had not been entitled to rescind the Sub-Contract.

23. At paragraph 5.3.1 ISG said:

> "The Responding Party has calculated the amount that it would have been obliged to pay to the Referring Party had the Referring Party completed the sub-contract works. This is set out in Folder 1, tab 2 in the column headed "CTC (Includes for Omissions) – assumed Platform Cost to Complete". Had Platform completed all of the sub-contract works it would have been entitled to be paid a total of £2,404,634.66 and this would have been the total cost incurred by the Responding Party."

24. At paragraph 5.4 ISG made submissions under the heading "Actual ISG Costs to Complete". This

(1) Set out what ISG had paid Platform to date;

(2) Set out the costs which ISG had incurred post termination by Platform;

(3) Deducted the amount which ISG would have had to pay Platform had Platform completed its works (£2,404,634.66) from the total of (1) and (2), namely £2,791,196.74, producing a figure of £386,562.08 said by ISG to be due from Platform to ISG.

25. On 18 November 2019 Platform served its Reply to the Response. This energetically challenged the figures for Costs to Complete put forward by ISG. It concluded on the last page:

> "Summary of wrongful and erroneous deductions in the CTC Termination Section for Subcontractor Costs allegedly expended by the Respondent.
>
> "The above Summary commentary as supported by the detailed and marked-up attachments in the Appendices to the Reply for each of the above, identifies that of the £601,080.94 of these costs to complete, that there has been an astonishing over-claim by the Respondent of all these alleged erroneous costs of £601,080.94 and this is a further proven example that the Respondent's Response Claim is fundamentally and fatally flawed.
>
> "In conclusion when adding up all the particularised wrongful and erroneous deductions, these amount to £1,051,844.95 (£256,042.77 plus £194,721.25 plus £601,080.94) and adjust these against the wrongfully asserted negative value of the Respondent of minus £386,562.08, that produces a positive account value in this Termination Section of £665,282.87, which is effectively slightly more than the Referring Party's claimed amounts of £621,268.43 …."

26. Sent with the Reply to Response was a copy of the Response with comments added by Platform. In this document, below paragraph 5.3.1 of the Response, Platform said simply "Denied as being grossly incorrect and unfounded as set out in the Appendices".

27. Below each of the sub-paragraphs of paragraph 5.4 were short denials.

28. There then followed numerous pages of tables dealing with the details of the figures put forward.

29. Next, on 22 November 2019 ISG sent a Reply. This took the form of ISG making comments in red type below entries in Platform's Reply to the

Response. Beneath the passage which I have set out at paragraph 25 above, ISG said:

> "ISG maintains the calculation in the termination valuation subject to any revisals conceded in the comments in this letter. The Referring Party clearly does not understand the basis on which the termination valuation has been prepared, its comments ignore the evidence produced and its own concluding calculations are clearly erroneous and lack any credibility.
>
> "The Referring Party appears to suggest that the Responding Party has incurred little or no additional costs to complete. Despite the fact that a significant amount of work required to be completed following the date of termination."

30. In what I might describe as the running commentary which started with ISG's case as to the valuation on the assumption that Platform's rescission was invalid, ISG now stated in red (underlining in the original; bold added):

> "The Referring Party has completely misunderstood how the Termination Valuation has been prepared. The Referring Party has included numerous comments on the valuation of its works as at the date of termination (see Volume 1 – "Productions of the Termination Valuation"). That valuation of its works and in turn its comments are entirely irrelevant when one considers how the Termination Valuation has actually been prepared. What the Termination Value does is compare the <u>costs actually incurred</u> by the Responding Party to complete all of the works with the costs <u>which would have been incurred</u> had the Referring Party completed the works. **The actual value of work carried out at the date of termination is irrelevant on this analysis**. To further clarify matters the Responding Party has produced a further explanation of its Termination Valuation together with more detailed comments against individual items and supporting documentation in response to the Referring Party's comments where relevant. …."

The Adjudicator's Decision

31. On 11 December 2019 the Adjudicator issued her Decision.

32. She considered with care the competing cases as to whether Platform or ISG validly terminated the Sub-Contract. She determined that issue in ISG's favour,

holding that Platform had unlawfully purported to rescind the Sub-Contract. In consequence she resolved that ISG was entitled to terminate the Sub-Contract under Sub-Clause 27(1)(h) of the Sub-Contract Conditions because Platform was "in material or persistent breach" of the Sub-Contract.

33. On that basis, the way in which Platform had put its case was unsustainable.

34. Her decision as to valuation decided as follows:

> "11.22 I address each respective elements of the valuation in my spreadsheet at Appendix B. However, prior to this, I consider the correct method of valuing the termination valuation.
>
> "11.23 I find clause 27(3) states:-
>
> > *"…the Sub-Contractor shall be entitled to no further payment until completion of the Works by ISG or by others, and ISG need not pay any amount that has already become due…ISG shall, within 30 days of completion of the Works by ISG or others, notify the Sub-Contractor that they have been completed…"*
>
> "11.24 I have not seen no evidence of the Respondent having issued such a letter to ISG, however there appears to be no dispute that the Works have been completed.
>
> "11.25 Thereafter, I find that clause 27(4) states *"The Sub-Contractor shall within 14 days of being so notified, submit an application for payment for works executed by him to to [sic] the date of termination …"*
>
> "11.26 I find that no such application was issued by the Referring Party, however I do not find this unusual as the Referring Party considered it had validly rescinded the Sub-Contract. In any event, I find the Referring Party has, in essence, submitted such an application by way of its Application No. 12 which was issued following the invalid rescission.
>
> "11.27 As such, I find that the Referring Party's value of works at the date of termination is that of Application No. 12.
>
> "11.28 I concur with the Respondent that the termination valuation should be based upon the value of the works it would have paid to the Referring Party less the costs it has actually incurred in completing the works within the scope of the

> Referring Party's Sub-Contract. Furthermore, I find that the Referring Party does not advance any detailed arguments as to why this approach is incorrect.
>
> "*Value had the Referring Party completed the works*
>
> "11.29 As noted above, the Respondent values this in the amount of £2,404,634.66. I find the Referring Party's submission in respect of its counterclaim is unclear.
>
> "11.30 Based on the submissions before me, I find and value this in the nett amount of £2,506,096.38, all as set out in Appendix B to this Decision, which also includes my findings and reasoning in respect of such.
>
> "*Cost to Complete*
>
> "11.31 My detailed findings in respect of the actual costs to complete are set out in detail in my spreadsheet at Appendix C. By way of summary, however, I find and value the "Costs to Complete" assessment as follows:-
>
> "….
>
> "Total Costs to Complete £2,088,555.05
>
> "….
>
> "13.1 Firstly. In respect of payment, as above and my spreadsheets at Appendix B and C, I find that the Respondent is liable to make payment to the Referring Party in the sum of £417,541.33, as follows:
>
> "Assumed Platform costs to complete £2,506,096.38
>
> "Actual ISG costs to complete £2,088,555.05
>
> £417,541.33"

ISG's Reaction to the Decision

35. Having received the Decision, Platform's representatives wrote to ISG demanding payment of £417,541.33 plus VAT.

36. On 16 December 2019 responded:

> "Thank you for your emails of 12th & 13th December. We have received advice that the adjudicator's decision is invalid and

> unenforceable. Accordingly payment will not be made. Our solicitors will write to you under separate cover to set out the reasons for this position."

37. On 23 December 2019 ISG wrote to Ms Cattanach:

> "I refer to the above adjudication and your invoice dated 11 December 2019. I can confirm that we are arranging payment. For the avoidance of doubt payment of your invoice does not constitute agreement that your decision is correct nor does it constitute agreement or acceptance that your decision is valid or enforceable. Accordingly we full reserve all rights available to us to challenge the validity and enforceability of your decision and all rights available to us to resist any attempt to enforce the same."

38. On 9 January 2020, ISG's solicitors, Brodies, wrote to Platform:

> "We refer to the above matter and our client's email dated 16 December 2019 advising that the Adjudicator's Decision is invalid and unenforceable. We now write as indicated to set out the reasons for that position.
>
> "As you will be aware from the Decision the Adjudicator has decided that Platform invalidly rescinded the Sub-Contract and that ISG was accordingly entitled to terminate Platform's employment under the Sub-Contract. We have no difficulty with that element of the Adjudicator's Decision which is clearly correct.
>
> "In relation to valuation however the Adjudicator has made fundamental errors affecting the validity and enforceability of her Decision. In summary the Adjudicator has correctly reflected the parties submissions that valuations should be carried out in terms of Clause 27 of the Sub-Contract whereby Platform gets paid the value of work carried out less any loss caused to ISG as a result of the termination. What the Adjudicator has gone on to do however is determine that ISG has failed to prove any loss arising from the determination but rather has made a significant saving. She then appears to have simply awarded that saving in favour of Platform. No reasons are given as to why she felt such an approach or award was appropriate. Such an approach is clearly incorrect. Such an approach does not reflect the terms of Clause 27 of the Sub-Contract. Such an approach does not reflect the submissions of either party in the Adjudication. Such an approach fails to give any consideration whatsoever to the value of work actually carried out by Platform and whether it had any entitlement to payment of any further sums.

> "In the foregoing circumstances the Adjudicator has (1) failed to exhaust her jurisdiction in respect of the dispute referred; (2) breached natural justice in reaching her award based on a method of valuation advanced by neither party; and (3) failed to give adequate and cogent reasons for her decision on valuation. Accordingly, the Decision is invalid and unenforceable …."

The Present Proceedings

39. On 31 January 2020 Platform issued proceedings to enforce the Adjudicator's Decision. This was supported by a witness statement from Mr. Richard Wright, a director of Platform.

40. In opposition ISG filed a witness statement from Mr David Arnott, a partner at ISG's solicitors, Brodies. This was followed on 27 February 2020 by the Part 8 proceedings to which I refer in paragraph 3 above.

The Challenge to the Decision

41. The essence of ISG's challenge to the Adjudicator's Decision is contained in paragraphs 20 to 25 of the skeleton argument of Mr Patrick Clarke, who represented ISG on the telephone hearing before me:

> "20. At paragraph 11.27, the adjudicator appears to have made a fundamental error. ISG's valuation under Clause 27(5) was a valuation of a loss incurred by ISG as a result of the termination in accordance with Clause 27(5). Clause 27(5) does not provide for Platform to become entitled to any saving that ISG achieved by the termination of the Contract and neither party in the adjudication contended that that approach could be adopted.
>
> "21. The adjudicator's reasoning was followed through to her conclusion at paragraph 13.1, (which summarised the findings at paragraphs 11.29 to 11.31) as follows:
>
> "*13.1 Firstly, in respect of payment, as above and my spreadsheets at Appendix B and C, I find that [ISG] is liable to make payment to [Platform] in the sum of £417,541.33, as follows:*

> *"Assumed Platform costs to complete* *£2,506,096.38*
>
> *"Actual ISG costs to complete* *£2,088,555.05*
>
> *£417,541.33"*
>
> ""22. The adjudicator went on to award that sum to Platform.
>
> "23. As well as being contrary to any recognisable measure of the value of the work completed or loss or damage incurred by Platform as a result of the termination, the adjudicator's decision was not in accordance with the terms of the Subcontract. The adjudicator appears to have disregarded Clause 27(4) altogether and turned Clause 27(5) on its head, construing it as a clause that gives rise to an entitlement to Platform. More significantly for these proceedings the adjudicator's approach was one which was not argues and which was not contended for by either party.
>
> "24. It is not clear how the adjudicator came to conclude that Clause 27(5) might give rise to a sum due to Platform, the reasoning is not explained. ISG's position is that it is incapable of reasoned explanation in any event.
>
> "25. The adjudicator did not assess the value of the work carried out by Platform at all."

Waiver

42. Mr Choat, for Platform, takes a threshold point. He submits that by paying the Adjudicator's fees ISG waived any right to challenge the validity of the Adjudicator's Decision.

43. The applicable principles have been set out recently by Coulson L.J. in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ. 27; 182 ConLR 1, at paragraphs [91] and [92]:

> "91. In my view, the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the

> adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour. To that extent, therefore, I consider that the position in adjudication is rather different to that in arbitration, and, unlike Ramsey J, I am not persuaded that the reasoning in *The Marquess de Bolarque* and *Allied Vision* is of direct application to the general reservation of a responding party's position as to an adjudicator's jurisdiction.
>
> "92. In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:
>
> "(i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so 'appropriately and clearly'. If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (*Allied P&L)*.
>
> "(ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit (*GPS Marine*).
>
> "(iv) A general reservation of position on jurisdiction but may be effective (*GPS Marine*; *Aedifice*). Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:
>
> "(i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (*Aedifice*; *CN Associates*);
>
> "(ii) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including one not yet even thought of) could be kept open (*Equitix*)."

44. Mr Choat relied upon this decision particularly in respect of what Coulson LJ had to say about general reservations. He drew my attention to the following passage in the Editorial Comment in the Construction Law Reports report:

> "Most interesting is the position stated in respect of general jurisdictional reservations (those which do not take any

> particular jurisdictional point). The court has recognised that such reservations may in theory be effective. However, it has also been held that a general jurisdictional reservation will be ineffective if at the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them and the court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet thought of) could be kept open. Whilst this might sound like a limited scenario, in reality it is thought likely that the vast majority of general jurisdictional reservations will fall within this exclusion and therefore be ineffective. It is unclear why a party would make a general jurisdictional objection other than as part of an attempt to protect itself from as yet unthought of objections."

45. Thus, in this case, Mr Choat argues that payment by ISG of its liability in respect of the Adjudicator's fees amounted to a waiver of any objection to the validity of the Adjudicator's Decision, and that the reservation in ISG's email of 23 December 2019 (see paragraph 37 above) was an ineffective general reservation.

46. Before considering whether the reservation was or was not effective, it is necessary first to consider whether payment of the Adjudicator's fees was capable of amounting to a waiver, and then, if it would otherwise amount to a waiver, whether the reservation of rights in the 23 December email preserved ISG's rights.

47. In *PT Building Services Ltd v ROK Build Ltd* [2008] EWHC 3434 (TCC) a defendant in adjudication proceedings had paid the adjudicator's fees and also deployed the decision in question to encourage a second adjudicator to resign. Mr Justice Ramsey said in that case:

> "26. In my judgment the underlying decisions on election or approbation and reprobation, as applied in the context of adjudication, show that a party cannot both assert that an adjudicator's decision is valid and at the same time seek to challenge the validity of the decision. The party must elect to

> take one course or the other. By taking a benefit under an adjudicator's decision, the party will generally be taken to have elected a particular course and will be precluded from challenging the adjudicator's decision. In *Macob* the benefit was the claim to have the proceedings stayed to arbitration in relation to the decision. In *Shimizu* the benefit was the right to have the decision corrected under the slip rule …
>
> "29. PTB also relied on the fact that ROK had paid the Adjudicator's fees and had thereby elected to treat the Adjudicator's decision as valid. I do not consider that, in the absence of evidence to show that the payment was a mistake, the court can come to that conclusion as a matter of inference or otherwise, as Mr Lee sought to submit. Rather, the natural inference from the payment of the adjudicator's fees is that ROK intended to make payment in respect of a valid decision requiring such payment. Did that payment amount to an election? Mr Lee submits that it is difficult to characterise ROK's payment as amounting to ROK taking a benefit. There is strength in that point but, in my judgment, the taking of a benefit, whilst sufficient for there to be an election, is not necessary. What has to be determined is whether there has been an election. Objectively, a party who decides to pay a sum awarded against it in an adjudicator's decision does so in reliance on that decision being valid. I consider that, in the absence of any circumstances indicating to the contrary, by making that payment ROK elected to treat the adjudicator's decision on fees and expenses as being a valid decision, at least to that extent."

48. In *Wales and West Utilities Ltd v PPS Pipeline Systems GmbH* [2014] EWHC 54 (TCC); [2014] BLR 163, Akenhead J cited the above passages and said at paragraph [44]:

> "I draw from these cases and those upon which they are based the same broad conclusions. Not only did Wales pay the adjudicator's fees in relation to Adjudication No 3 it also paid the full amount awarded by the adjudicator. There was no reservation orally, in writing or by way of conduct. Wales of course always had a long-stop remedy which, in this case, was arbitration and it would be open to Wales to seek to recover the payment made in respect of the alleged compensation event. The adjudicator's decisions are only temporarily binding until confirmed or reversed by the arbitrator. In my judgment, Wales has elected by making these unqualified payments to treat the Adjudication No 3 decision as valid and enforceable and it cannot now challenge it, albeit that its rights in arbitration are such that they can seek to recover at least the payment for the

> compensation event in that forum; this subject of course to any available defence in the arbitration."

49. Thus there is strong authority that payment of an adjudicator's fees may amount to an election to treat an adjudicator's decision as valid, although I was not referred to any case where such payment on its own was held to amount to an election – thus in *PT Building Services Ltd v ROK Build Ltd* the challenging party had also deployed the decision in question to encourage a second adjudicator to resign; and in *Wales and West Utilities Ltd v PPS Pipeline Systems GmbH* the challenging party had also paid the full amount awarded by the adjudicator. So also in *Shimizu Europe Ltd v Automajor Ltd* [2002] EWHC 1571 (TCC) the challenging party had not only paid part of the sum awarded, but had also invoked the slip rule.

50. For the purposes of this judgment I proceed upon the basis that payment of an adjudicator's fees may amount to an election to treat an adjudicator's decision as valid, but it is important to keep in mind the question to which such an act may be relevant which is (as explained by Ramsey J. in paragraph 26 of his judgment in *PT Building Services Ltd v ROK Build Ltd*) whether such act shows that a party is to be taken to have elected to treat the decision as valid. As he further explained in paragraph 29 of that judgment, the question is what is to be inferred from such a payment.

51. The two cases from which I have quoted above were both cases where the payment of the adjudicator's fees was made without any reservation.

52. Thus, the question here is whether I should infer from the payment by ISG of the fees requested by the Adjudicator that ISG was electing to treat the Adjudicator's Decision as valid.

53. In my view it would be wrong to do so. In the passages from the judgment of Coulson LJ in *Bresco* which I have set out above it is clear that his principal target was the taking of general and unspecified objections to the jurisdiction of an adjudicator during the course of an adjudication rather than after the adjudicator has reached a decision. As he says in his judgment, if in the course of an adjudication the grounds of a challenge are left vague, neither the adjudicator nor the opposing party can properly consider the position. In the present case the main ground of challenge is a complaint of breach of natural justice – that case will either be made out in the course of enforcement proceedings or it will not. In a case such as this it is a complaint which only arises after the adjudication process has ended with the issue of the Decision. Thus this is a situation falling outside the situations with which Coulson LJ was principally concerned.

54. It also seems to me that a waiver by payment of an Adjudicator's fees is a different type of alleged affirmation from the other situations considered in the authorities. As a matter of policy, it seems to me that this court should not do anything to discourage payment to an adjudicator of fees for the adjudicator's work. Thus, where the alleged election is payment of an adjudicator's fees, the court should perhaps be particularly careful to see whether the inference should properly be drawn that the payer intended to treat the decision as valid.

55. In this case, as set out at paragraph 36 above, ISG's email of 16 December had made it clear that ISG regarded the Decision as invalid and unenforceable. Was there anything in the payment of the fees from which the inference can be drawn

that ISG had changed its mind? In my view, the answer to that question is clearly "No", not least from the terms of the email of 23 December.

56. For these reasons I hold that ISG has not waived such rights as it has to challenge the Adjudicator's Decision. In consequence, I must now turn to consider ISG's challenge.

ISG's Challenge

57. I have set out above the passages from Mr. Clarke's skeleton argument in which he sets out the grounds of ISG's challenge to the validity and enforceability of the decision.

58. There are three grounds of challenge:

(1) That the Adjudicator failed to exhaust her jurisdiction in respect of the dispute referred;

(2) That the Adjudicator breached natural justice in reaching her award on a method of valuation advanced by neither party;

(3) That the Adjudicator failed to give adequate and cogent reasons for her decision on valuation.

Failure to exhaust jurisdiction

59. In respect of this challenge, Mr Choat submits that "this challenge is little more than a different way of phrasing its second challenge". I think this is a fair comment, and I did not understand Mr Clarke to argue with any energy that if the natural justice challenge failed, ISG could succeed on this basis.

Breach of Natural Justice

60. In *AECOM Design Build Ltd v Staptina Engineering Services Ltd* [2017] EWHC 723 (TCC); [2017] BLR 329 Fraser J set out the principles which, in my judgment, I am required to apply in deciding this challenge:

> "42. In *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC) Edwards-Stuart J at paragraphs 22 to 28 identified the relevant approach of the court where it is said by a losing party that a point has been decided by an adjudicator that was not argued. In those paragraphs he cited with approval the judgment of Akenhead J in *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC); [2008] BLR 250 at paragraph 57(e). The whole of that latter paragraph is of relevance to this case, and states as follows where breaches of natural justice are alleged:
>
> > "57(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 not 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 any judge in a case such as this.
> >
> > "(e) It is only if the adjudicator goes off on a frolic of his 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 does not come back on the point, there is no breach of the rules of natural justice in relation thereto."

> "43. Edwards-Stuart J. also stated in *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC) at paragraph 24 that "there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator".
>
> "44. In my judgment, that latter passage of Edwards-Stuart J aptly summarises the position here. The adjudicator decided a point of importance on the basis of the material before her, and on a basis for which neither party had contended, and she was entitled to do so. The point was one of contractual construction….The adjudicator was perfectly entitled to reach the conclusion that she did …. She was not bound to accept only one of the two alternatives put to her by the parties. Questions of contractual interpretation in particular will often (if not usually) be capable of more than two possible answers, and so the correct answer (as the adjudicator may see it) may not have been expressly proposed by either one of the parties. That does not mean that by choosing a different answer, the adjudicator is breaching natural justice by failing to notify the parties of this and inviting further submissions. I reject the notion that an adjudicator in particular, with the very tight timescales that govern the process, must inevitably consult the parties again on her draft findings. Ms Chambers did not, in my judgment, go off on a frolic of her own in the Decision, of the type that Akenhead J was referring to in *Cantillon Ltd v Urvasco Ltd*. She simply chose what she considered to be the correct answer, which was not one of the two potential answers that had been urged on her, one by either party.
>
> "45. AECOM or its advisers may, upon receiving the Decision, have wished that they had put more comprehensive submissions to the adjudicator on the point concerning deductions, but that is not the same as there having been a breach of natural justice, still less a material breach, in this case. They plainly made submissions on the point in any event."

61. In this case the parties were agreed on the way in which the Adjudicator should approach valuation in the event that she determined that it was ISG, not Platform, that validly terminated the sub-contract. The problem appears to me to be that the result of that approach produced a result which I suspect neither

party had expected and which gives rise to the legal issues raised in the Part 8 proceedings as to the proper approach on her conclusions as to valuation.

62. That problem, if, after the parties have made their submissions in the Part 8 proceedings, it continues to be perceived as a problem, arises out of the Adjudicator applying the approach which both parties had suggested should be applied. It may well be that ISG now wishes that it had caveated that approach as to what should happen if it resulted in a flow of money from ISG to Platform, but that is not a ground for holding that there was a breach of natural justice.

63. Insofar as ISG complains that the Adjudicator failed to carry out a valuation of Platform's entitlement at the date of termination, Mr. Choat justifiably referred to the passage in ISG's submissions which I have set out in bold at paragraph 30 above.

64. In any event, I agree with Mr Choat in his submission in paragraph 59 of his skeleton that if the above analysis is wrong, as held by Fraser J in *AECOM* the Adjudicator was "entitled to decide a point of importance on the basis of the material before her, and on a basis for which neither party had contended."

65. For these reasons, I reject the principal ground of challenge put forward by ISG.

Failure to give reasons

66. The principles which I should apply in considering this head of challenge were set out by Akenhead J. in *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC); 127 ConLR 110 at paragraph [48]:

> "Bringing all these strains of judicial observations together, I conclude as follows. (a) The decision needs to be intelligible so that the parties, objectively, can know what the adjudicator has decided and why. (b) A decision which is wholly unreasoned but which is required to be reasoned is not a decision for the purposes of the Scheme or under contractual machinery which requires a reasoned decision. It would therefore not be enforceable as such. (c) Because the courts have said time and again that the decision cannot be challenged on the grounds that the adjudicator answered the questions, which he or she was required to answer, wrongly, the fact that the reasons given are, demonstrably or otherwise, wrong in fact or in law or even in terms of emphasis will not give rise to any effective challenge. (d) The fact that the adjudicator does not deal with every single argument of fact or law will not mean that the decision is necessarily unreasoned. He or she should deal with those arguments which are sufficient to establish the route by which the decision is reached. (e) The failure to give reasons is not a breach of natural justice. (f) The reasons can be expressed simply. If the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them, it will not be a reasoned decision. (g) Adjudicators are not to be judged too strictly, for instance by the standards of judges or arbitrators, in terms of the reasoning. This reflects the fact that decisions often have to be reached in a short period of time and adjudicators are often not legally qualified. It certainly reflects the fact that there has not been a full judicial or arbitral-type process. (h) The fact that reasoning in a decision is repetitive, diffuse or even ambiguous does not mean that the decision is unreasoned."

67. Applying those standards, I have no hesitation in rejecting this head of challenge. The Adjudicator made clear in her decision how she had arrived at her conclusion – whether she was or was not right as a matter of law is not the question.

Conclusion

68. For the above reasons I reject the challenge to the validity of the decision. I will invite submissions as to the order I should make given the imminent hearing of the Part 8 proceedings.