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

No. HT-2020-000003

[2020] EWHC 847 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL
Wednesday, 11 March 2020

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

FLEXIDIG LIMITED — Claimant

- and -

M&M CONTRACTORS (EUROPE) LIMITED — Defendant

Mr Rupert Choat (instructed by Gateley Plc Solicitors) appeared on behalf of the Claimant

Mr Carlo Taczalski (instructed by Schofield Sweeney, Solicitors,) appeared on behalf of the Defendant.

JUDGMENT

MR JUSTICE WAKSMAN:

INTRODUCTION

1 I have before me an application for summary judgment to enforce the decision of the adjudicator dated 29 December 2019. By that decision, he awarded to the subcontractor, Flexidig Limited ("Flexidig"), and as against its employer, M&M Contractors (Europe) Limited ("M&M") the sum of £223,597.21 plus VAT, plus interest, plus its costs of the ICE nominating fee. The adjudicator's fees of £15,000 he also ordered to be paid by M&M ("the Enforcement Application"). That application is resisted on a number of grounds by M&M. However, I also have before me M&M's application to dismiss Flexidig's claim altogether on the basis that (a) it has not been served correctly as a matter form, and (b) this court does not have substantive jurisdiction to hear the claim anyway. That application ("the Jurisdiction Application"), is in its turn contested by Flexidig which, to the extent necessary, seeks (a) permission to serve M&M out of the jurisdiction and (b) an order for alternative service or to dispense with the service altogether.

2 The adjudication which is the subject of the Enforcement Application ("the Adjudication"), is the fourth between these parties. Their disputes arise out of Flexidig's role in carrying out civil works associated with a new Virgin Media underground infrastructure in Louth, Lincolnshire ("the Works"). The infrastructure was a network to facilitate delivery of fibreoptic broadband to people's homes. M&M is a company incorporated in Northern Ireland. It must follow from the Jurisdiction Application, if it succeeds, that I would have no power to entertain and decide the Enforcement Application.

3 Both applications were listed to be heard by me at the same time as indeed they were on Monday, 9 March. I heard argument on the Jurisdiction Application first and then immediately, and without prejudice to M&M's position on that, as it were, the substantive Enforcement Application. I propose to deal with those matters in the same order here. I will, however, set out the salient background facts first. Before doing that, I should record that I have the following evidence before me. First of all, the witness statement of Mr Van Gelder, solicitor with Gateley on behalf of Flexidig in support of the Enforcement Application dated 6 January. Secondly, the first witness statement of Ms Anderson on behalf of M&M opposing it on 21 February 2020. Then a second statement from Mr Van Gelder dated 28 February, a first witness statement of Mr Lloyd dated 31 January, a second witness statement of Ms Anderson dated 4 March, and then a third witness statement of Mr van Gelder on 5 March and the second witness statement of Mr Lloyd, a director of M&M, of 6 March.

BACKGROUND FACTS - THE CONTRACT

4 The written subcontract between the parties dated 9 March 2017 ("the Contract") provides, among other things, as follows, going first to clause 28 headed "Adjudication":

> "(1) Where the Act applies, every party shall have a right to refer a dispute to adjudication at any time;
>
> (2) Either party may give notice to the other at any time of its intention to refer a dispute to an adjudication. Such notice shall be in writing and clearly headed 'Notice of adjudication' and include details of the subcontract, the issues which the adjudicator is being asked to decide, details of the nature and extent of the redress sought, and the grounds on which it is sought;
>
> (3) Within seven days of a party giving a notice of adjudication, an adjudicator shall be appointed and dispute referred to the adjudicator for determination."

5 Sub-clause (5) says:

> "The decision of the adjudicator shall be binding until the dispute if finally determined by legal proceedings in the Northern Ireland court by arbitration or by agreement."

6 M&M does not rely on that sub-clause for present purposes. I then go to clause 30 headed "Notices":

> "Any notices that are given under clause 13 or 28 shall either be delivered personally or by recorded delivery post. Any such notice shall be deemed to have been served, if personally delivered, at the time of delivery or posted at the expiry of 48 hours after posting."

7 There is a set-off clause in clause 33:

> "M&M may deduct, retain, or set off damages, costs, charges, *et cetera* due from or payable by the subcontractor, Flexidig, arising out of the subcontractor."

8 Finally, clause 40, "Governing law":

> "The subcontract is subject to the laws of Northern Ireland and the parties agree to submit to the jurisdiction of the Northern Irish courts."

9 It is common ground that for present purposes, this is a non-exclusive jurisdiction clause.

EARLIER ADJUDICATIONS

10 The works were completed in 2018. M&M contends that they were defective. The first adjudication was brought by Flexidig in respect of reinstatement and by a decision given on 16 August 2018, the adjudicator awarded around £184,000 to Flexidig. On 23 August, M&M issued a writ against Flexidig in Northern Ireland in respect of that adjudication seeking a declaration that the adjudicator did not have jurisdiction to reach its decision that it should be set aside in full and declared to be of no effect and that the decision was made in breach of natural justice, and/or abuse of process, and should be set aside in full and declared to be of no effect.

11 Those proceedings were never progressed by M&M. That is probably because on 7 September, Flexidig issued proceedings in Northern Ireland to enforce the first adjudication. That ultimately led to a judgment of Horner J to enforce on 13 December 2018. In the meantime, on 25 October, M&M had commenced an adjudication against Flexidig seeking in excess of £1.5 million by way of damages for defects in the works and repayment of the sums said to be overcharged by Flexidig.

THE SECOND ADJUDICATION

12 That led to a decision by the adjudicator, Mr Baldwin, dated 13 December, to award to M&M the sum of £462,456. He described this award as in respect of an "on account sum". Flexidig has not paid it.

13 On 21 December 2018, M&M issued proceedings in the High Court in Northern Ireland to enforce the second adjudication position.

14 On 7 January, 2019, M&M sought summary judgment in respect thereof.

15 On 10 January 2019, the parties agreed a stay of the Northern Ireland proceedings to try and resolve their differences. That did not happen and on 6 September 2019, the stay came to an end.

16 On 2 December 2019, Horner J enforced the second adjudication decision to the extent of £12,000-odd only. This was on the basis that there was no contractual provision for a payment on account. In the meantime, Flexidig had commenced a third adjudication but this was later stayed.

THE PRESENT DISPUTE AND ADJUDICATION

17 I now turn to the dispute and adjudication in issue before me.

18 On 26 September 2019, Flexidig made an application for payment number 70 ("the AFP") in the sum of £2,507,481 and VAT. Of that sum, M&M paid £1.742 million plus VAT leaving £673,374 plus VAT owing according to the AFP. The due date for payment of the latter under the Contract was seven days afterwards, namely 3 October. The Contract provided for a payment notice from M&M also within seven days setting out the sum it considered should be paid and the basis on which it was calculated. No notice of any kind was served by 3 October. However, on 9 October 2019, M&M first of all sent this letter referring to the sum of about £673,000 saying:

> "We consider the amount due against this application is zero. The notified sum has been calculated on the basis that M&M dispute Flexidig's submitted measurements used to calculate the application. Furthermore, the works completed by Flexidig have been inspected. The cost of making good the defects has been valued at £1,504,598 and this figure has been submitted to your office previously. Once you have made good the defects and the works signed off by my client, we will evaluate the final account for the project. Please confirm receipt of this formal contract notification."

19 Then there is a document attached to that which refers to the claim for £673.000 saying that this was held back from the invoice, as the costs of making good the defects exceeded the value of what was being claimed. It refers again to £1.5-odd million and then refers to the counterclaim, as it were, to bring it to zero of £673,374. However, there was no actual breakdown in those documents of the sum withheld, i.e. the whole of the outstanding AFP or the underlying sum of £1.5 million. On the other hand, it was correct that M&M had previously submitted a claim for the £1.5 million which was broken down. Indeed, it was that claim that led to the second adjudication in which Mr Baldwin awarded the lesser sum of about £462,000. It is common ground that by reason of section 110B(4) of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"), the AFP stood as a payee/default notice and any pay less notice in respect thereof had to be served by 27 October setting out the sum which M&M contended was due on the basis of its calculation.

20 In the light of M&M's non-payment, Flexidig commenced the Adjudication by a notice of adjudication attached to a covering letter dated 20 November 2019. The underlying notice itself is dated 22 November though it is common ground it was created by no later than 20 November so as to accompany the letter bearing that date. It is further common ground that the notice was received on 22 November and certainly no earlier.

21 The dispute was summarised in the notice of adjudication thus beginning at paragraph 20. It stated that the AFP had been made for £2.5 million and £1.7 million had been paid, and therefore the balance was £673,000 and then stated in paragraph 21 that the due date was 3 October. There had been no compliant notice by 3 October. Paragraph 24 refers to the letter of 9 October saying it set out no basis of calculation. It was accompanied by a further sheet for defect rectification and again no details of the breakdown.

22 Paragraph 25 asserts that the application for payment for the AFP stood as the payee default notice and fixed the notified sum in the absence of a valid pay less notice. The final date was 30 October. Any pay less notice had to be issued by then setting out the basis of calculation. No such notice had been issued. Therefore, the notified sum of £673,000 was due.

23 At paragraph 28, it said that was sought was damages for breach of contract in M&M failing to pay the notified sum, the sum of £673,000, or "such other sum as the adjudicator finds is due from M&M."

24 It is further common ground that the referral was made by no later than 29 November 2019.

25 In the Adjudication that followed, there were the usual exchanges of submissions and I refer to the salient parts of them as follows. First of all, in M&M's response dated 9 December 2019 and in relation to the validity or otherwise of the pay less notice, paragraph 25(3) stated that that notice had set out: the parties; the Contract details; the date of the application for payment; a description of the sums claimed; and the grounds, namely £673,000 that had been held back from the invoice as the cost of making good defects presently estimated at £1.5 million. Paragraph 26 said that the contention by Flexidig that the pay less notice was non-compliant was incorrect and disingenuous.

26 Then paragraph 27 quotes from a decision of Coulson J, as he then was, in *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC) that a pay less notice would be construed by reference to its background to see how a reasonable recipient would have understood it and the court would not be impressed by over-technical analysis. Paragraph 28 said the notice not only set out the sum that M&M considered due but the basis on which the sum was calculated and there was no question that it was valid, and therefore Flexidig was not entitled to the sum claimed in the notice of adjudication.

27 In addition, M&M contended that the underlying AFP itself, the payment notice dated 26 September, was itself invalid. In its reply dated 12 December 2019, at paragraph 4, Flexidig said:

> "Flexidig has provided all necessary information in support of its referral to allow a merits-based value of the AFP. Accordingly, characterisation of this reference is purely a "smash and grab" is plain wrong. If the adjudicator decides the pay less is valid, there is jurisdiction to make a merits-based assessment of the AFP and order the payment of that assessed sum. M&M has made no attempt to address the value of the AFP at all."

28 That, in its turn, elicited this response from M&M in its rejoinder dated 17 December 2019 that, first of all, Flexidig has referred a technical dispute concerning whether M&M has submitted a valid pay less notice. The reason Flexidig now contends that the adjudicator has jurisdiction to make an assessment of its purported application for payment is because Flexidig is aware that M&M has served a valid pay less notice in respect of a purported application and the effect of this unavoidable fact was fatal to the referral claim. In paragraph 16, it stated that the scope and extent of the adjudicator was strictly limited to the dispute defined in the notice of adjudication, namely whether M&M had served a valid pay less notice. Nowhere in the description of the dispute or in the referral notice is there a single word concerning an assessment of the true value of the AFP application nor is the adjudicator advised that he grant redress in relation to any such issue.

29 On 18 December, at 11.31 a.m., the adjudicator emailed both parties to ask if they wanted him to give reasons for his decision. Almost immediately, M&M responded to say that it did. As for Flexidig, it sent an email at 5.46 on 18 December as follows:

> "We would also like reasons for your decision. We should, however, bring the attached correspondence to your attention. As set out in M&M's earlier correspondence, M&M maintains there are £1,504,598.49 in defects but provides no evidence. The purported withholding pay less notice seeks £673,374.18 but provides absolutely no breakdown. The attached letter demanding money from Flexidig claims £247,675.56 with no breakdown. It appears that M&M is plucking figures out of thin air to try and shore up its cashflow position rather than have any genuine counterclaim to make that has any proper substantiation, precisely the wrong identified in a document written by Sir Michael Latham which was the genesis of the Act."

30 The attached letter, which the adjudicator had not previously seen, was dated 10 December from M&M's Irish solicitors, Mcildowies, which says that their client had provided Flexidig with a comprehensive assessment of the defects:

> "Our client is currently undergoing the process of remedying the defects and, to date, has spent £247,000. Clause 6 of the Contract allows M&M to deduct any costs or expenses as a result of making good any subcontract works. The purpose of the letter was to advise of our client's intention to recover those sums and put you on notice that unless it is fully paid by return, we have instructions to issue legal proceedings."

31 So Flexidig was maintaining its position that the pay less notice had no valid breakdown and, in effect, the claims deduction was artificial at best. The adjudicator, obviously having read the 10 December letter, then sent a further email on 19 December saying he would provide reasons for his decision. He refers to the email of the previous day from Gateley making further comment on the matters of dispute and the letter attached of 10 December. He said that if M&M wished to respond to that email, it may do so by no later than tomorrow, 20 December. In any event, he asked M&M to provide the following documents: a copy of the comprehensive assessment of the defects identified which has already been provided to Flexidig and, secondly, if different, the makeup of the figure of £1.5-odd million which had previously been submitted to Flexidig's offices as stated in M&M's latter to Flexidig dated 9 October which was already part of the documents.

32 In response to that, Flexidig wrote on 19 December:

> "We acknowledge your email. Without.. any disrespect to your directions, we sent an email to you to a data room holding the information you request…. We should make you aware of the surrounding legal context. The alleged defects were generated in September 2018 and were the subject of the adjudicator's decision… He came to a markedly different conclusion. [, that is because he had awarded £462,000-odd.] In any event, we attach a sealed order from Mr Justice Horner, the court determining that apart from £12,679.52, Mr Horner's decision was unenforceable. Flexidig has attended to defect rectification for the past 15 months. This was made difficult because M&M's principal contractor withdrew the site set up and stopped applying for permit, thereby preventing Flexidig doing any defect rectification work. Between February and May this year, Flexidig did manage to do some works which significantly reduced the number of defects. It had to take over the principal contractor role. From June onwards, M&M refused to apply for any further permit to allow Flexidig to perform any further defect rectification works and, instead, in breach of contract employed others to undertake those works."

33 M&M's response came the following day, on the 20th, and it says this:

> "The proposition now advanced by Flexidig at this late stage is that the sum for defective works, which is the subject matter of a valid pay less notice, has been be artificially reached by [M&M]. [Flexidig] hopes that by raising such contention, the adjudicator will find the pay less notice submitted on time and in accordance with the terms of the Contract…is invalid. In effect, what the referring party is advising the adjudicator to do is to make an assessment of the true value of the works, i.e. the defects. The adjudicator is reminded of the scope and extent of his jurisdiction confirmed by notice of adjudication. The adjudicator did not have the necessary jurisdiction to make any assessment. Any decision which does so will be unenforceable. It is respectfully submitted that submissions by the parties have fully settled the fact the Responding Party [M&M] issued a valid pay less notice which operates as a full defence to the dispute referred... Any entertainment of the value of defective works is outwith the scope of this dispute and the adjudicator's jurisdiction. Please see attached assessment of defects which was provided to the referring party more than one year ago. This was the estimated costs last year of remedying the defects. Notably, further defects have now been identified .
>
> The letter issued to M&M on 10 December relates to the costs incurred by M&M to date. There remains approximately 2,000 defects to be corrected. While it is M&M's position that it is not necessary to make any further submissions on this latterly raised contention, or provide further documents on the issue of defective works, the adjudicator is asked finally to note that Flexidig has manifestly misrepresented the issue in what

> can only be considered a last ditch and disingenuous attempt to mislead the adjudicator. The issue of the value of defective works has been the subject of a number of adjudications, in fact, one, that before Mr Broadman, and they have been referred to the High Court of Justice for enforcement under the relevant provisions.
>
> It is correct to state that in the most recent of those hearings, the learned judge held that the adjudication was unenforceable save for £12,000. What Flexidig has not revealed is that the judge further stated the parties should commence a further adjudication on the merits to determine the true value of M&M's defective works. The commencement of that adjudication is now imminent and Flexidig acted in bad faith by not disclosing this to the adjudicator. The adjudicator is therefore invited to reach a decision to refuse the requests sought and if Flexidig wishes to establishes a true value of the works, it would be open to do so in the context of the impending adjudication"

34 And there the matter rested.

THE ADJUDICATION DECISION

35 The decision was given on 29 December. For reasons I do not need to rehearse, the adjudicator found that the AFP was a valid payment notice. He then turned to the pay less notice. First, he found it was ineffective insofar as it challenged the measurements used by Flexidig for the AFP because there was no explanation for the zero amount that M&M said was due in respect thereof. As to the key section beginning at paragraph 6.29, I have set it out verbatim in the Annex to this Judgment. But I paraphrase what it says below.

36 He said, having referred to a letter and having had documents relating to the assessment of the defects, that there was a substantial amount of information and, in his view, the pay less notice, taken with its reference to all of these documents, was more than sufficient to provide an agenda for adjudication of the true value of the defects, i.e. it was valid. He then went on to say in paragraph 6.32 that there was no breach of contract that could entitle Flexidig to recover damages. It was not entitled to recover damages of the £673,000. Then under the rubric of "some other sum" due from M&M, he noted in paragraph 6.34 the reference to such other sum as the adjudicator finds due. He noted what Flexidig had said in its reply about a merits-based assessment which I have set out. He also noted, as I have set out, at paragraph 36, that M&M strongly refuted the proposition that he should assess the true value of the AFP and he agreed on that point.

37 However, in 6.37, he said, he believed that without deciding the true value of the AFP, there was still jurisdiction to decide whether the amount to be paid should be greater than the sum specified in the pay less notice which here was zero. He said he derived that from section 118 (9) of the Act which he said applied where, among other things, a notice under subsection (3) was given in accordance with the section but on the matter being referred to adjudication, the adjudicator decides that more than the sums specified in the notice should be paid.

38 At 6.39, he said that in the referral, the £1.5m figure which M&M had estimated as the cost of defects was the same as that used in the second adjudication where the on-account sum was £462,000. At 6.40, he referred to the fact that M&M had said they had spent £247,000 to date- that was the 10 December letter. Then in the next paragraph, he refers to how he had been provided with a copy of the previous adjudicator's decision. He then goes on to say he had been provided with the order of Horner J and that it had been acknowledged that the only sum held enforceable was £12,000-odd. He then said at 6.44:

> "6.44 The question for me is not the true value of the defective works. What sum is M&M entitled to owe from the AFP? In December 2018, Mr Baldwin had assessed an estimated amount of £462,000 odd taking account of

estimated future costs but Mcildowies, letter of 10 December indicates an expenditure to date of only £247,000.

6.45 I am satisfied that M&M is entitled to withhold money for the estimated costs of making good the defective works but consider that the maximum amount relates to the £462,000-odd less the £12,000 already awarded. I calculate the amount to be £449,776.98 excluding VAT and stress it is only an amount to be withheld from the AFP pending an assessment of the true value of the defective works by separate adjudication or agreement of the parties. Then withholding the 449 from the 673 left the sum due of £223,00-odd."

39 Then he refers to the directions for payment for which provision is made in section 118 (9) of the Act and therefore says the date for payment should be 6 January He decided, therefore, that the sum due is £223,000. He then made provision for payment by M&M of interest and costs and his fees as I have already recounted.

40 That decision elicited further correspondence. On 30 December, Flexidig's solicitors wrote that the adjudicator should reconsider his decision and make a change under the slip rule. They referred to the order of Horner J who enforced only up to £12,000. It made clear Flexidig bears no liability for the £462,000 as a hypothetical on account payment for which the Contract made no provision. So as to the comply with the court's decision, the adjudicator could not use that figure as an assessment of defects. The only evidence he had was the £247,000 and, even then, there was no breakdown. It was dangerously vague. Accordingly, he was invited to amend the decision either to make no set-off for defects at all - in other words, he should award the full sum claimed by Flexidig - or, alternatively, make a lower allowance of £247,000.

41 The Adjudicator responded to that the following day where he says this. He refers to clause 22A of the scheme and the power of the adjudicator to correct the decision where a clerical or typographical error or ambiguity arose by accident or omission. He said that Flexidig's suggested amendment cannot be categorised as a clerical or typographical error or ambiguity. He was not going to change his decision. In any event, he did not accept the premise of Mr Van Gelder's argument that he could not take account of Mr Baldwin's assessment in considering what he had to decide was an appropriate amount to withhold. He had made no determination of the true value of any liability that Flexidig might have of the making good of defects. He has made no order for Flexidig to pay M&M anything in that regard. So he has not acted in any way in contradicting a court order and he had made no assessment of the true value of the works carried out by Flexidig in the AFP. These would be determined by separate adjudication or agreement between the parties.

42 Subsequently, on 2 January, Mcildowies wrote on behalf of M&M saying that they considered the adjudicator had exceeded his jurisdiction or erred in law in reaching a de facto valuation of the client's application for payment under number 70. The dispute before the adjudicator was whether a valid pay less notice had been served in respect of the payment application. The adjudicator determined that a valid pay less notice been issued. It was wrong in law and in breach of natural justice, and outwith the scope of the adjudicator to award any sum:

> "Please confirm by return that you agree the decision of the adjudicator is null and void and, as such, is unenforceable failing which we hold an instruction to commence legal proceedings to seek a declaration in that regard."

THE PROCEEDINGS HERE

43 I preface this by first referring to what happened in Northern Ireland on 3 January in the High Court there. M&M there did issue what, on the face of it, appears as a pre-emptive strike, being a claim form against Flexidig in similar terms as that which has been issued in relation to the first adjudication. It reads as follows:

> "A declaration that the adjudicator did not have jurisdiction to reach his decision dated 29 December 2019. The said decision was given in breach of natural justice or an abuse of process. The decision was wrong in law and should be set aside as a whole."

44 Subsequent to that, Flexidig's solicitors in Northern Ireland issued a challenge to the jurisdiction following a conditional appearance to the writ in Northern Ireland which was dated 27 January 2020 signed by Flexidig's Northern Irish solicitors who gave their address for service. Here in England, Flexidig issued a claim form with the particulars of claim attached so as to enforce the Adjudication on 6 January. It was not possible under the rules to have issued them any earlier. The adjudicator's decision for payment said that the payment had to be made by 6 January.

45 I now turn to the history of service, which is important. On 6 January, Flexidig emailed Mr Lloyd, a director of M&M, with copies for the unsealed claim form and the application notice to enforce. On 7 January, Flexidig's solicitors emailed the sealed claim form and other documents, including the present application notice to enforce, to Mr Lloyd again who passed it to M&M's lawyers who wrote back saying that the English proceedings should be withdrawn. Those documents were also sent by post on 7 January. On 17 January, M&M filed an acknowledgement of service here contesting jurisdiction and saying that they did not accept service by email. Also on 17 January, Flexidig sent further copies of the proceedings to M&M's lawyers and also sent them to M&M by post at its Belfast office. The Jurisdiction Application was made by M&M on 31 January. I can now turn to each of the two applications before me.

THE SERVICE POINT

46 Although Flexidig maintains that M&M is domiciled not only in Northern Ireland but here in England as well (see below), Flexidig has thus far acted as if it was domiciled in Northern Ireland. This meant that it was the Civil Jurisdiction and Judgments Act 1982 which would govern intra-UK proceedings if it could show that this court had substantive jurisdiction. It could then serve these proceedings on M&M without the permission of the court. The route to this would be CPR 6.32. The other route would be to seek permission from the court to serve out and that is 6.37. CPR 6.32, in its material parts, reads as follows:

> "the claimant may serve a claim form on a defendant in Scotland or Northern Ireland where each claim is one which the court has the power to determine under the 1982 Act and:
>
> "(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom...and
>
> (b) (i) the defendant is domiciled in the UK;
>
> (ii) the proceedings are within paragraph 11 of Schedule 4 to the 1982 Act…."

47 For those purposes, it is common ground that the English court would have substantive jurisdiction to hear the claim because of the fact that England is the place of performance of the Contract. As for the requirement of domicile in the UK, again, that much is common ground. However, M&M contends that by virtue of the proceedings commenced in Northern Ireland on 3 January, there

were proceedings "concerning the same claim" in another part of the UK for the purpose of CPR 6.32(1)(a).

48 Flexidig accepts that the Northern Ireland proceedings were commenced prior to any possible act of service of the claim here, nor does it take the point that the mere issue of proceedings in Northern Ireland was not enough. As it happens, Flexidig were served with them at some point early the following week. Rather, Flexidig says that the Northern Ireland proceedings did not concern the same claim. That is not because they were a claim for a negative declaration. That would inevitably follow in any claim made by M&M about this adjudication since it did not bring the Adjudication and nor was it the beneficiary thereof.

49 The case-law establishes that a claim elsewhere, which is the mirror image of the claim in the instant court, is sufficient but Flexidig contends that the Northern Ireland writ is too vague and too boilerplate to amount to a real mirror image of the claim here. I have some sympathy with that argument. Not a great deal of thought can have gone into the Northern Ireland writ. First, it alleges abuse of process and error of law which not only would not be legitimate challenges to an adjudicator's decision but they were never pursued as points here. Secondly, the grounds for the jurisdictional challenge have changed over time and the only constant now is that dealing with the ability of the adjudicator to make an award notwithstanding the finding of a valid pay less notice as to which see below. None of that casts M&M in a very attractive light although it is right to say that, of course, they had made some reference to forthcoming proceedings in the letter of 2 January. Notwithstanding that, it does seem to me to be a pre-emptive strike as its earlier writ had been to try, in my view, and get in first.

50 All of that said, however, the fact is that it is directed to the Adjudication here and it is the opposite to the claim for enforcement here. It is seeking non-enforcement thereof. Not only is it about the same adjudication but it does at least cover the jurisdiction and natural justice arguments pursued here which M&M did intimate very shortly afterwards in the sense of what it said in its letter of 2 January. Initially, it had seemed to me that if M&M did not serve its particulars of claim on Flexidig's Northern Ireland solicitors as it was due to do yesterday, that factor might itself cause the proceedings no longer to be pending but (a) apparently it did and (b) and in any event, there is at present something of a block on those proceedings anyway by reason of Flexidig's extant challenge to jurisdiction there. In all those circumstances, I am of the view that the Northern Ireland proceedings <u>are</u> pending for the purposes of 6.32. On that basis, the gateway for service without permission is not available.

51 Since that is so, the alleged breach of the requirements of 6.34, namely Flexidig's failure to provide the usual Form 510 with the claim form stated the grounds on which it was entitled to serve out without permission does not arise.

52 I therefore turn to CPR 6.37. In cases governed by the Recast Brussels Regulation, i.e. proceedings between member states of the EU, regulations are a complete code for service out. If the Regulation does not permit the claimant's attempt to serve out on an entity in another Member State, the claimant cannot then have recourse to the common law bases for service out as preserved by CPR 6.36 and 6.37, and paragraph 3.1 of 6PD. However, it is common ground that the same is not true where it is about intra-UK parties.

53 The first point to note is that the permission to serve out, which may be obtained here, has not yet been granted. Since Flexidig does not propose to serve these proceedings all over again, which would be somewhat pointless since everyone is here including for the *de bene esse*, if I may describe it, hearing of the Enforcement Application. However, because it does not propose to serve again, Flexidig must ally any permission to serve out under 6.37 in principle with its further

applications under 6.15 and/or 6.16. The application under 6.37 is dated 5 March supported by a third witness statement of Mr Van Gelder. By the same application notice, Flexidig seeks permission to amend the particulars of claim. This is because originally, they sought the full sum of the AFP, i.e. £673,000 even though the adjudicator only awarded £223,000. In truth, in my view, the claim for a larger sum in these enforcement proceedings is misconceived and to the extent that has now been recognised by reducing the claim to £223,000 and put right, I cannot see that this amendment is objectionable. That is, of course, subject to whether I proceed with the Enforcement Application at all.

54 To return to the question of service, the recent application notice is formally defective in the sense that it does not comply with 6.37(a) or (b). However, in my view, that defect should be waived. This is because (a) it is common ground that the court would have jurisdiction under paragraph 3.17 or paragraph 6(a) of 6PD dealing with the performance of the Contract here and (b) Flexidig had already deposed to its belief that there was a good claim here by reason of its earlier witness statements made in support of the Enforcement Application, i.e. on the basis of summary judgment. I should add so far as addresses are concerned, referred to in 6.37(3), the address of M&M in Northern Ireland is not in dispute and Flexidig has already communicated the proceedings to it there.

55 The real battle ground in my view is over the requirements subparagraphs (3) and (4) of 6.37 which say as follows:

> "(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.
>
> (4) In particular, where –
>
> (a) the application is for permission to serve a claim form in Scotland or Northern Ireland; and
>
> (b) it appears to the court that the claimant may also be entitled to a remedy in Scotland or Northern Ireland, the court, in deciding whether to give permission, will –
>
> (i) compare the cost and convenience of proceeding there or in [this] jurisdiction..."

56 Flexidig contends that this forum requirement is easily made out and M&M contends the opposite. I bear in mind that Flexidig bears the burden of proof on these matters. In my view, the forum requirement is clearly made out by Flexidig for the following reasons. Firstly, the Contract was performed in Louth, England. To the extent that Flexidig may return to the site to deal with defects or any other outstanding work - at present it says it cannot do so due to M&M's actions - then that is ongoing. Secondly, while I do not accept that M&M is strictly domiciled here (see below), it certainly has had and has a significant presence here. On any view, at least until 2017, it had an office and yard in Bristol still shown on its website, although M&M says it no longer has this, and the continued reference on the website to the Bristol location is a mistake. However, in addition, M&M is currently working at other sites as well.

57 In the letter from Gateley dated 7 March, it outlined the following. First of all, it noted the obligations on M&M by reference to the Construction, Design, and Management Regulations to provide certain facilities on site and it would seem that it had that obligation, whether it had distributed all of its work via sub-contracts (which I do not know), or not. However, apart from those facilities, it also says that M&M is currently working on the construction phase of the following projects: excavation works to allow fibreoptic cables for Virgin Media in Carnforth, Lancashire; construction of a fibreoptic network for Facebook at Whitley Bay; work for SSE, the

energy company, at multiple sites at Bournemouth University, Portsmouth, Chichester, and Wokingham; and in relation to each site, M&M must have a licence and is obliged to provide various forms of facilities. It also refers to another yard or office near Southampton with a postcode of SO16 0YD.

58 In those circumstances, the fact that M&M's registered office is in Northern Ireland counts for little or nothing. The same is true for the non-exclusive jurisdiction clause. Moreover, I doubt very much that the claim involves any difference between England and Northern Ireland law. Here, the proof of the pudding is in the eating. I now have heard the Part 24 claim and no question of Northern Ireland was raised at all. It is true that M&M did seek to enforce the second adjudication in Northern Ireland and Flexidig had enforced the first one there but I do not regard that as particularly important. Flexidig is entitled to take a different view by the time it got to the fourth adjudication and the prospect, as the documents suggest, that there are going to be yet further adjudications down the line or concerning this contract which was performed in England. So far, all the adjudications that have been done have been done under the 1996 Act, not the Northern Ireland order, and they have been done in England.

59 There is also the added factor that the unpaid adjudicator has now commenced proceedings against Flexidig for his fees, even though in the Adjudication he said that M&M should pay them. As a result, Flexidig has now joined M&M as a Part 20 defendant in that action here. So M&M will be litigating here anyway or might be if the action remains effective. Flexidig, of course, itself is an English company and operates here. However, finally, in my judgment, the most compelling comment is that the claim here has now been argued and awaits my judgment if I choose to deal with it. Either it succeeds, so there is enforcement, or does it not. That is the end of the English action.

60 This is not a typical case where the jurisdiction challenge is made at the very beginning of the process. It is, in fact, made at the beginning and the end of the process. There are no further elements in this litigation. This is not a case where there will be numerous interlocutory steps leading to a trial at the end of the day. By definition, we know that the Enforcement Application has caused no problem or inconvenience whatsoever to M&M to deal with it in the way that it has done by experienced counsel familiar with such cases. It may have to have used English solicitors instead of its regular Northern Ireland solicitors but that has not caused any problem either. There is no live evidence and it is all based on arguments concerned with the written adjudication and related materials. It is manifestly more convenient and appropriate to deal with the claim here because it has now been granted.

61 In all those circumstances, to suggest now that England is not the proper place to bring the claim is hopeless in my view. To bring the claim in Northern Ireland, where all the costs and expense of both parties incurred in doing it here, would be absurd. So if one was to compare the cost of litigating the dispute either there with the costs already and irrevocably incurred by both parties here as mandated by 6.37(4), it is plain that England is the obviously more appropriate forum. It is the proper forum.

62 While it is true that proceedings have been commenced in Northern Ireland, I have already explained how that came about and the nature of those proceedings. That remains the case. Even though I found that M&M had done sufficient to entitle them to say that the proceedings were pending for the purposes of 6.32. However, importantly, nothing in truth has happened in Northern Ireland because of the challenge to jurisdiction there. Furthermore, M&M left it to till the last minute to serve any particulars of claim and the reason why that was the case is because I was told that they did not want to take any further steps at all, if they could avoid it, prior to my determining these applications. Unlike 6.32, prior proceedings elsewhere are not fatal to permission to serve

out. They are simply one of the factors to be taken into account under the forum requirement. Therefore, not only are 6.37(3) and (4) made out, to the extent that it is then otherwise a matter of discretion whether or not I should grant permission to serve out, that overwhelmingly favours Flexidig. Accordingly, I give permission to serve out under 6.36 and 6.37.

63 I must then consider whether or not to permit service by an alternative means under 6.15. In many ways, this is almost academic. That is because M&M was served correctly, in my view, at its registered offered, by post, pursuant to the posting on 7 or, in any event, 17 January. It seems to me that given that the Part 24 hearing has now happened, all that is really necessary would be for me to confirm my permission to serve out retrospectively because there already has been serviced. Be that as it may, I turn to 6.15.

64 This says that:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service..."

65 The leading case here, *Abela & Ors v Baadarani* [2013] UKSC 44. The headnote says that CPR 6.15(2) can be used retrospectively to validate a party's actions as constituting good service on a defendant outside the jurisdiction provided that other methods set out in 6.14 have been successfully adopted and other matters that are not relevant here.

66 In deciding whether or not to make such an order, the court has to ask in all the circumstances was there good reason to do so. Although the mere fact the defendant had learned of the existence and content of the claim form could not itself constitute good reason to make an order, it was a critical factor for the court consider. The most important purpose of service was to inform the defendant of the context of the claim and the nature of the claimant's case. Other relevant factors were whether service through diplomatic channels was impractical and whether further attempts would lead to unacceptable delay and where the defendant has refused to cooperate. However, the mere fact of delay on the part of the claimant would not, save exceptionally, be relevant.

67 Then paragraph 36 refers to the point that mere fact that the defendant has in fact learned of the existence and content of claim would not, without more, constitute good reason. Nut it said it was a critical factor because CPR 6.15 was designed to remedy what were thought to be previous defects. At paragraph 38, the Judge took account of a series of factors. Here, "most importantly", the said that it was clear that the respondent was fully appraised of the nature of the claim because the respondent must have been fully aware of the claim form as a result of it and other documents having been delivered to its lawyers. The purpose of service of proceedings, quite obviously, was to bring proceedings to the notice of a defendant. It was not about playing technical games. There was no doubt on the evidence that the defendant is fully aware of the proceedings and of the seriousness of the allegations.

68 Here, there is plainly good reason to permit alternative service on the basis of declaring that what has already been done counts as the service:

(1) It has all been brought to the attention of M&M on at least four separate occasions, including its lawyers, and as it seems what would otherwise be conforming service on M&M by post;

(2) To serve again is completely pointless not only because M&M and its solicitors are fully appraised of the claim but because it would postdate any determination of the claim. To say now that the court's power to hear the claim which, as I say I have heard *de bene esse*, should no longer be there until and unless some further active service takes place would be absurd; and

(3) Service of proceedings is important. It is very important because as was said by the judge in the *Abela* case, it provides a wherewithal for the defendant to know the fact and nature of the claim being brought against it but the rules of service, where in effect there has been substantial compliance, as here, must not be used or, rather, abused so as to gain some wholly undeserved tactical advantage for the defendant. That is what would happen here if I did not permit alternative service.

69 Accordingly, for all those reasons, the claim for alternative under 6.15 succeeds and I will pronounce the various communications that have taken place amount to good service. That being so, the alternative claim to dispense with service does not arise. Furthermore, nor does the issue as to whether M&M was also domiciled in England by reason of the various sites on which it is presently working. In my view, that would not be sufficient to constitute a place of business for the purpose of domicile but for all the reasons already given, this issue does not matter. Accordingly, I have jurisdiction to decide the Part 24 Enforcement Application to which I shall now turn.

THE ENFORCEMENT APPLICATION

70 There are really two core jurisdictional objections to the Adjudication made by M&M:

(1) The adjudicator had now power to act at all because the referral was out of time (the "Referral Obligation"); and

(2) The adjudicator had, in any event, no jurisdiction to make a positive award in favour of Flexidig in the sense of deciding that £223,000 should be paid once he had found there was a valid pay less notice ("the Positive Award Objection").

71 I deal with each in turn.

The Referral Objection

72 This objection was considered by the adjudicator and dismissed. It had been raised in correspondence prior to the Adjudication on 3 and 4 December. The relevant provisions are those which I have set out in the Contract. That is because they conform to the requirements of the Act and so, in this respect, the scheme does not apply and I have already referred to the relevant provisions particularly in paragraph 28(ii) and (iii) of the Contract.

73 M&M says that the true date of the notice of adjudication was the 20th because that is when it was sent. It is not disputed that the adjudicator received the reference on 29 November. Accordingly, if the date of the "giving of the notice of adjudication" for the purpose of paragraph 28(iii) is the date of the document when it was sent, the subsequent referral would be out of time. On the other hand, if the relevant date is the date of actual or deemed service of the notice, the referral was in time.

74 In this regard, I was referred to the case of *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC). This was a decision of HHJ Coulson, as he then was. He was not deciding the point now before me but a different point of contractual construction. In that case, the notice

was transmitted by fax and so it was received on the same day that it was made and sent. So its date and the date of the service were coterminous. The point taken in *Cubitt* was whether the date of the notice should be taken as the day it was faxed or the day after since it was faxed at 4.42 p.m. The judge was, on that point, in favour of the claimant. However, the judge seems at least to have thought that the start of the period was service and I say that because of paragraph 34 where he said the first point to resolve was the effective date of the service of the notice of adjudication. See also paragraph 38, where he said that if he acceded to this request, he would be giving Cubitt relief from their own decision to serve the document at the time that they did. Finally, in paragraph 40, he said that as to Cubitt, they chose to serve the notice in the afternoon of the 20th and that was therefore the effective date of the notice.

75 The contractual provisions in that case were not dissimilar to those here because the relevant one said that where a party requires a dispute to be referred, that party shall give notice to the other party of his intention to refer the dispute briefly identified. If an adjudicator is agreed or appointed within seven days of the notice then the party giving the notice shall refer the dispute. So within 7 days of the notice.

76 That, in my judgment, is as far as one can take *Cubitt*. On any view, it gives no support to M&M's position. In my judgment, the date of giving notice is the date when it comes to the attention of the addressee depending on the circumstances and other provisions that may apply. That might be the actual day it came to their attention or, if earlier, some deemed date. Here, under contract, any notice to be "given" under paragraph 13 or 28 shall, if posted, be deemed to be 48 hours after the posting. Here it was posted and it is accepted it was received on 22 November.

77 M&M objects that if one takes account of a party's own deeming provisions, the process of adjudication would break down since they could decide to make deemed service of any notice 10 or 20 days after the posting but that is both speculative and unrealistic. One does not have deeming provisions like that. Moreover, if, as would be the case, the recipient would actually receive it only a day or two after it was sent, it is hard to see how that could be ignored. So there is nothing in that point.

78 I see no reason, on the basis of authority, principle, or language to say that the giving of notice here means the sending of it without the consequent receipt, nor is there any practical reason otherwise so to interpret the clause. Equally for the dispute is referred to adjudication, the adjudicator must have received the referral. So time does not run until the addressee receives or is deemed to receive the notice. Although the governing provision is paragraph 28.3 of the Contract, I would not, for my part, take a different view of paragraph 7 of part 1 of the scheme. That provides that where an adjudicator has been selected, the referring party shall not later than seven days from the date of the notice of adjudication refer the dispute in writing.

79 Equally, I take the same view of the underlying provision on the Act itself. Section 108(2) says the Contract must enable a party to give notice at any time of its intention to refer, provide a timetable, and require an adjudicator to reach a decision within 28 days of referral, and that the referral should be within seven days of such notice.

80 In this regard, I was also referred to the decision of *Hart Investments Ltd v Fidler* [2006] EWHC 2857 (TCC). While HHJ Coulson, as he then was, emphasised the importance of short time limits and the need to obey them in the context of adjudication, again, it does not deal with the question of service of the notice in relation to the running of any time. For all the reasons given above, I consider that time under the relevant period here only started to run on 22 November. Accordingly, the referral is in time. Therefore, I turn to the Positive Award Objection.

The Positive Award Objection

81 This breaks down into three elements:

(1) It is impossible to understand what the adjudicator was doing here;

(2) Even if I understood, he had no jurisdiction to do what he did; and

(3) What he did was a breach of natural justice.

Impossible to Understand

82 In truth, limbs (2) and (3) run together. As to the first limb, it is, in my view, very clear from the award what the adjudicator was doing. He considered that having found the pay less notice was valid, he had the power under section 111(8) of the Act to decide what the sum was that should be withheld and just to repeat it, this provided that the adjudicator can decide that more than the sum specified in the pay less notice (which here was zero) should be paid.

83 I have already referred to the other relevant parts of the decision. As the adjudicator confirmed later on, this was not a valuation exercise of the defects claim. It was a decision as to what amount of the AFP claimed could be withheld. The reasoning in paragraph 6.34 to 6.49 is readily understandable and explicable. Accordingly, there is nothing in limb 1.

Power to limit deduction

84 As to limbs 2 and 3, there is a wealth of case law as to how to decide if the decision made by the adjudicator was part of the dispute he was to adjudicate or not and whether by reference to principles of natural justice, he should have done so. For present purposes, it is necessary only to refer to the judgment of Fraser J in *Aecom Design Build Ltd v Staptina Engineering Services Ltd* [2017] EWHC 723. As to the law, he said this, first of all so far as the jurisdiction side is concerned that the court:

> "...should not adopt an overly legalistic analysis of what the dispute between the parties is. The ambit of the reference to adjudication can also, unavoidably, be widened by the nature of the defence or defences advanced by the responding party."

85 He then quotes from the case *Satellite Construction Limited v Vascroft Contractors Limited* [2016] EWHC 792 (TCC); [2016] BLR 402. It is necessary, in determining whether it was within the dispute, to see what the adjudicator actually found; and to analyse what claims and assertions were made by the referring party prior to adjudication broadly and in the round. Thus, a dispute "somewhat like a snowball rolling downhill gathering snow as it goes", may attract more issues and nuances as time goes on; one should analyse whether the whole of the pre-adjudication claims and assertions were referred to adjudication; consider the pleadings as to what the dispute encompassed; and the evidence deployed by both parties during the Adjudication and what that became. Generally, given the limited timetable and the question of the scope, courts will give adjudicators some latitude and not take an unduly restrictive view.

86 So far as natural justice considerations are concerned, Fraser J referred to the case on *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC), the decision of Edwards-Stuart J. What he did was approve the prior decision of Akenhead J in *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), [2008] BLR 250 at [57](e) and stated:

> "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 ... and is not peripheral or irrelevant.

(d) Whether the issue is decisive or of considerable potential importance or is peripheral ... 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 ... that [this] type of breach ... natural justice [comes into play]... 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..."

87 Edwards-Stuart J also stated in *Roe Brickwork* 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."

88 As to jurisdiction here, first, the notice of adjudication did actually refer to awarding such other sum as the adjudicator finds due. It is true that this is in the context of a claim for damages for breach of contract but one needs to read that realistically. In reality, the AFP was a claim in debt by Flexidig. The only question was whether all or some of it was owing and whether M&M could set off any amount based on its defects claim. So when the adjudicator said at paragraph 6.32, using the same language as Flexidig, that there was no breach of contract, all he really meant is there was a valid pay less notice and that being so, Flexidig could not simply recover the sums claimed without more, as it were.

89 In my judgment, the adjudicator did have jurisdiction here to go on and make the positive award that he did by reason of the following:

(1) The notice of adjudication did provide for some other figure which could, by definition, only arise if the pay less notice was held to be valid. If it was not valid, the entire sum would fall due;

(2) There is a power under section 118 which I referred to above and which he referred to;

(3) The fact that by the end, and by reason of all the submissions for and against, including the emails that I have referred to, the following position has been reached in my view:

(a) The adjudicator knew, because the parties told him, that £1.5 million had been attributed to the costs of the defects by M&M, and that had been the subject of a prior breakdown previously produced and was the subject of the second adjudication;

(b) That in that second adjudication, the adjudicator there decided the appropriate amount to award was the £462,000;

(c) To date, however, M&M here had spent £247,000 though it said another 2,000 defects had to be attended to; and

(d) The Northern Ireland High Court had prevented an enforcement of the whole of the £462,000 and allowed enforcement only of £12,000.

(4) Further, the adjudicator was, on any view, facing argument from Flexidig that all of M&M's figures were of little or no significance or weight such that the pay less was still invalid because here was no proper or genuine breakdown.

(5) Fifthly, and this goes to both what the dispute was or had become, M&M in particular had engaged in the debate about the true extent of its defects claim and what had happened with it thus far (see, in particular, the last instalment of the correspondence, being its letter of 20 December). It is a short, if any, step from that debate to what figure should be put on M&M's defects claim simply for the purpose of any allowance against the sums claimed by Flexidig in the exercise of the adjudicator's powers.

(6) In this regard, Fraser J's decision on the facts in his case is instructive. There, the question was whether the defendant could make deductions for defects for the purpose of a termination account dispute which was the subject of the adjudication. The adjudicator held that it could and then went on to say how and the extent to which any deductions could be made. He did not prescribe any particular figures though. That would be reserved for another occasion. This point did not arise expressly from the notice to adjudicate and there was no express argument on the point. The adjudicator had said that all that that was referred was the principle whether or not there was a right in principle to make the deductions:

> "However, I am empowered to decide how the sums to be deducted are to be assessed in the event that I find that deductions can be made, rather than simply stating that some form of deduction can be made in principle and no more….
>
> Accordingly, I find and declare that AECOM is also entitled in principle to deduct the cost of proven defects from the sum due to Staptina at termination. This right is however confined to a deduction of the sum (if any) it would have cost Staptina to carry out the relevant rectification works had the termination not taken place."

Thus, Fraser J then observed, in paragraph 31 that:

> "...that attempting to define a dispute by reference to there being only two permissible answers is one fraught with difficulty for conceptual reasons. It is fraught with even more difficulty when one considers that, almost uniquely in quasi-judicial resolution of disputes, adjudicators are entitled to be wrong in the answers that they give, both in fact and law. If there are only two answers available, yet an adjudicator were to choose (perhaps incorrectly) a third, that does not go to her acting outside her jurisdiction. That would be answering the right question but in the wrong way. That is not the same as answering the wrong question..."

In fact, he went on in paragraph 32 that, in any event, he did not accept that the notice of adjudication did not define a dispute by reference to how the deductions were to be performed. He took the view there that where there was a reference to whether one can make any deductions in respect of the cost of defects, and you are entitled to deduct the cost of defects and so on. So he said they were, in fact, within the notice although that was clearly not essential to his reasoning but he gave a wide interpretation to the notice to adjudicate. He did not make his findings as to jurisdiction simply on the basis of a so-called catch all provision. He said in [46] that the adjudicator had relied on the catch all provision which was something akin to the some other figure provision here.

90 As to the effect of such provisions, Fraser J says at [49] it was not necessary to answer the catch all point definitively because of his findings but he would suggest the authorities say how the dispute that is referred to should be considered:

> "...wording inviting alternatives of relief, which is often found ... will be part of the material to be considered by the court in each case, as each of the Notice of Adjudication and Referral Notice may contain it. However, such wording is most unlikely to be determinative on its own, and should not be seen by parties as giving any adjudicator carte blanche to go outside the scope of the dispute..."

91 I agree with all of that. It cannot be taken in isolation but it can be taken in any given case into account as part of the material and the context, and I do so here.

92 I should simply add this that while the expression "frolic of his own", which was used by Akenhead J in *Cantillon* was deprecated in the context of adjudication (see Coulson on Adjudication, paragraph 13.69, footnote 91) as demeaning, perhaps a less objectional expression might be 'going off course', i.e. departing from what is adjudged to be the essential course or route of the Adjudication.

93 I take here the same kind of non-technical approach which was taken by Fraser J and recognising that this is in the context of a relatively rough and ready procedure not ultimately binding in any way. Given what happened in the Adjudication here, one can equally say this that the adjudicators are saying the pay less notice was valid to prevent an award of the entirety of the sum claimed without more but that is, in my judgment, what he was entitled to do as a matter of jurisdiction. He was not straying off course.

Natural Justice

94 The actual materials before the adjudicator, which could have a bearing on the positive award he made, were, in fact, very limited indeed. I have already referred to the various sums claimed or pronounced on by others in relation to the defects claim. As the adjudicator said, this was not an attempt to value the defects work that could not be done then and he accepted that there would or could arise another adjudication later on. However, really, all the parties could say about whether or not to use the particular figure submitted they did say.

95 Unsurprisingly, they adopted diametrically opposed positions. Flexidig said that the various figures and how they have been treated meant that, in real terms, the pay less notice remained useless. On the other hand, M&M did attach and, in my view relied upon, its full assessment of defects of £1.5 million, the second adjudication decision of Mr Baldwin having by then been provided to the adjudicator by Flexidig. M&M also responded to the fact of Horner J's decision to refuse to enforce save up to £12,000 saying, "Yes, but that was all going to be valued in a yet further adjudication." Overall, it was saying that the adjudicator could not and should not qualify the effect of the pay less notice in any way.

96 In those circumstances, enough was raised by the adjudicator and debated between the parties to allow him justly to decide on a position that was somewhere in between. He could either award the whole sum claimed, or no sum at all if, for example, he went with the entire £1.5 million defects claim, or the £462,000 awarded by the second adjudicator, or the £12,000 awarded by Horner J. That is all he has done and could do and he decided the £462,000 option. He was not, in my judgment, consistently with the approach taken in a number of cases, obliged to go back to the parties at the very end and say that he was thinking of taking such a course. In my judgment, natural justice did not oblige him to do so.

97 Referring back to the judgment of Edwards-Stuart J in *Roe Brickworks*:

(1) The adjudicator making a positive award decided a point of importance on the material before him;

(2) Both parties were aware of the material that gave rise to it;

(3) The issues which that material gave rise to had been fairly canvassed and the emails going up to 20 December;

(4) On that basis, it was open to the adjudicator to reach a positive award even if neither party had specifically contended for it; and

(5) In fact, in this case, while there may have been no clearly defined contention by either side, it was, in my view, actually on the radar of the parties and the adjudicator by the end of the correspondence; that is shown, not least, by the fact that M&M was positively counselling against it. Accordingly, there was no breach of natural justice here.

98 Therefore, the Enforcement Application succeeds following my finding that I have jurisdiction to consider it. On that basis, the Adjudication decision must be enforced. I will now hear the parties on consequential matters.

A N N E X

6.29 With regard to the cost of making good defects. M&M's letter of 9 October 2019 states that:

> *... the work completed by Flexidig bus been inspected and the cost of making good the defects identified has been valued at £1,504,598.49. The make up of this figure has been submitted to your office previously.*

6.30 In response to my request to M&M to provide documents related to the assessment of defects, both parties disclosed a substantial amount of information. In my view the "Withholding Notice' letter, taken with its reference to all of these documents, is more than sufficient to provide an agenda for adjudication on the true value of the defects.

6.31 ***For the above reasons, 1 decide that M&M's 'Withholding Notice' letter dated 9 October 2019 was a valid "Pay Less" Notice under the terms of the Sub-Contract in so far as it related to the costs of making good defects.***

Is Flexidig entitled to recover damages for breaches of contract in the sum of £673,374**.19** + VAT

6.32 Having decided that M&M's "Withholding Notice' letter dated 9 October 2019 was a valid ""Pay Less" Notice. I find that there is no breach of contract that could entitle Flexidig to recover damages.

6.33 ***I therefore decide that Flexidig is not entitled to recover damages for breaches of contract in the sum of £673,374.19 + VAT***

Is some other sum due from M&M?

6.34 Although I have decided that Flexidig is not entitled to recover damages for breaches of contract in the sum of £673.374.19 + VAT, the relief sought by Flexidig in the Referral included *"such other sum as the Adjudicator finds is due from M&M'.*

6.35 In the Reply. Flexidig went further and submitted that *"if the Adjudicator decides that the Payless is valid there is jurisdiction to make a merits-based assessment of Application No. 70 and order payment of that assessed sum ".*

6.36 As outlined in the 'Summary of the Patties' Submissions" above, M&M strongly refuted this proposition and contended that 1 had no jurisdiction to make an assessment of the true value of Flexidig's Application No. 70. 1 agree with M&M on that point and make no attempt to assess the true value of Application No. 70.

6.37 I do. however, believe that, without deciding on the true value of the Application. 1 still have jurisdiction to decide whether the amount to be paid should be greater than the sum specified in the Pay Less Notice, which, in this case was £0.00.

6.38 I derive that jurisdiction from the provisions of s. 111(8) of the Housing Grants. Construction and Regeneration Act 1996 (as amended by the Local Democracy. Economic Development Act 2009) (the "Construction Act"), which, in the relevant part, states:

> *(H) Subsection (9) applies where in respect of a payment -*
>
> ***(a) ...***
>
> *(b) a notice under subsection (3) is given in accordance with this section*
>
> *but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.*

Subsection (3) is the provision under which the payer may give a pay less notice and subsection (9) specifies the date by which any additional amount awarded by an adjudicator is to be paid.]

6.39 Flexidig submitted in the Referral (paragraph 43) that the figure of £1.504,598.49, which M&M estimate as the current cost of rectifying defects, *"is the very same figure which M&M used in an earlier adjudication against Flexidig. from which an on-account sum of* ***£462,456.50*** *was awarded, subject to reconciliation and proof* \

6.40 In its letter to Flexidig dated 10 December 2019, Mcilldowies, acting for M&M. staled that M&M *"to dale has expended the sum of £247,675.56 in repairing your defective works ".*

6.41 Late in this Adjudication, outside of the formal submissions, Flexidig provided me with a copy of the 'Adjudicator's Decision' of Mr Denis Baldwin dated 17 December 2019. which had awarded the *"on-account"* sum of £462.456.50 to be paid by Flexidig to M&M in respect of defective works.

6.42 Flexidig also provided a copy of the Order of the High Court of Justice in Northern Ireland dated 5 December 2019. which declared that Flexidig was only liable to pay

£12.679.52 in respect of costs actually incurred, subject to final determination of the account between the parties in accordance with their contractual rights.

6.43 In response to this late submission. M&M acknowledged that the Adjudicator's Decision of Mr Baldwin was held by the High Court of Justice in Northern Ireland to be unenforceable save for the sum of £12.679.52 but also advised that the commencement of an adjudication on the merits to determine the true value of the defective works was *"imminent".*

6.44 The question for me is not the true value of the defective works but what sum is M&M entitled to withhold from interim Payment Application No. 70? In December 2018. Mr Baldwin had assessed an estimated amount of £462.456.50 for the costs of making good defects, taking account of estimated future costs. However. **Mclldowies** letter dated 10 December 2019 indicated an expenditure to date (at 10 December **2019**) of onIy£247,675.56.

6.45 I am satisfied that M&M is entitled to withhold monies for the estimated cost of

making good defective works but consider that the maximum amount to be withheld should be limited to the sum of £462.456.50. assessed by Mr Baldwin, less the £12.679.52 already awarded and ordered to be paid into court by the Order High Court of Justice in Northern Ireland dated 5 December 2019. I calculate that amount to be £449,776.98, excluding any VAT. and stress that it is only an amount to be withheld from interim Payment Application No. 70 pending an assessment of the true value of the defective works by separate adjudication or agreement by the parties.

6.46 Withholding the sum of £449.776.98 from the amount of £673,374.19, excluding VAT. applied for gives a sum due of £223,597.21 + VAT.

6.47 s. 111 (9) of the Construction Act (as amended) states:

> *(9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than-*
>
> *(a) seven days from the date of the decision, or*
>
> *lb) the dale which apart from the notice would have been the final date for payment,*
>
> *whichever is the later.*

6.48 The final date for payment under the Sub-Contract was 26 October 2019. therefore, payment of the additional sum that 1 have found to be due under the Pay Less Notice is required seven days after the date of this Decision, which I calculate to be **Monday** 6 **January 2020.** after excluding the New Year's day bank holiday.

1. For the reasons given above, I decide that the sum due from M&M in respect of interim Payment Application No. 70 is £223,597.21 + VAT, payable to Flexidig by no later than Monday 6 January 2020."

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**** This transcript is approved by the Judge****