Neutral Citation Number: [2016] EWHC 792 (TCC)

Case No: HT-2016-000045

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2016

**Before** :

**THE HON. MRS JUSTICE CARR DBE**

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**Between :**

| | |
|---|---|
| **Stellite Construction Limited** | **Claimant** |
| **- and -** | |
| **Vascroft Contractors Limited** | **Defendant** |

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**Mr Piers Stansfield Q.C.** (instructed by **Rosenblatt Solicitors**) for the **Claimant**
**Mr Paul Darling Q.C. and Ms Jennie Wild** (instructed by **Clarkslegal LLP**) for the **Defendant**

Hearing date: 22nd March 2016

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**The Hon. Mrs Justice Carr DBE :**

## Introduction

1. These Part 8 proceedings concern the decision of an adjudicator ("the Adjudicator") on 17th January 2016 ("the Decision") in relation to a written contract dated 21st January 2014 ("the Contract") for the construction of the shell and core of a substantial house in Hampstead known as Heath Park, North End Way, Hampstead, London NW3 7ET ("the Property"). Under the Contract, the Claimant property developer ("Stellite") engaged the Defendant contractor ("Vascroft") to carry out the shell and core works, which were also referred to as "Phase 1 Works" ("the Works"). The contractual completion date was 20th October 2014. The works are not yet practically complete.

2. The Contract incorporates the terms of the JCT Standard Building Contract Without Quantities 2011 ("the JCT Standard Form"). It provides for liquidated damages to be paid by Vascroft to Stellite for delay in achieving practical completion of the Works. Extensions of time can be granted for delay caused by Relevant Events (as defined in the Contract).

3. Adair Associates Limited, the contract administrator ("the CA"), on behalf of Stellite, sent a letter of intent dated 3rd August 2015 to Vascroft in relation to fit-out works at the Property, also referred to as "Phase 2 Works" ("Phase 2 Works") ("the Letter of Intent"). Vascroft signed the Letter of Intent on 7th August 2015.

4. As indicated, the completion of the Works was delayed. Stellite claimed liquidated damages under the Contract. When Vascroft did not pay such damages, Stellite referred its claim for liquidated damages to adjudication pursuant to s.108 of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("the Act") and the Scheme for Construction Contracts ("the Scheme").

5. By the Decision, amongst other things, the Adjudicator decided that time for completion had been set at large on the ground that the CA was unable to grant an extension of time under the Contract for delay to the works caused by the issue of the Letter of Intent or the carrying out of Phase 2 Works pursuant to the Letter of Intent, because such delay did not fall within any of the Relevant Events (as defined in the Contract). He thus decided that no liquidated damages were due.

6. Stellite contends that Vascroft did not argue that time for completion of the Works was at large on this ground and the Adjudicator did not give the parties a fair opportunity to comment on such a proposition. The Decision is therefore unenforceable as a result of a breach of the rules of natural justice. The breach was of fundamental importance to the outcome of the Decision.

7. Having decided that time was at large, the Adjudicator went on to decide that a reasonable date for completion was 5th March 2016. Stellite contends that the reasonable date for completion would be relevant only to a claim by Stellite for un-liquidated damages. There was no dispute between the parties regarding un-liquidated damages, and no such dispute was referred to the Adjudicator. Neither party had asked for a decision on the reasonable date for completion, nor had the parties' submissions addressed the issue. The Decision as to a reasonable date for

completion was accordingly outside the Adjudicator's jurisdiction and/or in breach of the rules of natural justice.

8. Thus on 19th February 2016 Stellite issued a claim form seeking two declarations :

   a) That the Decision is unenforceable because the Adjudicator breached the rules of natural justice ("Issue 1");

   b) That the Decision that a reasonable time for completion was 5th March 2016 is unenforceable because it was outside the Adjudicator's jurisdiction and /or the Adjudicator breached the natural rules of justice ("Issue 2").

9. On the same day of issue Stellite sought an expedited hearing and on 22nd February 2016 this Court made abridged directions for such a hearing.

10. Stellite also sought a third declaration, namely that time for completion of the contract works was not at large on the grounds decided by the Adjudicator, namely that delay to completion of that work had been caused by the carrying out of the Phase 2 Works, for which an extension of time could not be granted under the Contract. On 7th March 2016, on Vascroft's application to vary the order of 22nd February 2016, I directed that this claim for the third declaration be removed from the Part 8 procedure as being unsuitable for disposal in such a context and in all the circumstances of the case.

11. Stellite makes it clear that what it seeks in effect is to restore the parties to their pre-adjudication positions. A second adjudication would (probably, if not inevitably,) then follow. Vascroft resists the claim on its merits. It objects that this is a misconceived attempt by Stellite to have a "*second bite at the cherry*" which should not be permitted in the context of a dispute resolution process peculiar to the construction industry which is designed to achieve swift, if rough and ready, results. This process was one introduced with the parliamentary intention of providing a speedy mechanism for settling construction disputes on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. It is intended to be a speedy, and of necessity sometimes imperfect, procedure.

12. Evidence on the claim (and the application to vary) has been served as follows :

   a) For Stellite : witness statements of Mr Nikesh Haria of Stellite's solicitors dated 19th February, 3rd and 14th March 2016;
   b) For Vascroft : witness statements of Mr David Rintoul of Vascroft's solicitors dated 1st and 7th March 2016.

Save where otherwise expressly stated, all references to clauses below are references to clauses in the Contract.

## The Contract

13. The First Recital of the Contract described the Works as:

> "*Shell and core comprising a piled basement, construction of a nine bedroom house using a structural steel frame, flat roof,*

> *timber sliding sash windows, high-quality wall, floor and ceiling finishes, mechanical and electrical services, swimming pool and associated external works and landscaping…*"

14. By Article 1, the Contract Sum was £5,070,845.79. The Contract Particulars provided that:

    a) The Completion Date for the Contract Works was 20 October 2014; and

    b) The rate of liquidated damages was £23,000 per week.

15. By Clause 2.27 Vascroft was obliged to give notice and particulars of causes of delay to completion, its expected effects and to identify any event which was in its opinion a Relevant Event (as defined in Clause 2.29).

16. Clause 2.28.1 provided (under the heading "*Fixing Completion Date"*):

> "*.1 If in the Architects/Contract Administrator's opinion, on receiving a notice and particulars under clause 2.27:*
>
> *.1 any of the events which are stated to be a cause of delay is a Relevant Event;*
>
> *and*
>
> *.2 completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date,*
>
> *then, save where these Conditions expressly provide otherwise, the Architect/Contract Administrator shall give an extension of time by Works or Section as he then estimates to be fair and reasonable*."

17. Clause 2.29 included the following, so far as material :

> "*The following are the Relevant Events referred to in clauses 2.27 and 2.28: ...*
>
> *.1 Variations and any other matters or instructions under which these Conditions are to be treated as, or as requiring, a Variation;*
>
> *...*
>
> *.6 any impediment, prevention or default, whether by act or omission, by the Employer, the Architect/Contract Administrator, the Quantity Surveyor or any of the Employer's Persons, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or any of the Contractor's Persons*; ..."

18. By Clause 2.32 the Contract stated :

> "*.1 Provided:*
>
> *.1 the Architect/Contract Administrator has issued a Non-Completion Certificate for the Works or a Section; and*
>
> *.2 the Employer has notified the Contractor before the date of the Final Certificate that he may require payment of or may withhold or deduct, liquidated damages,*
>
> *the Employer may, not later than five days before the final date for payment of the amounts payable under clause 4.15, give notice to the Contractor in the terms set out in clause 2.32.2...*"

19. By Clause 9.2 of the Contract, if a dispute or difference arose under the Contract that either Party wished to refer to adjudication, then the Scheme was to apply.

20. The Letter of Intent stated:

> "*Further to our meeting of 27 July 2015, we write to confirm that it is the intention of our Client, Stellite Construction Limited, to enter into a formal Building Agreement with your company, Vascroft Contractors Limited, based upon the JCT Building Contract Without Quantities 2011 and bespoke amendments, to carry out the above works.*
>
> *Please accept this letter as the instruction to commence with the works, pending agreement and execution of the Building Contract. Any works completed under this instruction be governed by the terms and conditions of the Building Contract mentioned above ...*
>
> *In the event that Stellite Construction Limited decides not to proceed with the contract works, for any reason, prior to the formal execution of the Building Agreements, then it is agreed that your company shall be reimbursed costs incurred up to the time of cessation of the works to a limit of £2,000,000 (two million pounds) plus VAT (where applicable) to be agreed between your company and Adair Associates Limited ...*
>
> *This letter shall expire and cease to be in effect, 90 days from the date of this letter, unless extended by mutual consent. On expiry, if the Building Agreement has not been executed or an extension to letter issued, you will be under no obligation to continue with the work set out herein, and will be entitled to the reimbursement of any costs incurred as outlined above.*

> *Please sign and return this Letter of Intent as acknowledgement of your agreement to commence with the works on the basis outlined above*."

21. As already stated above, the Letter of Intent was signed on behalf of Vascroft on 7th August 2015.

22. The parties did not enter into a further contract in respect of the Phase 2 Works, and they did not agree to extend the Letter of Intent. Accordingly, the Letter of Intent expired 90 days from 3rd August 2015, namely on 1st November 2015.

23. No extension of time has been granted by the CA, which considers that Vascroft has not made a contractually compliant application for an extension of time. Vascroft argues that it has done so by its response in the Adjudication.

**The Adjudication**

24. The central chronology of the Adjudication at a glance is as follows :

a) Stellite served its Notice of Intention to Refer a dispute to adjudication ("the Notice of Intention to Refer") on Friday, 13th November 2015;

b) Stellite served its Referral notice ("the Referral Notice") on Friday, 20th November 2015;

c) Vascroft served its Response ("the Response") on Tuesday, 1st December 2015;

d) Stellite served its Reply ("the Reply") on Wednesday, 16th December 2015;

e) Vascroft served a Rejoinder ("the Rejoinder") on Thursday, 24th December 2015;

f) Stellite served a Surrejoinder ("the Surrejoinder") on Wednesday, 13th January 2016;

g) The Adjudicator issued the Decision on Sunday, 17th January 2016.

The Notice of Intention to Refer a Dispute to Adjudication

25. On 13th November 2015 Stellite served the Notice of Intention to Refer on Vascroft. It stated under the heading "*The Dispute*":

> "*Under the Contract the date for completion of the Works was 20 October 2014. Pursuant to cl.2.32.2 of the Contract Particulars liquidated damages are set at the rate of £23,000 per week. On 20 October 2014 a Non-Completion Certificate was served in accordance with cl.2.32.1.1. On 4 November 2015 Stellite notified Vascroft in accordance with cl.2.32.1.2 of*

> *the Contract, that it may require payment of or with-hold or deduct, liquidated damages. Also on the 4 November 2015 Stellite issued a pay less notice in accordance with cl.4.1.3.1.1 of the Contract indicating liquidated damages due to Stellite of £1,064,158.38. By letter dated 10 November 2015 but sent on 11 November 2015, Stellite requested full payment of the liquidated damages. Vascroft failed to make payment. Accordingly, there is a dispute between the Parties*."

26. Under the heading "*Relief Sought*" the Notice stated that Stellite requested the Adjudicator to:

> "*… find that Vascroft must pay Stellite £1,064,158.38 or such other amount that the Adjudicator deems appropriate*."

The Referral Notice

27. Stellite served the Referral Notice on 20th November 2015. It described the dispute as follows:

> "*The dispute concerns the failure by Vascroft to make any payment in respect of liquidated damages.*"

28. The Referral Notice set out the calculation of the sum claimed in respect of liquidated damages, and sought relief in the same terms as the Notice of Intention to Refer to Adjudication.

The Response

29. Vascroft served the Response on 1st December 2015. It stated that Vascroft sought a decision of the Adjudicator that:

> "*91.1 Stellite has no entitlement to the LAD's [sic] claimed because it has not met the condition precedent to entitlement required by clause 2.32.1.1 [the issue of a valid Non-Completion Certificate];and/or*
>
> *91.2 Stellite has no entitlement to the LAD's [sic] claimed because it has agreed with VCL to move the Completion Date to 18 September 2016, or such other date as the Adjudicator deems the parties to have agreed; and/or*
>
> *91.3 Stellite has no entitlement to the LAD's [sic] claimed because it has waived the Completion Date in the Contract and/or taken partial or entire possession of the Site; and/or*

> *91.4 Stellite has no entitlement to claim LAD's [sic] because the Contract mechanism has fallen down and time is at large; and/or*
>
> *91.5 The LAD's [sic] represent an unenforceable penalty; and/or*
>
> *91.6 VCL is entitled to an extension of the Completion Date beyond the present date, or whatever extension the Adjudicator deems fair and reasonable in accordance with the Contract, in respect of the delays listed in paragraphs 79 and 85 of this Response, and on the basis of the evidence advanced by this Response; and/or*
>
> *91.7 Stellite has no entitlement to the LAD's [sic] claimed far any other reason and to any other extent as the Adjudicator may decide*."

30. In its summary of response Vascroft stated :

> "*4.3. Notwithstanding that Stellite has failed to issue a valid Non-Completion Certificate, and so is not entitled to apply LAD's [sic] in any event, and that the parties have reached an agreement to move the Completion Date, Stellite's efforts to convince the adjudicator that this dispute is a simple matter of applying LAD's [sic]to a time overrun represent a significant and disappointing attempt to avoid the fact that its own acts of prevention and/or significant instructions, Variations and other Relevant Events have delayed VCL in completing the Works…*
>
> *4.5. Despite VCL's entitlement to significant extensions of time, Stellite has refused to administer the Contract correctly (or at all), which, together with Stellite's failure properly to separate Phases I and 2, and to procure the Phase 2 works in a timely manner, and so caused the Contract machinery to fall down. The original date for completion has fallen away and Stellite has not yet progressed the design and specification for the project to a point where a completion date can be fixed*."

31. As to its "*second alternative*" defence that time was at large, Vascroft summarised its position as follows (referring always in the Response to the Letter of Intent as "the Agreement") :

> "*4.9.3 In the second alternative, the date for completion of the works has passed and time is at large as a result of extensive acts of prevention and/or refusal to administer the delay mechanisms in the contract on the part of Stellite, which has led to the contractual mechanisms falling down and, together with the conduct outlined in the attached witness statements*

*and report, represents a waiver by estoppel of any right Stellite may have had to rely on the Completion Date*."

32. Vascroft's contention that time was at large was then expanded in paragraphs 43 to 53 of the Response. Paragraphs 43 to 48 in particular read as follows :

> "*43. The genesis of the "time at large" principle is Holme v Guppy (1838) 3 M&W 387 and its finding that "the plaintiffs were therefore left at large and consequently are not to forfeit anything for the delay". There is a large body of case law which has subsequently applied this principle, not least Trollope & Coils Ltd v North West Metropolitan Regional HospitaI Board [1973] 1 WLR 601, where the House of Lords affirmed previous authority that an act of prevention puts time at large. Lord Denning in the Court of Appeal said that:*
>
> *"it is well settled that in building contracts — and in other contracts too — when there is a stipulation for work to be done in a limited time, if one party by his conduct — it may be quite legitimate conduct, such as ordering extra work — renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."*
>
> *44. The need to undertake Phase 2 works in order to progress the Phase 1 Works, led to the Agreement (to move the Completion Date to 18 September 2015) set out in VCL's first alternative defence (above). Should the adjudicator take the view that the relevant terms of the Agreement have been superceded or withdrawn for any reason, it must follow that the events described in the witness statements and expert report appended hereto have resulted in there being no current Completion Date applicable to the "Works" (whatever element of the overall project they may encompass).*
>
> *45. The events that led to and followed the Agreement (whlch are set out in more detail in the appended witness statements of Chandni Vora (tab 3), Mitesh Vekaria (tab 2), and Shashi Vekaria (tab 1)) have meant that Stellite has been responsible for a vast number of Relevant Events pursuant to clauses 2.29.1, 2.29.2 and 2.29.6. In brief, and with particular reference to paragraphs 10 to 16 of the witness statement of Mitesh Vekaria (tab 2), the project went from a single-stage tender to a two-phase project, which exercise was undertaken by the Contract Administrator without input from VCL. As a result, the parties relied on the expertise of the Contract Administrator to split the works between phases 1 and 2, but:*
>
> *45.1. The Phase 1 drawings included Phase 2 details;*

*45.2. Relevant omissions were not made from the specification, but were omitted from the Contract Sum Analysis; and*

*45.3. There was no demarcation between the two phases in the National Building Specification.*

*46. When it became clear that the phase 1 contract had failed, Stellite attempted to rectify its Contract Administrator's mistakes by commencing negotiations with VCL for the phase 2 works in early 2015 (the appended witness statements refer). Whilst Stellite was trying to decide what to do about its procurement of Phase 2 (and which works would be included therein), it issued the letters of intent referred to in the first alternative defence set out above, to allow the works to move forward at least on a piecemeal basis. No new letters of intent have been issued, no phase 2 contractor has been appointed, and VCL has concluded those elements of the phase 2 works instructed pursuant to the existing letters of intent. In the circumstances, Stellite is still not in a position to fix a Completion Date for the Works (phases 1 and/or 2).*

*47. The foregoing may explain why the contractual extension of time mechanism has not been operated properly by Stellite. In fact, and probably as a result of the need to combine phases 1 and 2 of the project, Stellite has refused to apply the Contract mechanism at all. As such, the Contract Administrator has failed to operate clause 2.28 of the Contract by failing to give any fair and reasonable extensions of time pursuant to clause 2.28.1 or 2.28.5, or to notify VCL of its decision pursuant to clause 28.2 or 2.28.5.*

*48. The appended report of Mr Stephen Smith (in File 2), confirms that, on analysis, the contract mechanisms have fallen down because:*

> *"There are certain Principal delay issues, for which the Employer is responsible, that have prevented and currently continue to prevent Vascroft from completing the Works."*

*In overview, these issues relate to elements of the Works which were dependent upon the execution of work that the Employer had intended to carry out in a future phase following on after the Shell and Core Works.*

*In short, in order that Vascroft could complete certain parts of the Shell and Core Works, it was necessary for the Employer/the CA to have, for example:*

- *In the first instance, included such works in the shell and core contract that were necessary for its completion.*

- *Failing the above, designed the Shell and Core works in such a way that did not rely upon works intended for a future phase.*

- *Instructed Vascroft on a timely basis to carry out such additional works as may be necessary for if to be able to complete the Shell and Core works; and/or*

- *Employed, on a timely basis, others to carry out the necessary works that would allow and enable Vascroft to complete the Shell and Core Works by the due date or such date as may be ascertained.*

*In the event, the Employer took none of these courses of action and instead, engaged Vascroft, under a Letter/Letters of Intent to carry out work intended for a future phase, effectively a separate contract, at such a late stage, that as a consequence prevented and continues to prevent Vascroft from completing the Shell and Core works*"

33. Vascroft's conclusion in the Response (at section F) included the following paragraph:

> "*…It is clear that the "delays" faced on the project stem from the initial failure of Stellite to separate the original single-stage project into two phases. There was no "clean" separation of the two phases, which has meant that phase 1 works have never been capable of completion, through no fault of VCL. Such failure on the part of Stellite clearly represents an act of prevention, which acts to extinguish any entitlement to LAD's [sic] either by virtue of the Completion Date being "at large", or by virtue of VCL's contractual entitlement to extensions of time, the extent of which the Adjudicator is asked to decide...*"

34. Stellite relies on the fact that Vascroft did not suggest that delays had occurred that had not been caused by Relevant Events and for which no extension of time could be given. Rather it contended that each of the causes of delay was a Relevant Event in respect of which the CA ought to have granted an extension of time. Vascroft argued that the CA ought to have, but had failed to grant a fair and reasonable extension of time.

35. The delays alleged by Vascroft were identified in paragraphs 79 and 85 of the Response (as indicated in paragraph 91.6 of the Response set out above). In relation to each alleged caused of delay, Vascroft identified one or more applicable Relevant Events.

36. In the Reply Stellite responded to Vascroft's summary of its case that time was at large as follows :

> "*2.1.4 Vascroft is wrong to allege that time is at large as a result of Stellite's alleged refusal to administer the Contract correctly or at all. First, because Stellite is not responsible for administering the Contract. Secondly, because there has been no application for an extension of time pursuant to c1ause 2.28.1 and, accordingly, there is no obligation for the CA (or, as Vascroft alleges, Stellite) to consider whether any extension of time should be given. Thirdly, even if an application had been made and Stellite had failed to respond properly at all, it is contrary to authority to state that this would result in the contract machinery breaking down. Finally, Vascroft's assertion that Stellite failed to separate Phase 1 and Phase 2 works is untenable; the Contract identifies what works Vascroft was required to be carried out and Vascroft agreed to carry out those works by the completion date and Vascroft has recently maintained that it is committed to do so. Its failure to do so cannot be a reason to put time at large.*"

37. It went on (at paragraph 5.8) when summarising the Works and the Phase 2 Works to state :

> "*...There are mechanisms within the Contract in respect of instructing variations which can add, omit or amend the works which mean that the Contract was entirely workable even if, as commonly happened, variations were required. Such variations would give rise to an entitlement to an extension of time if they meant that the works would be delayed beyond the completion date...*"

38. Stellite set out its case on Vascroft's second alternative defence that time was at large, in more detail in section 8 of the Reply. Having identified the issues raised by Vascroft, Stellite stated that it was necessary first to consider the more recent case law on the prevention principal in order to correctly understand the applicable principles. It went on :

> "*8.4 In Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No.2) (2007) EWHC 447 (TCC), Jackson J explained the prevention principal as follows:*
>
> *"The essence of the prevention principle is that the promise cannot insist upon tie performance of an obligation which he has prevented the promisor from performing.*
>
> *In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from*

*completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor.*

*It is in order to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provisions for extension of time. Thus, it can be seen that extension of time clauses exist for the protection of both parties to a construction contract or sub-contract." (paragraphs 47-49)*

*8.5 Jackson J. then went on to review the authorities on the prevention principle, including those identified by Vascroft in paragraph 43 of the Response and from his review, identified the following three propositions:*

> *(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.*
>
> *(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.*
>
> *(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor." (paragraph 56)*

*8.6 It is the second proposition which is of importance in this case; the Contract contains a standard form mechanism for providing an extension to the completion date should there be an act of prevention by Stellite which delays the works beyond the completion date. Accordingly, this should be the Adjudicator's starting point when considering whether time has been set at large as alleged by Vascroft. For the reasons set out below, the Adjudicator is invited to find that time is not at large in relation to the Phase 1 Works.*"

39. As will be apparent below, the Adjudicator paid particular attention to (and accepted) this last submission by Stellite, namely that the second proposition (in bold) was of importance in this case.

40. In the Rejoinder Vascroft repeated is second alternative defence that time was at large. In response to Stellite's references to the prevention principle, it said this :

> "*8.3. As regards paragraph 8.5 of the Reply (The Prevention Principle): The paragraphs from Multiplex relied on by Stellite confirm that either: (1) time is at large; or (2) VCL is entitled to an extension of time, and: "insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor.*"

41. Stellite did not add to its submissions on the question of time being at large in the Surrejoinder.

The Decision

42. As indicated above, the Adjudicator made the Decision on 17th January 2016. The Adjudicator commented in the Decision that there was no doubt that he would have been assisted by hearing first-hand the parties' contentions, particularly from Vascroft's programming expert. He nevertheless proceeded on the basis of documents alone in circumstances where the parties had been unable to agree on a suitable date without considerable delay. Time was, on any view, very tight for the Adjudicator. The final timetable itself in any event involved an extension of time for the Adjudicator's decision of over a month. As a comment only, it may be that the issues identified by Stellite now would not have arisen, had there been such a hearing.

43. In overview, by the Decision the Adjudicator decided that the Non-Completion Certificate was valid, that there was no binding agreement in the Letter of Intent to postpone the completion date, but that Stellite had no entitlement to liquidated damages claimed on the ground that the time for completion had been set at large.

44. He described the issue regarding "time at large" in paragraph 56 of the Decision as follows:

> "*As there was, in my view, no binding agreement in respect of the Phase 2 works, it seems to me that what then has to be addressed is what affect (sic) the carrying out of over £500,000 worth of Phase 2 work had in respect of the Phase 1 [Shell and Core Contract] work? The parties have, from slightly different angles to me, addressed this issue in their submissions under the headings: Vascroft "Time at Large" and Stellite "Time is Not at Large.*"

45. The Adjudicator then went on to rehearse the parties' respective arguments, referring to the authorities relied on, in particular *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited* [2007] BLR 167. At paragraph 60, he said this :

> "*Stellite refer to the "three propositions" set out by Jackson J in Multiplex at paragraph 56 of the Judgment and rely in particular to that enunciated at paragraph 56(ii), which provides :"*
>
> > *(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.*"

46. At paragraphs 63 to 68 he went on to set out his central reasoning as it flowed from that proposition :

> "*63. I consider that the judgment of Jackson J in Multiplex to be particularly germane to this Decision and for that reason have attached an extract (paragraphs 47 to 66) at the end of this Decision. As correctly noted by Stellite the proposition confirmed by the learned Judge at paragraph 56(ii) is highly relevant.*
>
> *64. On my reading the proposition in the Judgment at paragraph 56(ii) is qualified or limited to "Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events. [Emphasis added]*
>
> *65. Accordingly, it is necessary to confirm what matters are included in the Shell and Core Contract in respect of "those events" which would otherwise be acts of prevention.*
>
> *66. The Shall and Core Contract, being in the JCT Standard Form of Building Contract (as noted above, refers to "those events" as Relevant Events. The Relevant Events are listed at clause 2.2.9.*
>
> *67. What I have given consideration to is whether the issue of the Letter of Intent dated 7 August 2015..fairly and properly falls within any of the Relevant Events noted in the Shell and Core Contract.*
>
> *68. I have concluded, and so decide, that the provisions of Vascroft any extensions of time for the issue of the Letter of Intent and the work undertaken by Vascroft in connection with that letter (and for which it now claims its costs and is, as appears to be the case, being paid separately by Stellite). Accordingly, I determine, and so decide, that time has been set at large in respect of the Shell and Core Contract – that is, that there is no fixed date for the completion the Phase 1 works. It follows, on the authorities, that Vascroft's obligation is (or was, if completion has since been attained) to "complete within a reasonable time"*."

47. The Adjudicator then went on to consider the question of what was the reasonable time for Vascroft to complete the Works. He referred expressly to the difficulties facing him in this task – not only a lack of time meaning that he could not conduct a thorough review of the detailed analysis of the parties but also the fact that there had been no meeting before him to gain a better understanding of the parties' position and arguments, especially in relation to the programme of work and delays/alleged delays. Doing the best he could on a "documents only basis", he decided that a reasonable time for completion was "*no later than 5 March 2016*" (in paragraph 73 of the Decision). That was reflected in paragraph 75.5 where he decided :

> "*that in respect of paragraphs 91.2, 91.4 and 91.7 of the Response, and for the reasons noted above at paragraphs 57–73, that Stellite has no entitlement to the liquidated damages claimed as the time for completion of Phase 1 work has been set at large and that Vascroft's obligation is to complete the Phase 1 work in a reasonable period, that being by no later than 5 March 2016*."

## The Law

Jurisdiction

48. It is common ground that the Notice of Adjudication defines the ambit of the adjudicator's jurisdiction and that any jurisdictional issues will be considered by reference to the nature, scope and extent of the dispute identified in that notice (see *Penten Group Ltd v Spartafield Ltd* [2016] EWHC 317 (TCC) per Coulson J at paragraph 16). The Notice of Adjudication (and Referral Notice) are however not necessarily determinative of the true dispute: the background facts also need to be considered (*Witney Town Council v Beam Construction (Cheltenham) Ltd* [2011] BLR 707 at paragraph 38).

49. It is for the party who refers the dispute to adjudication to define the issues which are referred and the adjudicator has no jurisdiction to vary the basis on which the reference has been made : see *McAlpine PPS Pipeline Systems v Transco* [2004] BLR 352 (at paragraphs 145 and 146) and *Vision Homes v Lancsville Construction* [2009] BLR 525 (at paragraph 61). The adjudicator's jurisdiction includes any defence to the claim advanced in the Notice of Adjudication (see for example *Pilon v Breyer Group* [2010] EWHC 837 (at paragraph 25)).

50. "*Dispute*" is a word interpreted broadly to mean "*whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference*" (see *Fastrack Contractors v Morrison Construction Ltd* (2000) 75 Con LR 33 per Judge Thornton at paragraph 34).

51. Akenhead J carried out a useful review of the authorities in *Cantillon Ltd v Urvasco Ltd* (2008) 117 ConLR 1 (at paragraph 55):

    a) Courts (and indeed adjudicators and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is;

    b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is;

    c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration;

d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.

52. To determine whether an adjudicator's decision is responsive to the dispute referred to him it is necessary to:

a) Determine from the adjudicator's decision what he actually found (*Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] 127 Con LR 110 per Akenhead J at paragraph 50);

b) Analyse what claims and assertions were made by the referring party prior to adjudication "[b]*roadly, and in the round*" (*Balfour Beatty* (supra) at paragraphs 51 and 55. Thus, a dispute "*somewhat like a snowball rolling downhill gathering snow as it goes, may attract more issues and nuances as time goes on*" (see *Witney Town Council* (supra) per Akenhead J at paragraph 33);

c) Analyse whether the whole of the pre-adjudication claims and assertions were referred to adjudication (*Balfour Beatty* (supra) at paragraph 56);

d) Consider the pleadings in the adjudication to determine what "*the dispute encompassed, or through the response and the reply and the evidence deployed by both parties during the adjudication became*" (*Balfour Beatty* (supra) at paragraphs 59 to 60).

53. Generally, given the limited timetable allowed by adjudication, on the question of the scope of the referred dispute the "*courts are going to have to give adjudicators some latitude*" and not take an "*unduly restrictive*" view (see *Penten Group Ltd* (supra) per Coulson J at paragraph 28).

Rules of natural justice

54. There is no doubt that an adjudicator must observe the rules of natural justice. In broad terms, this means that he should not decide a point on a factual or legal basis that has not been argued or put forward in the submissions made to him : see *Balfour Beatty Construction v London Borough of Lambeth* [2002] BLR 288. However, as Edwards-Stuart J commented in *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC) (at paragraph 22) that rule is often easier to state than to apply.

55. Save in the sense that an adjudicator will not have jurisdiction to act in breach of the rules of natural justice, the concepts of jurisdiction and the rules of natural justice are separate and discrete. Vascroft referred me to the decision of Akenhead J in *Brims Construction Ltd v A2M Development Ltd* [2013] EWHC 3262 (TCC) (at paragraph 31a). There it was stated, in the context of allegations of breach of the rules of natural justice on the part of the adjudicator, that if he always had the jurisdiction to address the issue upon which he ultimately decided the case, he could "*hardly be criticised for deciding the case on that basis*". However, I accept the submission for Stellite that this is not authority for a more general proposition that if an adjudicator is acting within his jurisdiction it will somehow be more difficult to establish a breach of the

rules of natural justice. Akenhead J made the comment that he did on the facts of the case before him where, amongst other things, the issue that the adjudicator decided was spelt out in the Referral Notice before him.

56. There are cases where there has been a breach of the rules of natural justice where an adjudicator has relied either on his own knowledge and experience or from other sources without informing the parties of his intention to do so and the provision of an opportunity to them to comment first : see for example *Balfour Beatty* (supra) where the adjudicator used his own analysis of the causes of delay to reach his decision, without informing the parties of the methodology that he intended to adopt or seeking the parties' observations on them. HHJ Lloyd QC considered the following question (at paragraph 28) :

> "*Is the Adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and of the conclusions which he might reach, taking those sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances.*"

57. HHJ Lloyd QC went on to say (in paragraph 29) that:

> "*… it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one of which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant*."

58. In *Cantillon v Urvasco* [2008] BLR 250, Akenhead J considered the earlier authorities, including *Balfour Beatty v Lambeth* (supra), and summarised the applicable principles as follows (at paragraph 57):

> "*From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:*
>
> *(a) It must first be established that the Adjudicator failed to apply the rules of natural justice;*
>
> *(b) Any breach of the rules must be more than peripheral; they must be material breaches;*
>
> *(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is 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 Camden Borough of Lambeth was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.*"

59. The suggestion that an adjudicator must be acting on a "*frolic of his own*" in order for there to be a breach of the rules of natural justice has been described as inapt and demeaning to the adjudicator, who will be doing his best in often difficult circumstances (see *Coulson on Construction Adjudication 3rd edition* at footnote 83). What the phrase does usefully emphasise, however, is the fact that the adjudicator must have strayed significantly outside the ambit of the materials and matters advanced before him without giving the parties an opportunity to comment or, where relevant put in further evidence, in order for there to be a finding that an adjudicator has acted in breach of the rules of natural justice.

60. Stellite referred me to *Hillcrest Homes v Beresford and Curbishley* [2014] EWHC 280, albeit for illustrative purposes only. There the referring party sought a declaration that a novation agreement was void because it had been entered into as a result of a misrepresentation and/or improper pressure. The adjudicator found that the agreement was void for another reason that had not been argued by either party. HHJ Raynor QC referred to the Referral Notice and stated that:

> "*The basis of the Adjudicator's decision was that because the actual appointment of HTA did not include provision for novation at the time of execution of the Building Contract, the Novation Agreement executed by HTA did not represent accurately the appointment as envisaged pre-Contract (ie an appointment including an agreement to novate on the execution of the Building Contract) and was thus void. I find that that was not a contention that was raised by either party and it follows in my judgment that Hillcrest is right in contending that the Adjudicator determined the issue of whether the Novation Agreement dated 26 October 2012 was void on a basis which had not been put forward by either party and which Hillcrest had had no opportunity to address. On that basis there was a material failure to comply with the rules of natural justice and for that reason in my judgment the declarations under paragraphs 23 and 24 of the Decision are unenforceable*."

61. This result is understandable, given the huge gulf between what was argued before the adjudicator (namely that the novation was void for duress) and the adjudicator's decision that the novation was void for a quite different reason, namely the lack of provision for novation.

62. Finally on the law, there is helpful general guidance to be found in the judgment of Edwards-Stuart J in *Roe Brickwork* (supra) (at paragraph 24):

> "*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 are aware of the relevant material and that the issues to which it gave rise had been fairly canvassed before the adjudicator. It is not unknown for a party to avoid raising an argument on one aspect of its case if that would involve making an assertion or concession that could be very damaging to another aspect of its case.*"

63. Indeed, both parties ultimately proceeded on the basis that the question on Issue 1 was whether the issues to which the material relating to whether time was at large gave rise had been "*fairly canvassed*".

## The rival positions in summary

Stellite : Issue 1

64. As for the Adjudicator's decision that time was at large, Stellite contends that the Adjudicator's central finding that Clause 2.29 did not permit Vascroft any extensions of time for the issue of the Letter of Intent and the work undertaken by Vascroft in relation to it was not fairly canvassed :

a) First, the question of whether or not the issue of the Letter of Intent and work undertaken in connection with it caused any delay itself was not in issue. The only case that Stellite had to meet was whether or not delay was caused to the Works by the specific events identified by Vascroft in the Response and the Rejoinder and as supported by Vascroft's programming expert. There was no suggestion there that the issue of the Letter of Intent caused any critical delay to the Works;

b) The question of whether or not Clause 2.29 allowed an extension of time as a result was also not in issue. It was insufficient for Vascroft to submit that there were acts of prevention. At no stage did Vascroft suggest that the issue of the Letter of Intent and/or works carried out thereunder were acts of prevention. Stellite contends that Vascroft only argued that time for completion was at large because the contract mechanism had fallen down meaning that it could not be operated, and sought a declaration to this effect. Vascroft made no submissions about the scope of Clause 2.29 of the Contract and in particular did not submit

> that delay caused by the issue of the Letter of intent and work carried out pursuant to it fell outside the scope of Clause 2.29. Indeed, it was Vascroft's positive case (in paragraph 45 of the Response as set out above) that the Letter of Intent and the events that followed were Relevant Events within the meaning of Clause 2.29. In these circumstances, Stellite did not address the question of whether delay caused by the Letter of Intent and work carried out pursuant to it fell outside the scope of Clause 2.29.

65. It was therefore the Adjudicator's own view that that was the crucial question and his own view that such delay fell outside the scope of Clause 2.29. His conclusion was decisive of the outcome. Stellite submits that this is not a case where the Adjudicator adopted an intermediate position, somewhere between the parties' submissions, but a case where the Adjudicator has used his own analysis as the basis for his decision, without giving the parties an opportunity to comment on that analysis.

66. Stellite contends that it would have wished to comment on the Adjudicator's reasoning including on the following specific matters :

a) The precise "act of prevention" by Stellite that he considered to have caused delay to the completion date;

b) The precise delay caused to the completion act by that act of prevention, by reference to Vascroft's case or the Adjudicator's analysis, if any;

c) If the act of prevention in his contemplation was one of the delaying events relied on by Vascroft, the basis on which the Adjudicator considered that the Relevant Event or Events identified by Vascroft did not apply;

d) The basis on which the Adjudicator considered that Relevant Event 2.29.6, which concerns "*any act of impediment, prevention or default*" by Stellite, did not apply to the act of prevention in his contemplation.

67. It also points to what it says is the nonsensical overall result whereby the Adjudicator decided that an extension of time could not be granted for events that had delayed completion, and then decided that the reasonable date for completion was the same as that for which Vascroft contended that an extension of time could be granted.

<u>Stellite : Issue 2</u>

68. As to the question of reasonable date for completion, Stellite's short point is that the only dispute referred to the Adjudicator was whether Vascroft was entitled to liquidated damages. Stellite made no alternative claim for damages in the event that time was at large. Whilst Stellite accepts that any matters raised by way of defence to its claim would fall within the Adjudicator's jurisdiction, Vascroft did not raise the question of un-liquidated damages by way of defence (or at all). Neither party made any submissions as to the reasonable date for completion in the event that time was at large. Additionally, the Adjudicator failed to give the parties an opportunity to do so, in further material breach of the rules of natural justice.

Vascroft : Issue 1

69. Vascroft contends that Stellite had a fair opportunity to deal with the Adjudicator's finding that Phase 2 matters were not covered by the extension of time mechanisms in the Contract. As a matter of common sense, in defence of a claim for liquidated damages, whether time was at large, acts of prevention and the effect of the Phase 2 works were all "*very much in the melting pot*". To hold otherwise is to adopt an unduly legalistic approach. The Response (at paragraph 4.9.3 as set out above) also made it clear that Vascroft's argument was not merely that the Phase 2 Works were a Relevant Event for which Vascroft was entitled to an extension of time but an act of prevention that did not fall within the delay mechanisms which had not been administered. Equally, Stellite positively contended that acts of prevention would not set time at large because such acts were a Relevant Event for which an extension of time could be granted under the Contract (see paragraphs 5.8 and 8.6 of the Reply as set out above).

Vascroft : Issue 2

70. Vascroft submits that on a proper analysis the Notice of Adjudication required and/or invited an answer on what a reasonable date for completion was. The words "*or such other amount that the adjudicator deems appropriate*" in the relief sought by Stellite left open the possibility that the adjudicator might find that Vascroft was required to pay some other (un-liquidated) amount. Combined with the possibility that the Adjudicator might find that time was at large, Stellite's request that the Adjudicator award delay damages (in whatever form) might be met with a finding that a reasonable date for completion had not yet passed. Furthermore, a consideration of the submissions and the evidence deployed show that the dispute encompassed the issue of when the Works ought to be completed. Vascroft suggests also that, as it flagged up in its Rejoinder at paragraph 11.3, it pointed to the fact that by referring the dispute to adjudication, Stellite had given the Adjudicator jurisdiction to consider any defence raised by Vascroft. Such defence raised the question of whether or not Vascroft had been delayed by Stellite and was entitled to an extension of time and/or protection from liquidated damages by the application of the principle of prevention.

**Analysis**

Issue 1 : Time at large

71. There is no doubt that the Adjudicator had jurisdiction over the question of whether or not time was at large. It is also common ground that the Adjudicator's decision that time was at large was central to his ultimate conclusion in the Decision. The issue was not peripheral to or at the margins of the outcome.

72. The question is simply whether or not there has been a breach of the rules of natural justice. As Edward-Stuart J commented in *Roe Brickwork* (supra) (at paragraph 27), the conclusion on that issue will in the great majority of cases be very fact-specific. This case does not fall within the small minority. The relevant question is whether or not the issues arising on the question of time at large had been fairly canvassed in the context of the Adjudicator's finding that Clause 2.29 did not permit Vascroft any extensions of time for the issue of the Letter of Intent and the Phase 2 Works.

73. What is and is not fair will depend upon all the circumstances. It is important at the outset to recognise the compressed and limited context in which the Decision was delivered. This matrix was well-demonstrated by the very short timetable imposed on the Adjudicator and the evident difficulties that he frankly admitted this (and the lack of a meeting) caused him. It would be wrong to assess the fairness of the procedure adopted by the Adjudicator in a vacuum. It would also be wrong to ignore the provisional, even if temporarily binding, status of the Decision. This is not to diminish the requirement of fairness, or to suggest that the rules of natural justice do not apply, but rather to calibrate it in its application to the facts.

74. Despite the able submissions of Mr Stansfield QC for Stellite, I have come to the conclusion that there was no breach of natural justice in the procedure adopted by the Adjudicator in relation to his finding that time was at large.

75. The issue of whether time was at large was obviously in play between the parties and canvassed fully by them. The scope of that debate was not as narrow as Stellite contends. Stellite's first assertion (that the question of whether or not the issue of the Letter of Intent or the Phase 2 Works caused delay to the Works was never in issue) is not correct. Paragraph 48 of the Response made it clear that Vascroft did contend that the Letter of Intent and the Phase 2 Works "*prevented and continue[d] to prevent Vascroft from completing the Shell and Core Works.*" Whether or not the focus of Vascroft's expert report was on other specific events of delay, the fact remains that relevant delay as a result of the Letter of Intent and Phase 2 Works were matters which both Stellite and Vascroft had the opportunity to address and on which to comment. Equally, the suggestion that Vascroft's case that time was at large rested exclusively on the contractual mechanism having fallen down is not correct. Paragraph 4.9.3 of the Response, as set out above, made it clear that Vascroft submitted that time was at large "*as a result of extensive acts of prevention and/or a refusal to administer the delay mechanisms in the contract on the part of Stellite, which [had] led to the contractual mechanisms falling down…*". The setting of time at large by reason of acts of prevention on the part of Stellite was thus an issue openly and independently in issue, as emphasised by Vascroft's conclusion in the Response, as set out above. The fact that Vascroft did not identify specific acts of prevention does not undermine that broad point. (In fact the conclusion of Vascroft's Response at least implies that the Letter of Intent and Phase 2 Works may have been acts of prevention.) Moreover, the contention that acts of prevention by Stellite would not set time at large because such acts constituted a Relevant Event for which an extension of time could be granted under the Contract was put before the Adjudicator by Stellite (at paragraphs 5.8 and 8.6 of the Reply).

76. Stellite's complaint thus has to be a narrower one, namely that in order for there to have been a fair hearing, the precise question of whether or not Clause 2.29 permitted an extension of time for delay caused by the Letter of Intent and/or Phase 2 works needed to be canvassed specifically and expressly with it before the Decision in order for there to have been a fair process. The question is therefore one of degree.

77. The focus of the Adjudicator's decision that time was at large was the authority of *Multiplex* (supra) and in particular paragraph 56(ii) of that judgment. This was an authority before the parties at all material times, on which they either did and/or could make such submissions as they wished. Indeed, Stellite placed particular reliance on paragraph 56(ii) of *Multiplex* (supra), as the Adjudicator noted at paragraph 63 of the

Decision, where he referred back to paragraphs 8.4 to 8.6 of the Reply. There Stellite invited the Adjudicator to take paragraph 56(ii) of *Multiplex* (supra) as the starting point for his consideration of Vascroft's contention that time had been set at large, an invitation which the Adjudicator appears to have taken up. And these paragraphs (8.4 to 8.6) were in turn a reply by Stellite to the Response at paragraphs 4.9.3, 43 to 53, and its conclusion. The fact that Vascroft may have positively asserted that the Letter of Intent was a Relevant Event for the purpose of a claim to an extension of time does not mean that there was unfairness. Vascroft's positive assertion did not bind the Adjudicator, as Stellite would have known at all times. Additionally, it was open to Vascroft to rely on the Letter of Intent and the Phase 2 Works separately for the purpose of its alternative submission that time was at large.

78. I accept the submission for Vascroft that the Adjudicator was in paragraphs 63 to 68 of the Decision effectively addressing and considering Stellite's submissions in section 8 of the Reply. He recorded Stellite's position in paragraph 59 : even if there was an act of prevention by Stellite, which Stellite denied, the inclusion in the Contract of provisions for the granting of extensions of time meant that time would not thereby be set at large. He rejected that submission by reference to the Letter of Intent and the Phase 2 Works. Stellite may disagree with his reasoning, but that is not the issue for present purposes, but rather for another day.

79. When one traces the Adjudicator's reasoning through in this way, and takes account of the fact that the question of whether time was at large, acts of prevention and the effects of the Phase 2 Works were all before the Adjudicator as identified above, it can be seen that there has been no breach of natural justice. This is not a case where the Adjudicator was relying on a new authority or line of authorities, let alone some external information, fact or expertise, or some expertise peculiar to himself, which he did not share with the parties. Rather he was applying ventilated law to the material before him in circumstances where, as he put it, the parties had, to their common knowledge and understanding, approached the issues on the facts from "*slightly different angles*". (As Stellite put it in oral submission, this may in fact have been something of an understatement.)

80. In conclusion, it seems to me on the facts of this case that the circumstances fall more aptly into the category of cases where the adjudicator has decided a case, not by accepting the precise submissions of one party or another, but rather by reaching a decision on a point of importance on the material before him. The Adjudicator did so in circumstances where the parties were each aware of the relevant material and where the issues to which it gave rise had been fairly canvassed before him (see paragraph 24 of *Roe Brickwork* (supra)), as the Adjudicator himself must have thought.

81. This last point is not wholly without significance, although I would reach the same conclusion independently of it : it is of course Stellite's case that the Adjudicator fell into error in proceeding as he did. In support of that submission detailed arguments were advanced before me as to how certain passages in the parties' respective written materials as submitted to the Adjudicator should or should not be read (for example, by reference to Vascroft's conclusion in the Response). But the Adjudicator clearly understood the materials before him in a way which allowed him, in his view proceeding fairly and properly, to reach the conclusions that he did.

82. Standing back in all the circumstances, I have therefore come to the conclusion on the facts of this case that there was no breach of natural justice in relation to the Adjudicator's finding that time for completion of the Works by Vascroft was at large for the reasons that he gave. As Stellite fairly accepted, it will be a rare case where there has been a breach of the rules of natural justice. This is not one of those cases. In my judgment the Adjudicator fell on the right side of the line in the context of this rough and ready adjudication process.

Issue 2 : Reasonable time for completion

83. On the facts of this case, the scope and nature of the Adjudicator's findings so far as relevant to Issue 2 are clear and unambiguous : having found time to be at large, he went on to consider that Vascroft's obligation was to complete the Works in a reasonable period, being no later than 5th March 2016. This could only be relevant to a claim for un-liquidated damages and only arose because of the finding that time was at large.

84. The Adjudicator's reasoning may have been the logical next step, given his finding that time was at large. But it is clear in my judgment that in proceeding to consider the issue, he exceeded his jurisdiction. It is important not to confuse the fact that the Adjudicator may have had material with which to decide an issue with having the jurisdiction to resolve it. The two are not the same.

85. The Notice of Intention to Refer did not confer jurisdiction on the Adjudicator to consider alternative claims that did not affect the sums that might be due to Stellite in liquidated damages. Even allowing for some latitude, the words "*or such other amount that the Adjudicator deems appropriate*" cannot be stretched to encompass a claim for un-liquidated damages (or, logically, any other amount brought in any claim for money under the Contract). Those words simply allowed for the awarding of a lesser sum than Stellite had claimed if, for example, Vascroft established an entitlement to an extension of time under the Contract. Thus it did not confer jurisdiction on the Adjudicator to determine what was a reasonable time for completion, which could only be relevant to a claim for un-liquidated damages. This is reflected in and consistent with the fact that at no stage thereafter did the parties make any submissions by reference to a claim for un-liquidated damages (or a reasonable time for completion outside the context of a claim for liquidated damages).

86. Nor did anything raised by Vascroft by way of defence extend the Adjudicator's jurisdiction to cover the question of what was a reasonable time for completion if time was at large. Stellite accepts that Vascroft had the right to raise a claim for extensions of time by way of defence to Stellite's claim for liquidated damages as it did. And the Adjudicator had jurisdiction to address it. But the question of whether or not Vascroft was entitled to an extension of time under the contractual provisions was a question quite separate and distinct from the question of what would be a reasonable date for completion in the event that time was at large. It was not necessary for Vascroft to raise the question of what would be a reasonable time for completion in the event of time being at large, since the fact of time being at large would be a defence to Stellite's claim without more. And Vascroft did not do so. It did not, for example, seek a declaration as to a reasonable completion date. Vascroft sought to rely on the fact that the Adjudicator in paragraph 73 of the Decision accepted its expert's views on delays (as summarised in section 3 of the expert's addendum report) and thus what

would be a reasonable date for completion. But it is clear that the expert's views to which the Adjudicator was referring were expressed only in the context of Vascroft's claims for extensions of time, not in the context of an alternative case based on a reasonable completion date if time was at large. This was not in any way a situation of a rolling stone gathering sufficient moss to extend jurisdiction to a new claim for un-liquidated damages.

87. Additionally, and perhaps fundamentally, the question of what was a reasonable completion date if time was at large would not have been a defence to Stellite's claim in any event. In those circumstances, absent an ad hoc agreement between the parties of which there is no suggestion, the Adjudicator's jurisdiction was not extended by any defence raised by Vascroft.

88. That is sufficient to allow the second limb of Stellite's claim and Stellite's alternative complaint of breach of natural justice does not arise.

89. It is common ground that, were I to make the finding that I have on Issue 2, the Adjudicator's decision on the reasonable time for completion (as set out in section 4 (paragraphs 70 to 73) and in paragraph 75.5 of the Decision) is severable from the balance of the Decision, which would otherwise survive. The Decision thus stands, save that section 4 (paragraphs 70 to 73 inclusive) and the corresponding finding in paragraph 75.5 of the Decision are unenforceable.

**Conclusion**

90. For these reasons :

a) I find that there was no breach of the rules of natural justice in the Adjudicator holding that time was at large for the reasons that he gave;

b) I find that the Adjudicator acted outside his jurisdiction in holding that a reasonable time for completion was 5th March 2016.

91. Accordingly, I dismiss the claim for declaratory relief on Issue 1 and grant it on Issue 2.

92. I invite the parties to draw up an order accordingly and to agree all outstanding matters, including costs, so far as possible.

93. I conclude by expressing my gratitude to all counsel for their courteous assistance throughout.