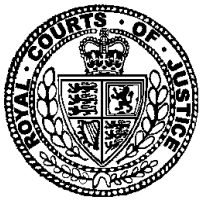

Neutral Citation Number: [2024] EWHC 617 (TCC)

Case No: HT-2023-000405 & HT-2023-000448

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

Royal Courts of Justice
7 Rolls Buildings
London
EC4A 1NL

Date: 13th February 2024

Before:

RECORDER SINGER KC SITTING AS A JUDGE OF THE TCC

- -

Between:

WORDSWORTH CONSTRUCTION MANAGEMENT LTD

Claimant

- and -

INIVOS LTD T/A HEALTH SPACES

Defendant

- -
- -

NICHOLAS KAPLAN (instructed by **Berry Smith LLP**) for the **Claimant**
WILLIAM WEBB KC (instructed by **Archor LLP**) for the **Defendant**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

RECORDER SINGER KC:

1. This is two applications for summary enforcement of two adjudicators awards. They were ordered to be heard together by a Consent Order made on 17 January of this year.

2. The first decision, which for ease of reference I will refer to as the "Jackson decision", is dated 25 September 2023 and is favour of Wordsworth Construction Management Ltd (WCM) and ordered Inivos Ltd t/a Health Spaces (HS), to pay the sum of £170,562.69 (excluding VAT).

3. The second decision, which I will refer to the as the "Milner decision" dated 24 November 2023, ordered WCM to pay HS the sum of £192,772 and £4,978.54 interest.

4. WCM says that the Jackson decision should be enforced and the Milner decision should not be enforced. HS says the opposite. Both parties agree that if both decisions are enforced contrary to their respective primary positions, that they should be set off against each other.

5. Mr Kaplan appeared for WCM and Mr Webb KC for HS. I am very grateful to both counsel for their focused and helpful written and oral submissions.

6. I have taken into account all the submissions and evidence before me in reaching my decision. If I do not refer to any particular points in the course of this judgment, that does not mean that I did not take them into account, rather it means that I do not consider that they are central to my decision-making process. I remind myself that both applications are for summary judgment and that the test for obtaining summary judgment must be borne in mind, notably that the court will not enforce an adjudication award summarily if there is a reasonably arguable defence put forward.

Issues to be decided.

7. In respect of the Jackson decision, the parties have helpfully agreed that the following issues arise for determination:

> 1. In relation to WCM's claim to enforce the Jackson decision, was there a material breach of natural justice in the manner in which Mr Jackson either decided or failed to decide the claims at B(1)(a) to B(20) and D(1) to D(6) of HS's counterclaim, in particular:
>
> i) Did Mr Jackson fail to decide those counter claims at all?
>
> ii) Did Mr Jackson fail to give reasons for his decision on those counter claims?
>
> iii) Did Mr Jackson dismiss the counter claims on a basis not argued by the parties without first giving the parties the opportunity to comment?
>
> If the answer to any of i to iii above is yes, does that render the decision unenforceable?

8. For the Milner decision, again the following are the agreed issues ("Issue 2").

   i) If the Jackson decision is enforceable, was the dispute referred to Dr Milner the same or substantially the same as the matters that Mr Jackson had already determined at paragraph 1(8)(1) of his decision?

   ii) Alternatively, was the appointment of Dr Milner invalidated by HS's assertion of a potential conflict in the RICS' nomination form?

9. Issue three, which I will read now, is as follows:

> "In the event that both decisions are enforced once (if any) is due in respect of vat and interest in respect of (1) the sums awarded to WCM by Mr Jackson; and (2) the sums awarded to HS by Dr Milner."

10. The parties agree that issue three, if applicable, will be resolved at this hearing after I have finished handing down this judgment.

Factual background/findings.

11. The factual background to both decisions is uncontroversial and the relevant facts are as follows. The parties entered into a construction management contract where WCM was the construction manager and HS the employer for a turnkey modular facility at Newham University Hospital in London. There was a previous adjudication between the parties and Mr Jackson was the adjudicator. That award is not, however, relevant to these proceedings.

12. The contract was terminated in or about May 2023 and a dispute arose. WCM commenced the adjudication which led to the Jackson decision, by notice of intention to refer dated 28 July 2023 and the referral notice dated 4 August 2023. The summary of WCM's position in the notice was as follows.

> "15. WCM contends that it is entitled to receive payment from HS in the sum of £961,245 plus VAT.
>
> 16. WCM contends that HS committed an unreasonable and vexatious act of bad faith contrary to the expressed wording of clause 8.2.1 of the contract in summarily terminating the contract as it did.
>
> Thus, HS, was in repudiatory breach of contract occurring on or around 12 May 2023 and having been subsequently accepted by WCM, WCM is entitled to receive payment of the balance due under the contract from HS, plus damages for the breach.
>
> 17. In the alternative, WCM contends that HS terminated its engagement under the contract for convenience under clause 8.4.1 of the contract and there is no basis whatsoever for HS's allegation that there were grounds for the termination of WCM's engagement under clause 8.4.3 of the contract. As a

> consequence, WCM is entitled to payment of the direct loss and/or damage it suffered due to the termination action by HS.
>
> 18. WCM further contends that late payment interest is also due on the unpaid sum at the contractual interest rate of 5% over the Bank of England base rate. The total interest due to WCM up to the date of the notice of adjudication is £20,277.95, with a daily rate of £263.35 accruing thereafter."

13. In its response, HS summarised its position as follows, under the heading "Executive Summary":

> "2.1. This dispute concerns the termination of WCM's employment under the CMA as defined below and in turn the payment that is due from one party to the other. Following the submission of WCM's termination account on 13 June 2023 pursuant to clause 8.6, WCM seeks a final payment from HS in the amount of £961,245 plus interest for late payment (although the courts have now substantiated the claim in the higher sum of £1,108,815) whereas HS seeks a final payment from WCM in the amount of £798,050.76 plus interest for late payment.
>
> 2.2. HS's claim for payment from WCM is based on the fact that WCM employment was properly terminated with a fault in accordance with clause 8.4.3 of the CMA, as a result of WCM failing to exercise the degree, skill and diligence required by clause 2.7 of the CMA. HS, therefore, claims that it is entitled to recover any loss and/or damage caused to HS by the termination pursuant to clause 8.6.2 of the CMA, including extra over costs in completing the works covered by the CMA.
>
> 2.3. On the other hand, WCM's claim for payment from HS is based on an allegation that WCM's employment was not properly terminated through default and it is either (a) the CMA was repudiated on or around Friday 12 May 2023, such that WCM is entitled to common law damage to breach and/or (b) WCM's employment was terminated for convenience, pursuant to clause 8.4.1 of the CMA, such that WCM's entitlement to any direct loss and/or expense caused to it by the termination pursuant to clause 8.6.1.3.4 of the CMA."

14. Section 8 of the response was headed "Quantum" and sub-headed "Payment due from WCM to HS". Paragraph 8.9, reads as follows:

> "The JS report evidences that HS is entitled to payment from WCM in the sum of £798,050.76. Even if WCM were successful in arguing that termination was for convenience or HS was in repudiatory breach, which WCM accepted (which is denied by HS) then WCM still owe HS the sum of £437,097. The summary of Joseph Stuart's conclusions can be found in the table below."

15. The table following has the headings "JS Val. default, JS Val. convenience", which refer to the alternative suggestion that the contract was terminated due to WCM's default or by convenience. There is no other heading on the table which refers to "freestanding" claims, which are unaffected by the decision on which party terminated the contract. That said, half way down the table is a heading "items B(1)(a) to B(20)", which reads; "WCM breaches prior to termination". A similar heading appears before items D 1 to 6

16. As I have already noted, HS sought a payment to it in the adjudication in the total sum of £798,050.76. In their reply at paragraph 60, WCM said:

> "In relation to claims under categories B, C and D, Mr Stuart again simply assumes that the breaches which have been falsely alleged by HS are proven in principle, when in reality they have not been proven to any extent and are baseless in the first instance. Incredibly, he even includes the category B and D figures within his convenience assessment. Again, Mr Stuart's inclusion of such figures in both of his assessments is wrong in principle."

17. Further, at paragraphs 91 to 93, WCM indicated its response to the category B (C and D) claims and made reference to the burden of proof. In its rejoinder, another table has headings which again are limited to default and convenience. Paragraphs 8.9 to 8.11, state:

> "As the adjudicator will note from Mr Stuart's first report, his assessment of the sum owing to HS of £798,050.76 or at its lowest even if WCM is successful in terms of liability on termination, a sum owing to HS of £407,437.97. Mr Stuart's revised assessment as set out in its supplemental report is that HS is entitled to the sum of £981,493.14, or at its lowest, that WCM would be entitled to a sum of £121,233.68.
>
> Whilst WCM may seek to suggest in their rejoinder that it has provided evidence to demonstrate their additional entitlement of a further £500,000 the difference between £407,437.97 and £121,233.68, such a submission would be misplaced. The sum of £121,233.68 would be arrived at in the highly unlikely scenario that WCM is successful on all grounds, namely that there was a termination for convenience/repudiatory breach and that HS has no claim in respect of any sums for its items A, B, C and D as set out in appendix 1 to Mr Stuart's supplemental report. Those items include <u>all</u> of HS's claims for breaches prior to termination, which are evidenced by HS in this adjudication by reference to the witness evidence provided, contemporaneous evidence in support and the liability expert reports of Mr Hugh Corrigan and Mr Ioannis Bompolas. Plainly, WCM is not and could never be entitled to payment of £121,233.68 or indeed any other sum.

> HS is entitled to the sum of £981,493.14 and as set out in the response in section 4 of the rejoinder. The adjudicator has jurisdiction to decide that HS is entitled to payment from WCM of that sum or such other sum as the adjudicator may decide."

18. The Jackson decision made the following findings, having set out the issues for determination at paragraph 24, as follows:

> "Having considered the nature of the dispute, the parties' submissions and information provided to me (whether specifically referred to in this decision or not), I consider that the following key issues remain to be decided:
>
> Issues:
>
> 1. Was the contract terminated or repudiated?
>
> 2. Is WCM or HS entitled to payment and if so, how much?
>
> 3. If WCM are entitled to payment, are they entitled to interest? If so, how much?
>
> 4. How are the adjudicators fees to be apportioned?"

19. After a detailed discussion of the events of early to mid-May 2023, Mr Jackson found at paragraph 92 that HS were in repudiatory breach of contract. He then turned to consider quantum. Having determined the quantum of the sums claimed by WCM, he then considered the B(1)(a) in a single paragraph number 181, as follows:

> "On the basis that I have decided HS repudiated WCM's contract, I decide that HS's claim for WCM's breaches prior to termination in HS's claim for items, B(1)(a) to B(20) fail."

20. He repeated that wording, though for different item numbers, for items D(1) to (6) and also for items C(1) to (3), which were for claims "resulting from termination". The way in which the counterclaims for B1(a) to (20) and D(1) to (6) were dealt with, to use a neutral phrase, in the Jackson decision, forms the basis for resistance to payment of the sums he awarded.

21. Following the Jackson decision on 5 October 2023, HS started the reference which led to the Milner decision. When seeking the nomination of an adjudicator from the RICS, HS stated in the nomination form , in the box provided for comments, as follows:

> "We consider that Mr Guy Jackson has a potential conflict of interest because a natural justice argument may be raised in relation to a prior adjudication he has decided between the parties under the same contract (the date of that decision was 25 September 2023). Our view is that it would be inappropriate for there to be an ongoing adjudication with Mr Guy Jackson if that were to materialise."

22. The explanatory notes to the form include at bullet point one:

> "RICS has a duty to act independently and transparently when nominating an adjudicator. On receipt of a request, the RICS will select a suitably qualified adjudicator who is free from conflicts of interest, normally from the RICS panel of adjudicators. Details of your application will be sent to prospective third parties to help them decide whether they are able to accept the nomination."

23. The penultimate bullet point on this page reads:

> "Where there is one or a series of adjudications on the same contract (I think that should probably read "of" rather than "or") normal policy is to appoint the same adjudicator because of potential savings in costs and time. Each application is treated on an individual basis and there may be circumstances where it may not be appropriate to nominate the same adjudicator. These could include the availability of the adjudicator, court action by one of the party's relating to the adjudicator's previous decision, different type of disputes, other reasons which the RICS considers makes a nomination inappropriate."

24. The final bullet point:

> "The RICS retains discretion which will always be exercised fairly."

25. In answer to the nomination form, WCM's representative sent an email on 5 October 2023. That says:

> "Dear RICS DRS, we write further to the adjudicator nomination application form attached submitted by Archor on behalf of Invios t/a Health Spaces. Please note that despite being fully aware that we are the representatives of Wordsworth Construction Management Ltd (WCM), Archor has disingenuously and unprofessionally failed to include our details on the application form. We, therefore, respectfully ask that you note our appointment as representatives of WCM and ensure that all correspondence is copied to the undersigned.
>
> We also note that Archor has blatantly attempted to influence and/or restrict in your search for an adjudicator contrary to the judgment in *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC), with purported reasoning set out by Archor as to why they contend that Mr Guy Jackson has a conflict of interest, is in fact utterly meritless – they simply do not want him as an adjudicator and are attempting to unduly influence your selection process in precisely the same way as occurred in Eurocom.
>
> **Please be aware that Mr Guy Jackson has previously made decisions in adjudications one and two between the same parties on the same contract**.

> All of WCM's rights are expressly reserved, including its rights to challenge the jurisdiction of any adjudicator nominated pursuant to the attached nomination application form."

26. Archor replied to that email by their email of the same date, timed at 17:43. In short they did not accept the reasoning given for Mr Jackson's potential conflict of interest as meritless or contrary to the judgment in *Eurocom*. They say that they simply alerted the RICS to the fact that Mr Jackson has a potential conflict of interest because the natural justice argument may be raised in relation to the decision he made in the adjudication two and in their view it would be inappropriate for there to be an ongoing adjudication if that were to materialise.

27. Thereafter, Dr Milner was appointed by the RICS. WCM then submitted to Dr Milner that he lacked jurisdiction due to the contents of the nomination form and also because it took the view that the matter referred in its adjudication had already been decided by Mr Jackson. Dr Milner rejected both contentions and provided his non-binding decision.

28. WCM took part in the reference whilst maintaining its position as to jurisdiction and without prejudice to the same.

29. It is accepted by HS as a matter of fact that the items of claim referred to by Dr Milner were the most substantial contra-charge claims which had been included in the B items in the reference before Mr Jackson. Dr Milner awarded sums to HS in its decision, as I have noted in paragraph 3 of this judgment and agreed with HS's argument that the Jackson decision did not bind him because in that decision, the counterclaims had been rejected as they were not part of the determination of the account, rather than having been addressed as freestanding breaches of contract.

Legal Principles

Failure to consider defences:

30. It is clearly right to describe as trite law, the proposition that a deliberate refusal to consider a defence to a money claim is a breach of natural justice as Mr Webb KC's skeleton does, see *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC) at paragraph 31.

31. As far as inadvertent failure to consider defences are concerned, I accept and gratefully adopt the dicta of Stuart Smith J, as he then was, in *KNN Coburn LLP v GD City Holdings Ltd* [2013] EWHC 2879 (TCC), Paragraph 49 reads as follows:

> "It will be noted that an inadvertent failure to consider one of a number of issues will "ordinarily" not render the decision unenforceable. This qualification admits the possibility that an inadvertent failure may, in an extraordinary case, bring the principle into play. No clear guidance is available about when an inadvertent failure will render the decision unenforceable. Since the essence of the adjudication process is that the real dispute between the parties should be resolved, it seems to me that the touchstone should be whether the inadvertent failure means that

> the adjudicator has not effectively addressed the major issues raised on either side. Clearly, as [22.4] of Pilon makes clear, the failure must be material in the sense of having had a potentially significant effect on the overall result of the adjudication. The burden of showing materiality must rest on GD City, which asserts it. When confronted by a reasoned decision, the court should tend to look for coherent reasoning underpinning the adjudicator's decision rather than the hastening to a conclusion that an omission renders a decision unjust. That said, however, the decision whether an adjudicator has fairly disposed of the dispute that was referred to him will depend upon the facts of each case."

32. I note that in the KNN case, Stuart Smith J rejected the argument of breach of natural justice on the merits that he decided that the point which was not taken into account was, in any event, misconceived. I also note that His Honour Judge Steven Davies quotes from *Pilon* in his decision in *Van Elle Ltd v Keynvor Morlift Ltd* [2023] EWHC 3137 (TCC), at paragraph 83. He also quotes from paragraph 13.55 of Sir Peter Coulson's textbook.

33. I do not accept, however, that an inadvertent failure to address can never ground a defence of breach of natural justice. It is a decision which could be made on certain extraordinary facts, in particular circumstances. I do also note that no authority was put before me where an inadvertent failure has been held to bar enforcement. Of course, as I have already noted, any defence to an enforcement of an adjudication award on the grounds of breach of natural justice has to be material and of sufficient seriousness. See in that regard *Primus Build Ltd v Pompey Centre Ltd & Others* [2009] EWHC 1487 (TCC) and the decision of Coulson J, as he then was, at paragraphs 7,8 and 29.

Failure to give reasons:

34. The parties were agreed as to the relevant principles. In *AMEC Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC), another decision of Coulson J, as he then was, at paragraph 93 the judge said:

> "It may be that a certain amount of confusion has arisen out of references in some of the earlier cases to the need for the adjudicator to respond to the issues. That means nothing more or less than addressing the question that the adjudicator has been asked by the parties to answer, i.e. what, if anything, is due, what if anything, is the period of culpable delay and so on. This expression was not intended to convey an obligation on the part of the adjudicator to provide an answer to each and every issue raised in the party's submission and it would be absurd to suggest that a failure to address a particular issue, no matter how trivial, on the face of the decision, in some way amounted to an automatic breach of natural justice. Furthermore, it is not for the court on an enforcement application to pick through every pleaded issue on the present case, there were literally thousands of them, to see if each had been answered by the adjudicators. What matters, as I have said, is whether he attempted to answer

> the broad question that he had been asked. It seems to be plain that this adjudicator did so, thus the last ground of challenge to his decision walks away.

35. In his book at paragraph 11.38, Sir Peter states:

> "Stated reasons for a particular decision do not need to be lengthy. They do, however, need to be coherent and adequate. They need to set out the decision maker's conclusions on the important issues that were raised, including any significant issues of fact and/or any matters of law."

Considering points not raised by either party:

36. In *Primus*, at paragraph 39 and 40, Coulson J stated:

> "In those circumstances, it might be said that the adjudicator was doing something which was very similar to what the adjudicator did in Balfour Beatty, for which he was rightly criticised, namely filling in the gaps in the referring party's case without any reference to the other side. It is a fine line for an adjudicator between wanting to help the parties on one hand and making one side's case for them on the other, but if an adjudicator believes that in the interest of justice there is a legitimate alternative course, which has not been considered or put forward by the referring party, but which may on its face meet the objections of the responding party, he should immediately ask himself the question "do I need to give notice of and obtain submissions about that alternative approach. As I have said, these things are always a matter of fact and degree. An adjudicator cannot and is not required to consult the parties on every element of his thinking leading up to a decision, even if some elements of his reasoning may be derived from rather than expressed in the parties' submissions. Whereas here, an adjudicator considers that the referring party's claims as made cannot be sustained, yet he himself identifies a possible alternative way in which the claim of some sort could be advanced. He would normally be obliged to raise that point with the parties in advance of his decision. It seems to me that the principle must apply *a fortiori* in circumstances where the document from which the alternative approach is to be derived, is a document which the adjudicator was told by the parties to ignore. In those circumstances, common sense demands that before reaching any conclusion, the adjudicator must ask the party for their submissions upon that alternative approach.

> In his book at 13.68, Sir Peter states:

> "There have been a number of more recent cases where the principle complaint has been that the adjudicator undertook an important element of the decision making process (whether it be the calculation of extension of time or the valuation of particular costs) which was not put forward by either of the parties, the courts have generally been wary about concluding in such circumstances, that the adjudicator had embarked on his own exercise without properly warning the parties in advance, although in particular cases show that even if the adjudicator's final result was not that contended for by either side, if he has utilised material put before him the parties in order to arrive at that result, there will ordinarily be no breach of natural justice."

The effect of earlier decisions:

37. The leading case on whether a previous decision binds a subsequent adjudication, is the Court of Appeal's recent decision in *Sudlows Ltd v Global Switch Estates 1 Ltd* [2023] EWCA Civ 813, paragraph 1 states:

> "An adjudicator cannot determine a dispute which has already been decided in an earlier adjudication. The test is whether the dispute in the second adjudication is the same or substantially the same as the dispute that was decided in the first, that is a matter of fact and degree."

38. Paragraphs 56 to 59 of Coulson LJ's judgment contain three overarching principles.

> "The first is that the purpose of construction adjudication is not always easy to reconcile with serial adjudication, see paragraphs 32 and 33. If the parties to a construction contract do engage in serial adjudication and then inevitably get drawn into a debate about whether a particular dispute has already been decided, the need for speed and the importance of at least temporary finality, mean that the adjudicator, and if necessary, the court's enforcement, should be encouraged to give a robust and common-sense answer to the issue. It should not be a complex question of interpretation of documents and citation of authority.

> "The second is the need to look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision, *Quietfield, Harding and Paice and Hitachi*. Of course, it can be relevant to consider the adjudication notice, the referral notice and so on, but what matters for the purposes of section 108 and the paragraphs in this keynote as well, is what it was in reality that the adjudicator decided. It is that which cannot be re-adjudicated. The forming content of the documentation with which he was provided, is of lesser relevance and as was pointed out in *Harding and Paice*, can be misleading.

> "The third critical principle is the need for flexibility. That is the purpose of the test, fact and degree to prevent a party from re-adjudicating a claim or a defence on which they have unequivocally lost, *HG Construction v Benfield,* but to ensure that what is essentially a new claim or new defence is not shut out. In this way, the re-adjudication in *Carillion v Smith* of the same claim, where the only differences were the figures, was impermissible, whilst a new wider claim was permissible, even if it included elements of a claim which had been considered before, such as *Quietfield v Balfour Beatty* and indeed, I consider the result in each of the reported cases to which I have referred, is the product of common sense and fairness, which while I accept is not a invariable guide one way, but at least testing whether the correct approach has been adopted, is to consider whether if the second adjudication is allowed to continue, it would or might lead to a result which is fundamentally incompatible with the result in the first adjudication. If, in that second adjudication, one or other of the party's is asking the adjudicator to do something that is diametrically opposed to that which the first adjudicator decided, then that may be an indication that what they are seeking to do is impermissible."

39. At paragraph 65, Coulson LJ stated:

> "However, these are theoretical rather than real dangers and they stem in part from the particular features of construction adjudication and in part from what leading counsel accepted were the unusual facts of this case. As a matter of practice, adjudicators and where necessary, enforcing courts have not found very much difficulty in determining where the line should be drawn. In the present case, Mr Molloy concluded that he was bound by the decision and the adjudication found. That finding and its potential significance has perhaps got rather lost in the subsequent litigation. Whilst the court is not bound by such a ruling, *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 418; [2005] BLR 1, it should be slow to interfere with it unless it concluded that it was clearly wrong. Anything less runs the risk of undermining the adjudication process by encouraging repeated challenges to the adjudicator's decision."

40. At paragraph 69, Coulson LJ said:

> "It is important that in serial adjudications, the policing of this sort of debate is primarily left to the adjudicators themselves. The court should only intervene when something has gone clearly wrong in a later adjudicator's decision."

41. The decision whether a particular adjudicator's decision is binding on a subsequent adjudicator is of course fact specific, but one case that is illustrative of the proper

approach is the *Hitachi* case [2019] EWHC 495 (TCC) and in that regard, I refer to paragraph 41 where the judge, Stuart Smith J, as he then was, said:

> "In my judgment the dispute referred in the eighth adjudication was also not "substantially the same" as the dispute decided in the second. It is important to bear in mind that the comparison to be made is between what was *referred* in the eighth adjudication and what was *decided* in the second. Once it is recognised that there was no valuation decision at all in the second adjudication, it becomes clear that, in the event of the value to be attributed to and recovered for Event 1176, there is no overlap at all. It is only if one compares what was *referred* in each adjudication that a misleading and irrelevant similarity between the two referred disputes appears. I recognise and take into account the dicta of Dyson LJ in *Quietfield* and Akenhead J in *Carillion*, that neither laid down a hard-edged rule that disputes should be regarded as being the same or substantially the same if there was an overlap of evidence. To the contrary, in *Quietfield* (as in this case) the remedy originally sought (there an extension of time) was the same and there was an overlap of evidence when compared with the substance of the dispute that was referred in the later adjudication."

Invalidity of the appointment process.

42. Section 108(2)(e) of the Act provides that all construction contracts shall impose a duty to act impartially in his book at 12.18 and 16.88 commenting on the decision in *Eurocom v Siemens Plc*, Sir Peter Coulson explains the risks of warning nominating bodies against any potential conflict of interest, unless they are clear. The *Eurocom* claim itself was based on findings that false representations had been made to the nominating body and made either deliberately or recklessly. There is no authority which was cited to me where a representation was made other than effectively fraudulently where a nomination thereafter has been held to be invalid.

Issue One: Discussion and Decision.

43. HS defends the enforcement of Mr Jackson's decision on the basis that there has been a material breach of natural justice, in particular because it says (a) that Mr Jackson failed to decide the counter claims at all; (b) Mr Jackson failed to give reasons for his decision on those counter claims and (c) Mr Jackson dismissed the counter claims on a basis that neither party had argued, without giving the parties the chance to comment.

44. In paragraphs 62 and 63 of HS' skeleton, Mr Webb KC submits:

> "These are, however, all just different legal ways of analysing the same point. Both claim and counterclaim are part of the second adjudication, they should have both been addressed in some meaningful way. They were not.

> By discarding the counterclaim with a single sentence, the second adjudicator completely failed to fulfil his role, which was to resolve both claim and defences on an equal footing.*"*

45. It is certainly the position, and I also find that the decision on the counterclaims at B(1)(a) to (20) and D(1) to (6) was extremely briefly expressed by Mr Jackson in contrast, for example, to his discussion and decision on the key termination issues between the parties. It is also clear to me Mr Jackson did not engage at all in consideration of the quantum of those items of counterclaim, simply recording a value at £0.00p. I also agree with Mr Webb KC's submission that the decisions made as to the valuation and of the B, C and D items, were informed and influenced by the decision on which party had validly terminated the contract, see decision at paragraph 93. That said, in his paragraph 96, the adjudicator clearly addresses the issue of what sums were due "to either party".

46. The suggestion that Mr Jackson failed to consider HS's defence at all, is clearly incorrect in my judgment, not least because it is accepted that the adjudicator considered and determined the termination issues between the parties, which formed the background of the claim and counterclaim before him. The error, therefore, on the part of Mr Jackson is that he failed to consider the merits of items B and D counterclaims, irrespective of the termination issues, which in my judgment is an error of law, not a breach of natural justice.

47. There is no evidential basis in the Jackson decision that Mr Jackson refused to consider the items on the grounds that he considered them to be outside his jurisdiction. None of the language used in the Jackson decision is consistent with that being the approach. The true position, on my reading of the Jackson decision, is that he decided, wrongly in law, that once the termination issues went in WCM's favour, that in itself disposed of the B and D counterclaim items. Making an error in law is not the same as refusing to make a decision at all. Whilst a refusal to consider a defence at all in a money claim, is a breach of natural justice, a decision not to award sums on an erroneous legal basis is not a breach of natural justice. It is inherent in the adjudication process that mistakes of law and fact may be made by adjudicators and the parties will have to live with decisions made on an erroneous basis unless and until challenging them later, if they choose to do so.

48. Whilst it may be tempting to suggest that some errors of law are so basic that an adjudicator must have effectively refused to consider an issue at all rather than make such a mistake, that suggestion can only be determined in the context of the wording and reasoning of any particular decision. Here, the adjudicator used the same words to dismiss the item C claims as the B and D claims. That decision, of course, was correct in law and has not been criticised. On that basis, it seems to me extremely unlikely that Mr Jackson decided consciously to refuse to even entertain the item B and D counterclaims whilst deciding correctly that the C items failed due to his decision on termination. That involves rewriting his decision, which is of course impermissible.

49. It follows that I do not accept that there is a reasonably arguable defence, that there was a conscious failure to decide items B and D. Even if there was such a failure to decide the issues, such failure was clearly at worst inadvertent, i.e. not deliberate in the *Pilon* sense. Although in certain extraordinary circumstances I have accepted that the inadvertent refusal might offend against natural justice, this case is not such an example.

The B and D issues, whilst a significant part of HS's defence to the claim, were not the entirety of their defence. The broad questions identified by the adjudicator, including which party was entitled to payment and how much, were decided by him in broad terms, albeit partly on the basis on an error of law.

50. I also do not accept that Mr Jackson's decision failed to give reasons. Reasons were clearly identified. They are erroneous, but they do amount to reasons for not awarding anything for items B and D and the adjudicator valued them at £0.00 accordingly.

51. In reality, this submission is an attempt to argue that there was a refusal to decide these items by another route and does not, in my view, add anything substantial to the argument which I have rejected and in that regard, I again note Mr Webb KC's skeleton.

52. The final aspect of this ground of defence is an allegation that the decision was reached on the basis that neither party argued. Whilst it is true that neither party suggested that the termination was dispositive of the B and D items, it is, in my view, significant to note that in their response, HS's position that items B and D being effectively claimable whatever the decision on termination were not made in anything other than in brief terms and were in themselves somewhat equivocal, in particular the tables produced did not make clear that pre-termination losses were claimable irrespective of which party had or had not lawfully terminated. It seems to me that HS may have created some degree of equivocality about the status of the counterclaim items, which may indeed have led to the adjudicator deciding that they had failed, the termination issues having been decided against HS.

53. It is certainly not the position in my judgment that the adjudicator went on a frolic of his own in deciding to dismiss items B and D in the sense of using independent and unheralded information or legal argument. As I have already held, an error of law was made, but in making that error, the adjudicator did not step outside the case before him at all, let alone in any material respect.

54. It follows that all the grounds for defending enforcement are not made out to the relevant standard and that, therefore, means that the Jackson decision will be enforced.

Issue two: The Milner Decision:

55. I can deal briefly with the suggestion that Dr Milner's appointment was invalidated by the comments on the RICS nomination form. In my judgment, the comments were accurate and more importantly, the subject of comment by WCM before the nomination was then made. That puts the matter in a wholly different light to the background in *Eurocom* and whilst it may be that without those comments, Mr Jackson could have been appointed for the third adjudication, his not being appointed does not in itself mean the appointment of another adjudicator is invalid. In my view, if the *Eurocom* principle is to be extended as a matter of policy as Mr Kaplan asked me to rule, this would require a much clearer case where comments were made, which whilst not made recklessly or deliberately, were nevertheless of doubtful correctness and likely to mislead.

56. The RICS form itself allows comments to be made and also refers to the sort of conflict which, in fact, did arise in this case. In my view, to rule that any comments which are not shown to be based on a clear-cut conflict of interest will automatically invalidate the appointment process is going too far and will encourage yet more attempts to avoid

valid adjudication awards. Whilst I respectfully agree with Sir Peter Coulson's concerns, nevertheless, he does not suggest that such unjustified concerns will lead to an appointment being invalidated as of itself.

57. I have held that the Jackson decision is enforceable and it follows that if the Milner decision is a decision on matters which are the same or substantially the same as those decided by the Jackson decision, then the later decision is unenforceable. It is clear and accepted that the claim brought before Dr Milner consisted of the larger claims in the counterclaims, which Mr Jackson had dismissed. On the face of it, therefore, a decision to award some of the claim in a subsequent adjudication would seem to offend against what has been described as the rule of thumb identified by Coulson LJ in *Sudlows.*

58. However, it is important to consider what precisely was decided (my underlining) in the Jackson decision. I have already identified the decision which was to decide the B and D items on the basis that the termination issue was decided against HS. It follows that the Jackson decision cannot extend to deciding the merits or quantum of those items as individual breaches of contract, not least because they were not decided or even considered by the Jackson Decision on that basis at all. As a matter of distinction and as a matter of fact and degree, the claiming of matters which had been dismissed in the Jackson decision only shows that the same factual matters were put to Dr Milner but fails to show that the same claim in law was put to him. Clearly, it does not in itself provide an answer to the question whether what was decided in the Jackson decision was the same or substantially the same as what Dr Milner decided.

59. Since the claim before Dr Milner was one that had not been previously decided it follows that rather than being incompatible with each other, the two claims are actually compatible. In any event, Dr Milner decided that he did have jurisdiction and unless I were satisfied that he was clearly wrong in reaching that decision, I would not overturn it. I have decided that Dr Milner was clearly right, but even if that were not the case, that decision was clearly open to him and not obviously or clearly wrong and it follows that the Milner decision also falls to be enforced.

60. I will now hear the parties on issue three and any other consequential issues that might arise.

(This Judgment has been approved by the Judge.)