Neutral Citation Number: [2015] EWCA Civ 1231

Case No: A1/2014/4046

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE EDWARDS-STUART
HT-14-371

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2015

Before :

LORD JUSTICE JACKSON
LADY JUSTICE RAFFERTY
and
LADY JUSTICE GLOSTER

- -

Between :

MATTHEW HARDING (TRADING AS M J HARDING CONTRACTORS)	**Appellant**
- and -	
(1) GARY GEORGE LESLIE PAICE	**Respondents**
(2) KIM SPRINGALL	

- -
- -

Mr Adrian Williamson QC and Mr Gideon Scott Holland (instructed by **Davies & Davies Associates Ltd**) for the **Appellant**
Mr David Sears QC and Mr Charles Pimlott (instructed by **Silver Shemmings Llp**) for the **Respondents/Defendants**

Hearing date: Wednesday 18th November 2015

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Approved Judgment

Lord Justice Jackson :

1. This judgment is in seven parts, namely:

Part 1. Introduction

2. This is an appeal by a building contractor against a judgment of the Technology and Construction Court ("TCC") refusing to grant either an injunction or a declaration to prevent an adjudication going forward. The central issue in this appeal is whether an earlier adjudication on related matters shuts out the new adjudication.

3. The appeal is of some general importance. This is because of the crucial role which adjudication plays in the operation of the construction industry.

4. The employers in this case are Mr Gary George Leslie Paice and Ms Kim Springall. They are defendants in the current litigation and respondents in this court. I shall refer to them as "PS". They are described as "the employer" (singular) in the building contract.

5. The contractor is Mr Matthew Harding trading as MJ Harding Contractors. He is claimant in the current litigation and appellant in this court. I shall refer to him as "Harding".

6. PJ English Associates Ltd ("PJE") is a firm of Chartered Quantity Surveyors and Dispute Resolution Consultants, which acted for PS.

7. Blue Sky ADR Ltd ("BSA") is a firm of construction consultants, which acted for Harding.

8. I shall refer to the Housing Grants, Construction and Regeneration Act 1996 as "the 1996 Act". Section 108 of the 1996 Act provides:

> "**Right to refer disputes to adjudication.**
>
> (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
>
> For this purpose "dispute" includes any difference.
>
> (2) The contract shall include provision in writing so as to—
>
> (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
>
> (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
>
> (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
>
> (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
>
> (e) impose a duty on the adjudicator to act impartially; and
>
> (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
>
> (3) The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
>
> The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
>
> ….
>
> (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

9. Section 110A of the 1996 Act (as amended by the Local Democracy, Economic Development and Construction Act 2009) provides:

"**Payment notices: contractual requirements**

(1) A construction contract shall, in relation to every payment provided for by the contract—

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person—

(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated.

(3) A notice complies with this subsection if it specifies—

(a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

(b) the basis on which that sum is calculated."

10. Section 111 of the 1996 Act (as amended by the Local Democracy, Economic Development and Construction Act 2009) provides:

"**Requirement to pay notified sum**

(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means—

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify—

(a) the sum that the payer considers to be due on the date the notice is served, and

(b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3)—

(a) must be given not later than the prescribed period before the final date for payment, and

(b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), "prescribed period" means—

(a) such period as the parties may agree, or

(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts."

11. The Scheme for Construction Contracts referred to in section 108 (5) of the 1996 Act is to be found in the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998, as amended from time to time. In accordance with convention I shall refer to this simply as "the Scheme".

12. Paragraph 9 of Part I of the Scheme provides:

> "9 – (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.
>
> (2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that adjudication."

13. Paragraphs 9 and 10 of Part II of the Scheme provide:

> "**Payment notice**
>
> 9.—(1) Where the parties to a construction contract fail, in relation to a payment provided for by the contract, to provide for the issue of a payment notice pursuant to section 110A(1) of the Act, the provisions of this paragraph apply.
>
> (2) The payer must, not later than five days after the payment due date, give a notice to the payee complying with sub-paragraph (3).
>
> (3) A notice complies with this sub-paragraph if it specifies the sum that the payer considers to be due or to have been due at the payment due date and the basis on which that sum is calculated.
>
> (4) For the purposes of this paragraph, it is immaterial that the sum referred to in subparagraph (3) may be zero.
>
> (5) A payment provided for by the contract includes any payment of the kind mentioned in paragraph 2, 5, 6, or 7 above.
>
> **Notice of intention to pay less than the notified sum**
>
> 10. Where, in relation to a notice of intention to pay less than the notified sum mentioned in section 111(3) of the Act, the parties fail to agree the prescribed period mentioned in section 111(5), that notice must be given not later than seven days before the final date for payment determined either in accordance with the construction contract, or where no such

provision is made in the contract, in accordance with paragraph 8 above."

14. I shall refer to a notice served by the payer under paragraph 9 (3) of Part II of the Scheme as a Pay Less notice.

15. After these introductory remarks I must now turn to the facts.

Part 2. The facts

16. On 25th March 2013 the parties entered into a building contract under which Harding agreed to construct and fit out two residential houses at Woodcote Park Avenue, Purley, Surrey. The contract was in the JCT Intermediate Form 2011 with a modest number of amendments. The conditions of contract included the following:

"**Termination by Contractor**

8.9 Default by Employer

.1 If the Employer:

.1 does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.11 and/or any VAT properly chargeable on that amount; or

.2 interferes with or obstructs the issue of any certificate due under the Contract; or

.3 fails to comply with clause 7.1; or

.4 fails to comply with clause 3.18,

the Contractor may give to the Employer a notice specifying the default or defaults (the 'specified default or defaults').

.2 If before practical completion of the Works the carrying out of the whole or substantially the whole of the uncompleted Works is suspended for a continuous period of the length stated in the Contract Particulars by reason of:

.1 Architect/Contract Administrator's instructions under clause 2.13, 3.11 or 3.12; and/or

.2 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

(but in either case excluding such instructions as are referred to in clause 8.11.1.2), then, unless in either case that is caused by the

negligence or default of the Contractor or of any of the Contractor's Persons, the Contractor may give to the Employer a notice specifying the event or events (the 'specified suspension event or events').

.3 If a specified default or a specified suspension event continues for 14 days from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that 14 day period by a further notice to the Employer terminate the Contractor's employment under this Contract.

…

Consequences of Termination under clauses 8.9 to 8.12, etc.

8.12 If the Contractor's employment is terminated under any of clauses 8.9 to 8.11, under clause 6.11.2.2 or under paragraph C.4.4 of Schedule 1:

.1 no further sums shall become due to the Contractor otherwise than in accordance with this clause 8.12;

.2 the Contractor shall with all reasonable dispatch remove or procure the removal from the site of any temporary buildings, plant, tools and equipment belonging to the Contractor and Contractor's Persons and, subject to the provisions of clause 8.12.5, all goods and materials (including Site Materials);

.3 where the Contractor's employment is terminated under clause 8.9 or 8.10, the Contractor shall as soon as reasonably practicable prepare and submit an account or, where terminated under clause 8.11 or 6.11.2.2 or under paragraph C.4.4 of Schedule 1, the Contractor shall at the Employer's option either prepare and submit that account or, not later than 2 months after the date of termination, provide the Employer with all documents necessary for the Employer to do so, which the Employer shall do with reasonable dispatch (and in any event within 3 months of receipt of such documents). The account shall set out the amounts referred to in clauses 8.12.3.1 to 8.12.3.4 and, if applicable, clause 8.12.3.5, namely:

.1 the total value of work properly executed at the date of termination of the Contractor's employment, ascertained in accordance with these Conditions as if the employment had not been terminated, together with any other amounts due to the Contractor under these Conditions;

> .2 any sums ascertained in respect of direct loss and/or expense under clause 4.17 (whether ascertained before or after the date of termination);
>
> .3 the reasonable cost of removal under clause 8.12.2;
>
> .4 the cost of materials or goods (including Site Materials) properly ordered for the Works for which the Contractor then has paid or is legally bound to pay;
>
> .5 any direct loss and/or damage caused to the Contractor by the termination;
>
> .4 the account shall include the amount, if any, referred to in clause 8.12.3.5 only where the Contractor's employment is terminated either:
>
> .1 under clause 8.9 or 8.10; or
>
> .2 under clause 8.11.1.3, if the loss or damage to the Works occasioned by any of the Specified Perils was caused by the negligence or default of the Employer or of any of the Employer's Persons;
>
> .5 after taking into account amounts previously paid to the Contractor under this Contract, the Employer shall pay to the Contractor (or vice versa) the amount properly due in respect of the account within 28 days of its submission to the other Party, without deduction of any retention. Payment by the Employer for any such materials and goods as are referred to in clause 8.12.3.4 shall be subject to such materials and goods thereupon becoming the Employer's property"
>
> …
>
> "**Adjudication**
>
> 9.2 If a dispute or difference arises under this Contract which either Party wishes to refer to adjudication, the Scheme shall apply, subject to the following:
>
> .1 for the purposes of the Scheme the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Contract Particulars; …"

The nominating body in this case was the Royal Institution of Chartered Surveyors.

17. Harding commenced work on 8th April 2013. Problems arose on the project. PS dismissed the original architect/contract administrator. They appointed, or purported

to appoint, a new architect/contract administrator, Adair Associates. Harding refused to recognise Adair Associates in that role. Relations between PS and Harding deteriorated.

18. On 18th September 2013 PS sent a letter to Harding, stating that they were terminating the contract because of (a) Harding's failure to proceed regularly and diligently with the works and (b) Harding's refusal to recognise or allow onto site the new contract administrator. Harding denied that PS were entitled to terminate on that or any basis.

19. In late September 2013 work came to a standstill. Harding maintained that this was the fault of PS, because they had failed validly to appoint a replacement architect/contract administrator. Harding maintained that he was not receiving necessary instructions and design information.

20. On 3rd October 2013 Harding commenced an adjudication against PS in respect of interim payments due. On 28th October 2013 Harding commenced a second adjudication against PS in respect of further interim payments due. Mr Robert Sliwinski was appointed adjudicator in both those adjudications. Harding was successful in both adjudications and recovered sums totalling £258,022. Harding enforced payment of those sums by bringing proceedings in the TCC.

21. While those adjudications were proceeding, Harding took steps to terminate what he believed was a subsisting contract. On 30th November 2013 Harding gave PS notice pursuant to clause 8.9.2.2 of the contract conditions that the works had been suspended because of PS's failure to appoint a replacement architect/contract administrator and to provide the design information necessary to continue with construction beyond wall plate level. In the same letter Harding gave PS notice pursuant to clause 8.9.3 that they had 14 days in which to cease the suspension, otherwise Harding would be entitled within 21 days from the expiry of that 14 days to terminate his employment under the contract.

22. On 3rd January 2014 BSA on behalf of Harding sent to PS a notice of termination pursuant to clause 8.9.3 of the contract conditions.

23. By January 2014 it was clear that, one way or another, the contract had come to an end. The parties set about formulating their claims against each other.

24. On 8th August 2014 Harding sent to PS his account pursuant to clause 8.12.3 of the contract conditions. The account showed that after giving credit for payments already made, the sum of £397,912 plus VAT was due to Harding.

25. On 1st September 2014 BSA on behalf of Harding sent to PS a notice of adjudication claiming the full amounts shown as due in the contractor's account, namely £397,912. These proceedings constituted the third adjudication between the parties.

26. PS did not accept Harding's claim. They took the view that they had overpaid Harding and that a substantial repayment was due to themselves. On 2nd September 2014 PJE on behalf of PS sent to Harding what purported to be a Pay Less notice pursuant to section 111 (3) of the 1996 Act and paragraphs 9 and 10 of Part II of the Scheme.

27. On 3rd September 2014 the Royal Institution of Chartered Surveyors appointed Mr Christopher Linnett as adjudicator in the third adjudication. On 8th September 2014 Harding sent his referral notice to the adjudicator pursuant to paragraph 7 of Part I of the Scheme.

28. The referral notice claimed two alternative forms of relief, namely:

    i) A decision that PS, having failed to serve any effective Pay Less notice, were obliged to pay £397,912 to Harding pursuant to section 111 (1) of the 1996 Act; alternatively

    ii) A decision that £397,912 was the sum properly due to Harding under clause 8.12 of the contract conditions.

29. On 14th September 2014 PS served a response, vigorously taking issue with Harding's claims and asserting that substantial repayments were due to themselves.

30. The adjudicator handed down his decision on 6th October 2014. He held as follows:

    i) The employer's termination of the contract was invalid.

    ii) The contractor effectively terminated the contract on the grounds of lack of instructions.

    iii) PS's Pay Less notice was invalid because it did not specify the basis of the employer's contentions.

    iv) Accordingly under section 111 of the 1996 Act PS were required to pay £397,912 to Harding.

    v) In those circumstances it was not necessary to decide whether or not £397,912 represented a correct valuation of the works in accordance with clause 8.12 of the contract conditions.

31. Harding commenced enforcement proceedings in the TCC, in order to recover the sum awarded by the adjudicator. PS paid that sum on 11th November 2014, which was the day before the enforcement hearing.

32. While the enforcement proceedings were in progress, PS decided to launch a new round of adjudication. On 14th October 2014 PS served an adjudication notice, seeking the following decisions from the adjudicator:

> "i. That the Value of the Contract Works (as per Priced Document: Contract Sum Analysis) is the sum of **£340,032,60** or such other sum as the Adjudicator shall decide;
>
> ii. That the value of Variations and/or loss and/or expense and/or damages is in the sum of **-£5,473,01** or such other sum as the Adjudicator shall decide;
>
> iii. That the value of loss of profit is in the sum of **£ NIL** or such other sum as the Adjudicator shall decide;

> iv. That the value of abatement and/or set off for defective works is in the sum of **£45,400.00** or such other sum as the Adjudicator shall decide;
>
> v. As to the amount due from Harding to us or from us to Harding as applicable;…"

33. On 17th October the Royal Institution of Chartered Surveyors appointed Mr Robert Sliwinski as adjudicator in this, the fourth adjudication between the parties. Mr Sliwinski was well acquainted with the background, having had the good fortune to sit as adjudicator in the first and second adjudications.

34. Harding, who was now in a strong tactical position, objected to the launch of the fourth adjudication. Accordingly he commenced the present proceedings.

Part 3. The present proceedings

35. By a claim form issued in the TCC on 21st October 2014 Harding claimed injunctive and declaratory relief in order to stop the fourth adjudication from going forward. The basis of Harding's claim was that all the issues raised by PS in the fourth adjudication had been decided by Mr Linnett in the third adjudication.

36. The TCC is a court which is well known for its speed and efficiency. The action came on for trial, on the basis of written evidence, before Mr Justice Edwards-Stuart on 29th October 2014. That was just eight days after proceedings were issued.

37. On 21st November 2014 the judge handed down his judgment. He dismissed Harding's claims for injunctions and declarations. I would summarise the judge's conclusions as follows:

    i) The adjudicator decided that PS were obliged to pay the sum shown on the face of the contractor's account because they had failed to serve a compliant Pay Less notice.

    ii) As a result of the adjudicator's decision PS were obliged to pay that sum over to Harding, which they had duly done.

    iii) The failure to serve a compliant Pay Less notice could not deprive PS for ever of the right to challenge the contractor's account.

    iv) PS were entitled to have determined either by adjudication or litigation the question of what sum was properly due in respect of Harding's account.

    v) Accordingly PS were entitled to proceed with the fourth adjudication.

38. Having defeated the injunction proceedings PS duly pressed on with adjudication 4. On 15th December Mr Sliwinski handed down his decision. He resolved most of the issues in favour of PS. He ordered Harding to pay £325,484 to PS by 22nd December 2014.

39. PS's success in adjudication 4 proved to be a Pyrrhic victory. Harding did not comply with the adjudicator's order. PS brought enforcement proceedings in the TCC, which were unsuccessful. On 10th March 2015 Mr Justice Coulson held that Mr Sliwinski's decision was tainted by apparent bias. Accordingly he was not prepared to enforce it by summary judgment.

40. Mr Justice Coulson's decision is not the end of the matter. PS maintain that by reason of Mr Justice Edwards-Stuart's decision they are entitled to launch a fifth adjudication, in order to challenge Harding's account under clause 8.12 of the contract conditions. Furthermore, according to their counsel, that is what they intend to do.

41. Harding is and was aggrieved by Mr Justice Edwards-Stuart's decision. Accordingly, while adjudication 4 was still in progress, Harding appealed to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

42. By an appellant's notice filed on 9th December 2014 Harding appealed to the Court of Appeal against the decision of Mr Justice Edwards-Stuart ("the judge").

43. Harding asserts that this appeal is not academic, because he fears that if the judgment below stands, PS will bring a fifth adjudication covering the same ground as the fourth adjudication. I shall refer to that further adjudication which Harding fears as "the fifth adjudication", even though that proceeding is not yet in existence.

44. There are two grounds of appeal, which I would summarise as follows:

    i) The judge erred in his construction of paragraph 9 (2) of Part I of the Scheme.

    ii) The judge erred in his analysis of the scope and effect of Mr Linnett's decision in the third adjudication.

45. On 14th December 2014 I granted permission to appeal, stating two reasons. The first reason was that the grounds of appeal were properly arguable. The second reason was that the appeal raised issues of importance concerning the operation of the adjudication regime.

46. The appeal was argued on 18th November with great skill on both sides. Counsel for the appellant, Harding, are Mr Adrian Williamson QC leading Mr Gideon Scott Holland. Counsel for the respondents, PS, are Mr David Sears QC leading Mr Charles Pimlott.

47. I must now turn to the first ground of appeal, which concerns the construction of paragraph 9 (2) of Part I of the Scheme.

Part 5. The construction of paragraph 9 (2) of Part I of the Scheme

48. I have set out the wording of paragraph 9 (2) of Part I of the Scheme in Part 1 of this judgment.

49. At paragraphs 38-46 of his judgment the judge held that paragraph 9 (2) only applied where a dispute previously referred to adjudication had actually been decided by the adjudicator.

50. Mr Williamson submits that that is wrong. It involves reading words into the provision. Also, says Mr Williamson, it involves a sophisticated analysis of the earlier adjudication. It becomes necessary to examine both the dispute referred and the decision. That would be a difficult exercise for the new adjudicator, simply in order to determine whether he should resign.

51. More generally Mr Williamson argues that it is not right to read words into a statutory scheme of wide application.

52. Mr Sears submits that "decision" in paragraph 9 (2) means "decision in relation to that dispute". If "decision" does not have that meaning, the consequences would be absurd. All sorts of questions referred but not decided would be treated as finally determined for the purposes of any future adjudication.

53. As both counsel recognise the leading authority in relation to serial adjudications is *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA Civ 1737; [2007] BLR 67. In that case the contractor referred to adjudication his claim for an extension of time on limited grounds specified in two letters. The adjudicator rejected those claims. Subsequently the employer claimed liquidated and ascertained damages for delay and referred that claim to adjudication. In its response the contractor claimed extensions of time on grounds not specified in the original two letters. The adjudicator in the second adjudication held that the contractor could not rely upon those new grounds, because the first adjudicator had dealt with extensions of time. The Court of Appeal held that that was wrong. At paragraphs 31 to 33 May LJ said this:

> "31. Section 108(3) of the 1996 Act and paragraph 23 of the Scheme provide for the temporary binding finality of an adjudicator's *decision*. More than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided. Indeed paragraph 9(2) of the Scheme obliges an adjudicator to resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a *decision* has been taken in that adjudication.
>
> 32. So the question in each case is, what did the first adjudicator decide? The first source of the answer to that question will be the actual decision of the first adjudicator. In the present appeal, Mr Holt did not even take us to the first adjudicator's decision, although he was invited more than once by the court to do so. He was conscious, no doubt, that it would show, as it does, that the decision was limited to the grounds for extension of time in the two letters.
>
> 33. The scope of an adjudicator's decision will, of course, normally be defined by the scope of the dispute that was referred for adjudication. This is the plain expectation to be derived from section 108 of the 1996 Act and paragraphs 9(2) and 23 of the Scheme. That is also the plain expectation of paragraph 9(4) of the Scheme, which refers to a dispute which

> varies significantly from the dispute referred to the adjudicator in the referral notice and which for that reason he is not competent to decide. There may of course be some flexibility, in that the scope of a dispute referred for adjudication might by agreement be varied in the course of the adjudication."

54. Dyson LJ, giving the second judgment, summarised the effect of paragraph 9 (2) of Part I of the Scheme. Then he said this at paragraph 47:

> "Whether dispute A is substantially the same as dispute B is a question of fact and degree. If the contractor identifies the same Relevant Event in successive applications for extensions of time, but gives different particulars of its expected effects, the differences may or may not be sufficient to lead to the conclusion that the two disputes are not substantially the same. All the more so if the particulars of expected effects are the same, but the evidence by which the contractor seeks to prove them is different."

55. In *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC); [2007] BLR 175 Ramsey J stated that the extent to which a previous adjudication decision is binding will depend upon an analysis of (a) the terms, scope and extent of the dispute now under adjudication and (b) the terms, scope and extent of the decision made by the previous adjudicator.

56. Counsel have referred us to a number of subsequent decisions in which TCC judges have re-stated the principles and applied them to particular facts before them. See the decision of Mr Justice Coulson in *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC) in particular at [34] and the decision of Mr Justice Akenhead in *Redwing Construction Ltd v Wishart* [2010] EWHC 3366 (TCC); (2010) 135 Con LR 119.

57. It is quite clear from the authorities that one does not look at the dispute or disputes referred to the first adjudicator in isolation. One must also look at what the first adjudicator actually decided. Ultimately it is what the first adjudicator decided, which determines how much or how little remains available for consideration by the second adjudicator.

58. In my view Mr Sears' argument is correct. The word "decision" in paragraph 9 (2) means a decision in relation to the dispute now being referred to adjudication. I arrive at this interpretation as a matter of construction rather than implication. It is what the paragraph obviously means. Parliament cannot have intended that if a claimant refers twenty disputes or issues to adjudication but the adjudicator only decides one of those disputes or issues, future adjudication about the other matters is prohibited.

59. Despite Mr Williamson's eloquent argument, I do not think that Mr Sears' interpretation of paragraph 9 (2) creates any particular difficulties for an incoming adjudicator, who is considering whether he is required to resign.

60. At paragraphs 38 to 46 of the judgment below the judge interpreted paragraph 9 (2) in the way that I have set out above. In my view the judge was correct. I would therefore reject the first ground of appeal.

61. I must now turn to the second ground of appeal, which concerns the scope and effect of Mr Linnett's decision in the third adjudication.

Part 6. The scope and effect of Mr Linnett's decision in the third adjudication

62. Mr Williamson submits that the judge erred in his analysis of the scope and effect of Mr Linnett's decision in the third adjudication. The dispute referred to Mr Linnett for adjudication was what sum was due to the contractor on its final account. There were two ways the adjudicator could get to the answer, the short route and the long route. The short route was to say that the employer had not served a Pay Less notice; therefore the employer was obliged to pay the total sum shown on the final account. The long route was to embark upon an analysis of the evidence and submissions on all the valuation issues. Both parties deployed their full evidence on valuation, so that the adjudicator could take whichever route he thought was appropriate. In the event the adjudicator took the short route. The result was that the adjudicator reached a final decision on the sum which was due to Harding on the final account. That question can be re-opened in litigation, but not in adjudication.

63. I do not agree with this analysis of the third adjudication. On a proper analysis of the notice of adjudication and the referral document in the third adjudication, I think that Harding referred to Mr Linnett a dispute involving two alternative issues. Paragraph 159 of the referral document reads:

> "**CONCLUSION**
>
> Accordingly, the dispute hereby referred and what MJH seeks is:
>
> 159.1. pursuant to, amongst others, paragraphs 20 to 26 above [these paragraphs rely upon section 111 of the 1996 Act and the lack of a valid Pay Less notice], a Decision that the Employer must and shall immediately pay MJH the sum of £397,912.48 being the outstanding sum under the Contract since 6 September 2014 or such other sum as the Adjudicator shall decide;
>
> 159.2 in the alternative, without prejudice to MJH's primary position which is expressly reserved, a Decision that after taking into account amounts actually and physically previously paid to MJH under the Contract the amount properly due to MJH in respect of the account and that shall be paid by the Employer to MJH on or before 6 September 2014, without deduction of any retention, (or any other sum for that matter), shall be the sum of £397,912.48 in accordance with MJH's Cl.8.12 Account (which forms **Exhibit A** attached hereto) or such other sum as the Adjudicator shall decide."

64. The first issue is a contractual one. The second issue is one of valuation. The adjudicator dealt with the contractual issue. He did not need to deal with the valuation issue. He made that abundantly clear in paragraph 185 of his determination where he said:

> "185. For the avoidance of doubt, I stress that I have not decided on the merits of Harding's valuation and have not decided that £397,912.48 represents a correct valuation of the works. The parties made submissions in this adjudication about the proper valuation but these did not fall to be considered by me because of the rule relating to a notified sum becoming automatically due in the absence of a valid pay-less notice."

65. I reach this conclusion by reference to the clear language of the adjudication notice, the referral document and Mr Linnett's decision in the third adjudication. Nevertheless I must consider the authorities cited by counsel, to see whether they point to or compel a different conclusion.

66. In *Watkin Jones & Son Limited v Lidl UK GmbH* [2002] EWHC 183 (TCC); (2002) 86 Con LR 155 the contractor served a draft final account as an application for interim payment. The employer failed to serve a Pay Less notice. The first adjudicator, Mr Bergin, held that the employer must pay the full amount claimed. The employer subsequently made procedural errors, so that the proceedings were sidetracked. The important feature of this case is that HHJ Humphrey Lloyd QC said at paragraph 23:

> "What Lidl might have done, after Mr Bergin's decision, was to have sought a declaration from an adjudicator as to what is quite clearly in dispute which is the true value of the final account."

67. In *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2003] EWCA Civ 1563; [2004] 1 WLR 1867 the employer disputed part of the sums shown as due on the seventh interim certificate, but it failed to serve a Pay Less notice under section 111 of the 1996 Act. (The original version of section 111, which was then in force, is set out in paragraph 2 of Jacob LJ's judgment.) The Court of Appeal held that the contractor was entitled to prompt payment of the full sum shown as due in the seventh interim certificate, even if that certificate was wrong. Nevertheless the absence of a Pay Less notice under section 111 did not prevent the employer from subsequently challenging the valuation underlying that certificate. Jacob LJ (with whom Schiemann and Sedley LJJ agreed) stated that section 111 of the 1996 Act was a provision about cash flow. At paragraph 14 he said:

> "Sheriff Taylor's analysis, once articulated, is obviously right. And it has a series of advantages:

> (a) It makes irrelevant the problem with the narrow construction – namely that Parliament was setting up a complex and fuzzy line between sums due on the one hand and counterclaims on the other – a line somewhere to be drawn between set-off, claims for breach of contract which do no more than reduce the sum due and claims which go further, abatement and so on.
>
> (b) It provides a fair solution, preserving the builder's cash flow but not preventing the client who has not issued a withholding notice from raising the disputed items in adjudication or even legal proceedings.
>
> (c) It requires the client who is going to withhold to be specific in his notice about how much he is withholding and why, thus limiting the amount of withholding to specific points. And these must be raised early.
>
> (d) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings."

68. In two more recent cases Edwards-Stuart J took a somewhat different line. These are *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC); [2015] BLR 233 and *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC); [2015] BLR 321. I shall not embark upon an analysis of those two cases. Instead I shall set out the judge's own summary in *Galliford* of what he had intended to decide in *ISG*. This appears at paragraphs 18 to 20 of *Galliford* as follows:

> "18. I held [in *ISG v Seevic*] that if an employer fails to serve the relevant notices under this form of contract it must be deemed to have agreed the valuation stated in the relevant interim application, right or wrong. Accordingly, the adjudicator must be taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.
>
> 19. However, I made it clear that this agreement as to the amount stated in a particular interim application (and hence as to the value of the work on the relevant valuation date) could not constitute any agreement as to the value of the work at some other date (see paragraph 31).
>
> 20. This means that the employer cannot bring a second adjudication to determine the value of the work at the valuation date of the interim application in question. But it does not mean any more. There is nothing to prevent the employer challenging

> the value of the work on the next application, even if he is contending for a figure that is lower than the (unchallenged) amount stated in the previous application. If this was not made clear by my judgment, then it should have been, and it is certainly made clear by the decision of the Court of Appeal in *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2004] 1 WLR 1867, in particular the passage from paragraph 14 that is set out in paragraph 30 below. My judgment in *ISG v Seevic* was not intended to go behind that."

69. I do not need to decide whether or not that passage is correct in relation to interim valuations and interim payments. In almost all construction contracts special contractual provisions apply to interim payments. Mistakes can usually be put right at a later stage, although that was not possible in *Galliford* because the contract prevented negative valuations.

70. The important point for present purposes is that the quoted passage (whether right or wrong in relation to interim valuations) does not apply to final accounts. Edwards-Stuart J said so in *Galliford* at [25], where he emphasised the "fundamental difference" between payment obligations which arise on an interim application and those that arise on termination.

71. In the present case we are concerned with a final account following termination of the construction contract. Clause 8.12.5 of the contract conditions requires an assessment of the amount which is "properly due in respect of the account". The clause expressly permits a negative valuation. Mr Linnett did not carry out any such valuation exercise in the third adjudication. Therefore PS were entitled to refer that dispute for resolution in the abortive fourth adjudication. They will be entitled to do so again in the proposed fifth adjudication.

72. This conclusion is consistent with the reasoning of HHJ Humphrey Lloyd QC in *Watkin Jones* and the reasoning of the Court of Appeal in *Rupert Morgan*. Nothing in *ISG* or *Galliford* contradicts this conclusion.

73. One may then ask, what did the third adjudication achieve? The answer is that the third adjudication achieved an immediate payment to the contractor. Harding will be entitled to retain the monies paid to him unless and until either the adjudicator in the fifth adjudication or a judge in litigation arrives at a different valuation of Harding's final account under clause 8.12.

74. Accordingly I would reject Harding's second ground of appeal.

Part 7. Executive summary and conclusion

75. The claimant building contractor seeks an injunction to restrain the employer from proceeding with an adjudication to determine the sum properly due to the contractor following termination of the contract. The contractor also seeks declarations to the same effect.

76. The basis of this claim is that a previous adjudicator ordered the employer to pay the full amount shown as due on the contractor's final account pursuant to section 111 of the Housing Grants, Construction and Regeneration Act 1996. This was because of the employer's failure to serve a valid Pay Less notice.

77. Mr Justice Edwards-Stuart dismissed the claim. The contractor now appeals to this court.

78. In my view the employer's failure to serve a Pay Less notice (as held by the previous adjudicator) had limited consequences. It meant that the employer had to pay the full amount shown on the contractor's account and argue about the figures later. The employer duly paid that sum, as ordered by the previous adjudicator. The employer is now entitled to proceed to adjudication in order to determine the correct value of the contractor's claims and the employer's counter-claims. Therefore the judge's decision was correct.

79. If Rafferty and Gloster LJJ agree, this appeal will be dismissed.

Lady Justice Rafferty:

80. I agree.

Lady Justice Gloster:

81. I also agree.