

JUDGMENT : HHJ Frances Kirkham sitting as a deputy High Court Judge. TCC. Birmingham District Registry. 25th September 2008

1. The claimant, Birmingham City Council ("BCC") engaged the defendant, Paddison Construction Limited ("Paddison") to undertake construction work for a new community and training centre at Handsworth in Birmingham. The building contract provided for a completion date of 24 February 2006; that date was revised to 17 April 2006. Practical completion was certified as at 23 June 2006. Paddison alleged that BCC was responsible for the delay in completion and sought, amongst other matters, a full extension of time and loss and/or expense. BCC did not accept that it was responsible for the delays and denied that Paddison was entitled to any further extension of time or any further sum by way of loss and/or expense over and above the sum of £40,541.59 which BCC had already certified.
2. In February 2008 Paddison referred to adjudication the parties' dispute regarding responsibility for delay and the financial consequences of such delay. After several requests for an extension of time (all of which were granted) the adjudicator in this first adjudication, Mr Bullock, gave his decision on 16 April 2008. He decided (i) that Paddison were entitled to an extension of time for the full period, that is, of 119 days up to 23 June 2006; (ii) that BCC should pay LADs withheld of £26,800; and (iii) that BCC should pay Paddison £25,363.69 in respect of variations. So far as the loss and/or expense claim is concerned, at section 6 of his decision, Mr Bullock stated as follows:
"Direct loss and or expense claim
 6. 1 *The contractor has submitted a claim in the sum of £294,158.83.*
 6. 2 *The sum currently certified amounts to £40,541.59.*
 6. 3 *Having considered the submissions by both Parties and particularly File 5 submitted by the Contractor, I consider the claims made to be extravagant and exaggerated.*
 6. 4 *I consider the claim made and the information compiled, down to the telephone bills, to be nothing other than an attempt to claim as much as possible on the proviso that they may achieve some success if not all their claim.*
 6. 5 *I do not dispute that some claim over and above the £40,541.59 may be due and I would grant the Contractor leave to pursue this claim via a further Adjudication if they so wish.*
 6. 6 *For the claim to be analysed in detail, I believe a 3rd Party Quantity Surveyor would need to be appointed to assist the Adjudicator. The tight timescales associated with Adjudication, even considering the extension of time granted to me, would, I believe require a dedicated adjudication to consider the claim within the prescribed time frame.*
 6. 7 *I am not prepared therefore, to grant any further monies relating to the Contractors loss and/or expense claim."*
3. The construction of that section of the decision was, and remains, in issue between the parties. Paddison's stance was that no decision had been made in relation to their claim for loss and/or expense. They then required BCC to assess their entitlement to loss and/or expense based upon the extension of time which Mr Bullock had awarded to Paddison. BCC considered that Mr Bullock had decided that Paddison was entitled to nothing further by way of loss and/or expense and refused to reassess Paddison's claim in the light of Mr Bullock's decision. Paddison then served a second notice of adjudication, seeking reimbursement of loss and expense, alternatively damages. Mr Jensen was appointed adjudicator. BCC required Mr Jensen to resign on the ground that the dispute referred to him was the same as that which Mr Bullock had decided. Paddison disputed that. Mr Jensen refused to resign and the second adjudication has continued.
4. BCC commenced these Part 8 proceedings seeking declarations to the effect that the dispute referred to Mr Jensen is the same, or substantially the same, as that which had been referred to Mr Bullock; that Mr Bullock made a decision on the dispute, such decision having binding effect on a temporary basis; and that, as a consequence, Mr Jensen has no jurisdiction to act as adjudicator and must resign, and/or that any decision reached will be a nullity and unenforceable.
5. BCC's Adjudication Scheme applied to the first adjudication. The following conditions are relevant:
 - 10.2 *An Appointed Adjudicator shall resign where the dispute arises under the same contract and 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.*
 - 23.1 *The Appointed Adjudicator shall decide the matters in dispute.*
 - 26.2 *The decision of the Appointed Adjudicator shall be binding on the Parties in Dispute, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the Contract provides for arbitration or the Parties in Dispute otherwise agree to arbitration) or by agreement between the Parties in Dispute.*
6. BCC's case is that Mr Bullock made a decision in relation to Paddison's loss and/or expense claim. No new dispute has arisen. The claim which Paddison now wish to pursue before Mr Jensen is the same or substantially the same as that referred to Mr Bullock.
7. Paddison's primary case is that Mr Bullock made no decision in relation to loss and/or expense. That fact does not render the decision or any part of it a nullity. As such, Paddison was entitled to refer its entitlement to loss and/or expense to Mr Jensen. If (and contrary to Paddison's primary case) Mr Bullock did reach a decision in relation to their claim for direct loss and/or expense, Paddison's secondary and alternative case is that the dispute referred to Mr Jensen is not the same or substantially the same as that referred to Mr Bullock; accordingly, Paddison was

entitled to refer the new dispute to Mr Jensen. On either case, Mr Jensen is properly seized of matters and has jurisdiction to deal with the second adjudication.

Did Mr Bullock make a decision with respect to Paddison's loss and/or expense claim?

8. I have set out earlier the wording of section 6 of Mr Bullock's decision. In my judgment, the proper construction of the whole of section 6 of Mr Bullock is that he did make a decision. He considered Paddison's claim under this head. He found this to be "extravagant and exaggerated". He was "not prepared to grant further monies relating to [Paddison's] loss and/or expense claimed." That is, he decided that Paddison was not entitled to any sum over and above that already certified
9. At paragraph 6.7 Mr Bullock uses the word "therefore". Use of that word could refer back to paragraphs 6.5 and 6.6 only. In my judgment, however, the word more logically relates back to paragraphs 6.1 to 6.4, so that his conclusion is that, because of the problems with Paddison's claim identified in paragraphs 6.3 and 6.4, Paddison are not entitled to more. Even if the word "therefore" applies to all the preceding paragraphs ie 6.1 to 6.4, the meaning is the same, namely a decision that no further payment is due.
10. It is unfortunate that Mr Bullock included the comments he made in paragraphs 6.5 and 6.6. Plainly, he had no jurisdiction or power to "grant" Paddison the right to pursue its claim in another adjudication. As Mr Lofthouse suggested, Mr Bullock's intention may have been to "sweeten the pill" of his refusal to grant Paddison more money with (to mix the metaphors) the prospect of another bite at the cherry. If that was so, it was misguided. Still less did Mr Bullock have the right to make such a suggestion without first warning the parties of his intention to make such a suggestion, and no such warning was given.
11. Ms Stephens has referred me to *CIB Properties Ltd v Birse Construction Ltd* [2005] BLR 173 as authority for the proposition that, where it is not possible for an adjudicator to reach a fair and impartial decision on a complex issue, he is entitled to make no decision on that issue. Similarly in *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC), in circumstances where it would be extremely difficult for the adjudicator, or other party, to deal with the case within the time allowed, then "an adjudicator, acting impartially and in accordance with the principles of natural justice, ought in such circumstances to inform the parties that a decision could not properly reasonably and fairly be arrived at within the time and invite the parties to agree further time. If the parties were not able to agree more time then an adjudicator ought not to make a decision at all and should resign."
12. If an adjudicator found himself in that position one would expect him to warn the parties. Mr Bullock gave no warning that he would not be able to reach a decision on Paddison's loss and/or expense claim. Condition 23 of the scheme to which the parties and adjudicator were working required Mr Bullock to make a decision. Mr Bullock was therefore obliged to make a decision. At no stage did he inform the parties that he would not be making a decision on an element of the claim. It is likely, as Paddison suggest, that if Mr Bullock had requested more time to consider Paddison's loss and/or expense claim, the parties would have agreed to this. But he did not make such a request.
13. In my judgment this is not a case where the adjudicator concluded that he could not make a decision. Mr Bullock gave express consideration to Paddison's claim and decided to refuse to award them any money. I conclude that Mr Bullock did decide Paddison's loss and/or expense claim. He decided that the information provided to him was insufficient to support a decision that Paddison was entitled to further payment.
14. I have been taken to the obiter remarks of Akenhead J in *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC). Summarised broadly, these are to the effect that, where more than one dispute has been referred to an adjudicator, a successful jurisdictional challenge in relation to one claim will not undermine the validity and enforceability of other heads of claim. Although obiter this passage in the judgment is persuasive. However, this is not a case where the question of severability arises, as I have found that Mr Bullock did make a decision.

Is the dispute referred to Mr Jensen the same, or substantially the same, as that referred to Mr Bullock?

15. In the first adjudication Paddison said in its Notice of Adjudication, dated 13 February 2008: "The sum due from BCC to Paddison ... includes ... (c) the amount of direct loss and/or expense incurred by Paddison as a result of delay and disruption to the regular progress of the Works amounts to £294,158.83." At paragraph 4.2 Paddison stated "... it considers that it is entitled to reimbursement of direct loss and/or expense, including reimbursement of finance costs, in the sum of £294,158.83. The finance costs will be updated in the Referral Notice". At paragraph 9.5 of its Referral Notice dated 19 February 2008, Paddison said that it sought an order that BCC pay to Paddison its "application for the reimbursement of loss and/or expense as detailed and applied for in its Addendum Report of August 2007 [File 5] in the sum of £294,158 83, adjusted for ongoing finance charges, or such other sum as the Adjudicator shall decide is due to [Paddison] over and above the sum currently certified of £14,541 59."
16. BCC rejected Paddison's claims. They criticised the loss and/or expense claim, as being global in nature. The loss and expense claim had been the subject of previous discussion between the parties, with BCC requesting details and further information.
17. In the second adjudication, Paddison identified in their Notice of Adjudication dated 12 August 2008 the issues in dispute, namely their entitlement (i) "to reimbursement of direct loss and/or expense alternatively damages in the sum of £216,418.31 alternatively £164,208.04 or such other sum as the Adjudicator shall decide; (ii) to interest alternatively financing charges on late payment of interim certificates numbered 20 and 21 by way of damages for breach of contract and the quantum thereof; and (iii) to interest/financing charges on unpaid sums due and owing to it and the quantum thereof." In their Referral Notice, also dated 12 August 2008, Paddison relied on a report

prepared by Faithful & Gould, and dated July 2008. They sought payment of loss and/or expense pursuant to the building contract, alternatively damages for breach of contract, in the sum of £216,418.31 plus VAT, alternatively in the sum of £164,208.04, alternatively such sum as the adjudicator should determine.

18. Paddison say that there are real differences between the disputes in the first and second adjudications. They put it this way. In the first adjudication the dispute consisted of (a) Paddison's claim for reimbursement of loss and/or expense of £294,150.83, based upon Faithful & Gould's August 2007 report, for a period of 119 days; and (b) rejection of that claim on the basis that Paddison was not entitled to any further extension of time beyond the 21 days already awarded and in respect of which loss and/or expense had been assessed and paid. In the second adjudication the dispute consists of (a) Paddison's claim for reimbursement of loss and/or expense and all damages in the sum of £216,418.31 alternatively £164,208.04 or such other sum as the adjudicator shall decide based upon Faithful & Gould's July 2008 document; and (b) BCC's failure and/or refusal to reassess Paddison's entitlement to loss and/or expense in the light of Mr Bullock's decision that Paddison was entitled to an extension of time of 119 days.
19. I deal as follows with the detailed points raised in support of this case.
20. In the Notice to Adjudicate in the first adjudication, Paddison ask for an extension of time for completion up to 23 June 2006 (ie for the whole period up to practical completion) and for loss and/or expense; the sum referred to was in fact the sum claimed for that whole period of delay. In the second adjudication, they ask for loss and/or expense for the whole of the period up to practical completion. In my judgment, these are the same or substantially the same.
21. The loss and/or expense claim in the first adjudication was based on Faithful & Gould reports dated April and August 2007, whereas in the second adjudication, the claim was based on a Faithful & Gould document dated July 2008. Paddison claim different sums of money in two adjudications. In the first they claimed £294,158.83. In the second they claimed either £216,418.31 or £164,208.04. Neither party has taken me to the detailed loss and/or expense claims made in each adjudication, though the documents have been provided to the court. Neither suggests that there is any material difference between the evidence supporting the different sums claimed. Ms Stephens told me that the differences in the figures lie only in the claims made for head office and overhead recovery. I am told that, in the first adjudication Paddison calculated this head of claim by reference to the Hudson or Emden formula, whereas in the second adjudication the claim was based on records such as invoices. This is not a real difference, as a claim made pursuant to a formula must nevertheless be rooted in evidence, eg the company's records. There is no difference in the supporting material, only in the analysis of that material: It appears, therefore, that, while Paddison relied on different reports in the two adjudications, there is no real difference between these when the only difference is the way in which head office and overhead recovery were calculated, with the back up and supporting information and documents behind the reports remaining essentially the same for both adjudications. In these circumstances the fact that the sums claimed differ between the two adjudications does not render BCC's refusal to consider the second claim a dispute which is essentially different from that in the first adjudication. To construct a dispute capable of reference to a fresh adjudication based on BCC's refusal to reassess a claim which is the same as that previously submitted, save with regard to calculation, on material previously supplied would be artificial and contrived.
22. In the first adjudication, Paddison sought an extension up to practical completion, ie for a period of 119 days, and payment of loss and/or expense. Mr Bullock decided both the extension of time claim and that Paddison was not entitled to payment over and above the sum already been certified. A dispute capable of being referred to a fresh adjudication does not arise because BCC refused to reconsider a claim for loss and/or expense, for the same period of time based upon essentially the same material, which had been adjudicated upon.
23. Paddison rely on the differences between the content of the Notice to Adjudicate in the first and second adjudications. In the Notice in the first adjudication Paddison did not expressly confer upon Mr Bullock jurisdiction to revalue their claim in the event that he did not agree that they were entitled to the full £294,158.83 claimed, whereas in their Notice to Adjudicate in the second adjudication they asked for reimbursement of loss and/or expense of one specific sum or another, or such other sum as the adjudicator should decide. However, as I have set out earlier, Paddison in their Referral Notice did ask Mr Bullock to award either the sum claimed or such other sum as the adjudicator should decide. It is the basis on which the parties and Mr Bullock proceeded. The first adjudication did not proceed on the basis that the adjudicator was being asked to decide whether Paddison was entitled to £294,158.83 or not; neither the parties nor the adjudicator proceeded on the basis that Paddison was entitled to all or nothing. Indeed, Mr Bullock noted in his decision that Paddison had attempted to claim as much as possible in the hope that they might achieve some success. In those circumstances it seems to me that it would amount to a wholly unmeritorious and technical outcome to conclude that there was a difference between the two disputes. To arrive at that conclusion would permit Paddison to have a second bite at precisely the same cherry. If this were litigation, such an approach would amount to a clear abuse of process of the court proceedings. In the adjudication context, to allow a second bite will often place an even greater burden on the other party than is the case in litigation, as in adjudication commonly there is no provision for recovery of costs. In this case, BCC would not be entitled to recover its costs whatever the outcome of the second adjudication. To do justice between parties the court should be vigilant to ensure that a party is not unfairly subjected to successive adjudications of the same dispute.

24. In the second adjudication a claim is made for damages for breach of contract. No such claim is made in the first adjudication. I note that a claim for damages is not included in the list of disputes in the Notice to Adjudicate in the second adjudication. However, the Notice to Adjudicate does, in turn, refer expressly to the Referral Notice. The claim for damages for breach of contract appears to be set out in paragraphs 28-32 of the Referral, under the heading "reimbursement of direct loss and expense". It is not suggested that the damages claim is materially different from the claim for loss and/or expense. Indeed, in paragraphs 28-32 the claims appear to be entirely coextensive. In my judgment the existence of a claim for damages for breach of contract does not render the dispute in the second adjudication materially different from that in the first.
25. In reaching these conclusions I have borne in mind the guidance in the authorities to which I have been referred on the question whether a dispute referred to a second adjudication differs from that previously referred. In **VHE Construction v RBSTB Trust Co Ltd** [2000] BLR 197 the first adjudication concerned payment due pursuant to an interim certificate issued prior to practical completion. The first adjudicator made a decision which amounted in effect to declaratory relief. The second adjudicator was concerned with questions of entitlement to LADs following practical completion. The second adjudicator opened up, reviewed and revised the interim application/payment the subject of the first adjudication. The court upheld the second adjudication decision. The circumstances in that case were different from those here. In that case, VHE had not requested an order for payment of a sum of money. Here, Paddison requested sums of money in both adjudications. In this case, unlike the circumstances in **VHE**, Paddison's claims in both adjudications arise post-completion, and both were for loss and/or expense consequent upon delayed completion. I am not assisted by **VHE**.
26. Paddison rely on the judgment of His Honour Judge Thornton QC in **Sherwood & Casson Limited v McKenzie Engineering Ltd** (2000) 2 TCLR 418. That does not assist me. In that case, one of the claims referred to adjudication concerned the sum due as an interim payment; the second adjudication concerned sums due on the final account. This involved different consideration of two claims put on different bases. But that is not the position here. Paddison's claims for loss and/or expense both arise after practical completion and both represent their final entitlement to such payment.
27. In **Holt Insulation v Colt International** 23 July 2001 (TCC), BAILII: [2001] EWHC 451 (TCC), His Honour Judge McKay was also concerned with the validity of a second adjudication. The first adjudication was concerned with applications for specific sums payable, and which the adjudicator held were not payable. The second related to a more flexible claim for valuations on different aspects of the contract. The learned judge concluded that the second adjudication was based firmly on a different dispute, namely to what sum was the defendant entitled. This case has a superficial similarity to the circumstances in **Holt**. It might be said that here, as in **Holt**, in the first adjudication Paddison arguably took an all-or-nothing approach and in the second adjudication took a more flexible approach. I have already dealt earlier with the all-or-nothing argument. In any event, in other respects this case can be distinguished from **Holt**. In that case, claims were made pursuant to different aspects of the contract in the first and second adjudications. Here, however, Paddison's claims in both adjudications are for loss and/or expense consequent upon delayed completion. They are both firmly rooted in precisely the same contractual provisions.
28. **Quietfield Ltd v Vascroft Construction Ltd** [2007] BLR 67 is a decision of the Court of Appeal. It concerned two adjudications of disputes concerning requests by Vascroft for an extension of time for completion. In first adjudication in that case, the adjudicator decided that Vascroft's notices were valid and stated that as Vascroft had not provided evidence or reasoned analysis to demonstrate causation, they had failed to prove entitlement to an extension of time. In a subsequent adjudication, Vascroft attempted to make good its claim for an extension of time, but the adjudicator declined to consider it on the ground that he was bound by his first decision. The Court of Appeal decided that he was not so bound. The claim in the first adjudication was based on two letters only; in the second, Vascroft relied on a fully reasoned analysis to support its claim. In my judgment the present case differs from **Quietfield**. May LJ characterised the dispute referred to the first adjudication as entitlement to an extension of time on grounds advanced in two letters whereas the second adjudication was concerned with a dispute as to entitlement to extension of time on grounds set out in a later document. Dyson LJ said that whether dispute A is essentially the same as dispute B is a question of fact and degree. At paragraph 48 he said: "*Where the only difference between disputes arising from the rejection of two successive applications for an extension of time is that the later application makes good shortcomings of the earlier application, an adjudicator will usually have little difficulty in deciding that the two disputes are substantially the same.*" The circumstances in this case are different from that in **Quietfield**. In that case, the dispute in the second adjudication arose out of a request by Vascroft for an extension of time on different grounds from those it relied on in making its first request. Here, however, Paddison's claims for loss and/or expense in both adjudications are made on precisely the same grounds, namely based on an extension of time for completion of 119 days. And, as I have indicated earlier, the material on which Paddison relies is essentially the same as between the two adjudications.
29. In my judgment, the circumstances here are as described by Dyson LJ in **Quietfield**: this is a case where Paddison sought to make good in the second adjudication the shortcomings in their claim in the first adjudication. I conclude that the dispute regarding loss and/or expense consequent upon delayed completion is the same or substantially the same in both adjudications.

Is there any basis on which the current adjudication can proceed on a somehow more limited basis?

30. Paddison have not argued for continuation of the adjudication to deal simply with their claims for interest by reason of the payment of interim certificates numbered 20 and 21. Their claims under this head total £781.12. That is realistic. An adjudication to deal with such a small claim is most unlikely to be economic.

Conclusion

31. Mr Lofthouse confirmed that BCC were not pursuing the raised at paragraph 17 of the particulars of claim, namely, if Mr Bullock had failed to make a decision, then his entire decision dated 16 April 2008 was a nullity.
32. BCC are entitled to the declarations they seek, namely:
- (i) The dispute referred to the second adjudicator, Mr Jensen, by Paddison under its second Notice of Adjudication dated 12 August 2008 is the same, or substantially the same, as the dispute referred to Mr Bullock as first adjudicator under Paddison's first Notice of Adjudication dated 13th of February 2008.
 - (ii) Mr Bullock made a decision on the dispute referred as set out in his decision dated 16 April 2008, such decision having binding effect on a temporary basis on Paddison.
 - (iii) As a result, Mr Jensen has no jurisdiction to act as adjudicator and must resign and/or any decision reached will be a nullity and unenforceable.

Mr Simon Lofthouse QC of Counsel (instructed by Mills & Reeve) for the Claimant
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