Quietfield Ltd v Vascroft Construction Ltd No2 [2006] Adj.L.R. 12/20

CA on appeal from TCC (Mr Justice Jackson) before May LJ; Dyson LJ; Smith LJ. 20th December 2006

Lord Justice May:

Introduction

1. A party to a written construction contract has a statutory right to refer a dispute arising under the contract for adjudication. This is the effect of section 108(1) of the Housing Grants, Construction and Regeneration Act 1996, which has to be read and construed in accordance with other provisions of Part II of the 1996 Act. The parties may by agreement have contractual adjudication provisions which comply with the section. If they do not, the adjudication provisions of the Scheme for Construction Contracts apply – see section 108(5). The Scheme is in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No 649). In the present case, the parties by agreement adopted the Scheme.

2. The nature of the parliamentary intention which underlay these provisions is classically described by Dyson J, as he then was, in ***Macob Civil Engineering v Morrison Construction Ltd*** [1999] BLR 93 at 97. In short, adjudication is intended to provide a speedy and proportionate temporary decision of disputes arising under construction contracts. The idea includes that such a decision may both hold the ring for the moment in a fair way, and help the parties, if possible, to resolve their disputes finally by agreement without the need for protracted and often very expensive arbitration or litigation. My understanding is that the statutory provisions have been reasonably successful. But it is well known that there have been problems with some large contracts; as if huge disputes scarcely amenable to speedy, even temporary, determination are nevertheless referred wholesale for adjudication; or if a procedure which is supposed to be speedy turns into something more akin to protracted and more expensive litigation or arbitration.

3. The usual means of enforcing an adjudicator's decision is to bring proceedings in the Technology and Construction Court for summary judgment by means of a claim under Part 8 of the Civil Procedure Rules. The Technology and Construction Court Guide has a streamlined procedure for conducting these proceedings. That is what happened in this case.

4. On 2nd February 2006, Jackson J, sitting in the Technology and Construction Court, dismissed the claimants', Quietfield Limited's, application for summary judgment to enforce an adjudicator's decision against the defendant, Vascroft Contractors Limited. The judge refused Quietfield permission to appeal, but Brooke LJ gave permission on the papers. This is the hearing of Quietfield's appeal.

Facts

5. The judge set out the facts, the relevant law and his application of it in his characteristically crystal clear judgment. This may be found under the Neutral Citation Number *[2006] EWHC 174 (TCC)*. I shall give a brief summary only.

6. Quietfield employed Vascroft as contractor to carry out works of renovation, alteration and addition to Denham Place, a 17th century mansion in Buckinghamshire. The contract, in JCT 1998 standard form with a number of amendments, was dated 24th April 2003. The works were to start on 9th August 2002. The original Completion Date was 12th February 2004. Clause 25 of the Conditions provided that the architect, upon receiving due notice, should grant to the contractor fair and reasonable extensions of time for delays caused by Relevant Events. Clause 26 entitled the contractor to recover loss and expense for delay or disruption caused to him. Clause 24 provided that the contractor should pay liquidated damages at the rate of £1000 per day if the contractor failed to complete the works by the Completion Date, as extended under Clause 25. These clauses were largely in unamended standard form. They contain a huge number of words, but this brief summary of them is sufficient for present purposes.

7. There were delays to the works and they were not completed by 12th February 2004. The responsibility for the delays is in issue between the parties.

8. Vascroft made two specific applications to the architect for extensions of time. The first was in a letter dated 2nd September 2004. The terms of the letter are quoted in paragraph 9 of the judge's judgment. The letter asked for an extension of the Date for Completion to 9th June 2005. An attachment to the letter identified 12 matters, listed in paragraph 10 of the judge's judgment, as being causes of delay. They consisted mainly of late information or slow progress by other specialist contractors.

9. The second application was in a letter to the architect dated 22nd April 2005. An extended passage from it is quoted in paragraph 11 of the judge's judgment. It relied on delay caused by work being carried out by others, and asked for an extension of time so that the Date for Completion was 23rd September 2005. There was also intimation of a claim for loss and expense.

10. The architect did not give any extension of time pursuant to these requests or for any other reason. The Completion Date accordingly remained 12th February 2004.

11. On 1st August 2005, Vascroft wrote to Quietfield with a Notice of Adjudication. The letter is quoted in paragraph 13 of the judge's judgment. In paragraphs 14 and 15, the judge gives an account of, and quotes from, the Particulars of the Notice of Adjudication. He said in paragraph 16 that, when the document is read in its context, the dispute referred for adjudication included Vascroft's claims for extension of time on the basis of the matters set out in the two letters of 2nd September 2004 and 22nd April 2005. The adjudicator was explicitly requested

to decide that Vascroft were entitled to an extension of time which revised the Date for Completion to 23rd September 2005, or to any other such date as the adjudicator should decide.

12. Mr J.A. Williams was appointed adjudicator. A Referral Document was prepared on behalf of Vascroft, and statements of case and witness statements were exchanged and provided to the adjudicator. He held a meeting on 6th September 2005 to clarify issues. There is something of a factual dispute between the parties to the present proceedings as to what may or may not have been said or agreed in this respect. This factual dispute cannot be determined in these summary proceedings. Mr Holt, who appeared for Quietfield, did not submit that this court should decide the appeal with reference to any such determination.

13. The adjudicator delivered his written decision on 16th September 2005. He declined to say that Vascroft were entitled to an extension of time, although he did award some money for some of Vascroft's financial claims. In relation to the claim for extension of time, he decided that the two letters of 2nd September 2004 and 22nd April 2005 were contractually valid notices under clause 25; but Vascroft had not provided either evidence or reasoned analysis to demonstrate that the events on which they relied caused delay to the completion of the works. He stated that Vascroft had failed to discharge the burden of proof that they were entitled to an extension of time.

14. After the adjudicator's first decision, Quietfield began a second adjudication, which was soon abandoned for procedural reasons. They then on 19th October 2005 began a third adjudication, for which Mr Williams was again appointed adjudicator. In this adjudication, Quietfield claimed to be entitled to Liquidated and Ascertained Damages of £588,000 for Vascroft's failure to complete the works by 12th February 2004 or until 23rd September 2005, five hundred and eighty eight days late. Quietfield's simple case was that the contractual Completion Date was 12th February 2004; the architect had granted no extension of time; and the adjudicator had not been persuaded to say in the first adjudication that Vascroft were entitled to any extension of time. Accordingly liquidated damages were payable at the rate of £1000 per day for the entire period, the architect having given the requisite certificate under clause 24 and the other formalities of that clause having been complied with.

15. Vascroft resisted Quietfield's claim in the third adjudication, contending that they were entitled to an extension of time for the whole period on grounds set out in Appendix C to their response. The judge described Appendix C in paragraph 22 of his judgment as follows: *"Appendix C is a bulky document. It spans almost 400 pages. It sets out numerous causes of delay. It also traces the dominant critical path. Appendix C analyses the delay to completion which was caused by each of the relevant events. Appendix C includes a number of bar charts, which (a) set out Vascroft's planned and actual programme and (b) trace the inter-relationship between the different activities on site and the various causes of delay."*

16. There was an issue whether the adjudicator in the third adjudication could pay any regard to Appendix C, or whether he was precluded from doing so by his decision about extension of time in the first adjudication. He dealt with this as a preliminary issue, but he restated his conclusion on the preliminary issue in his substantive decision dated 7th December 2005. He decided that he was not able to have regard to the matters in Appendix C because he was bound by the decision given in the first adjudication. He considered that Vascroft's defence to the claim for liquidated damages was seeking to rely for a second time on the same matters as they had unsuccessfully relied on in the first adjudication, but on different evidential submissions. His reading of the Notice of Adjudication in the first adjudication was that it was so broad as to encompass the whole issue of Vascroft's entitlement to 84 weeks extension of time – see paragraphs 8.3.1.17 to 8.3.1.20 of the Decision in the third adjudication.

17. In the present proceedings, the judge said uncontroversially in paragraph 29 of his judgment: *"It is clear from the particulars of claim, the defence and the skeleton arguments in this action that there is effectively only one issue to be decided. That issue may be formulated as follows: Was the adjudicator correct in treating his own decision in the first adjudication as conclusive in relation to extension of time? If the answer to this question is "Yes", then the adjudicator's decision dated 7th December 2005 must be enforced. If the answer to this question is "No", then it follows that the adjudicator has expressly refused to consider both the written submissions and the evidence which constitute Vascroft's only substantive defence in the adjudication. In that event there has been a breach of the rules of natural justice and the adjudicator's decision cannot be enforced."*

The law

18. Section 108(3) of the 1996 Act provides that a compliant construction contract shall provide: *"… that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration … or by agreement."*

    Paragraph 23(2) of the Scheme reproduces the substance of this subsection.

19. Paragraph 9(2) of the Scheme provides: *"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."*

    Paragraph 9(4) of the Scheme provides: *"Where an adjudicator resigns in circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to payment of … [reasonable fees and expenses]."*

20. The judge said, again uncontroversially, in paragraph 34 of his judgment that the effect of these provisions is that, once a dispute has been determined by adjudication, there cannot be another adjudication about that same dispute. The adjudicator's decision remains binding on the parties unless and until it is overtaken by a judgment of the court, an arbitration award or a settlement agreement. The question then was how section 108(3) of the 1996 Act and paragraphs 9 and 23 of the Scheme interrelated with the usual provisions for extension of time. Clause 25 of the conditions permitted the contractor to make successive applications for extension of time on different grounds. Successive adjudications concerning extensions of time must be permissible provided that each adjudication arises from a separate dispute. This was in substance what HH Judge Havery QC, sitting in the Technology and Construction Court, had decided in *Emcor Drake & Skull Limited v Costain Construction Limited* (2004) 97 Con L.R. 142. The judge also considered *David McLean Contractors Limited v The Albany Building Limited* (Salford District Registry, 10th November 2005), saying that he agreed with the decisions in both cases and the general approach adopted. In the *David McLean* case, HH Judge Gilliland QC had said that, to determine whether a decision in a second adjudication should be enforced, it was necessary to construe the notice of intention to refer the first dispute to adjudication and the relevant Scheme rules to determine whether the second adjudicator had jurisdiction.

21. The judge concluded in paragraph 42 of his judgment that there were four relevant principles where there are successive adjudications about extension of time and the deduction of damages for delay, as follows:

> *"(i) Where the contract permits the contractor to make successive applications for extension of time on different grounds, either party, if dissatisfied with the decisions made, can refer those matters to successive adjudications. In each case the difference between the contentions of the aggrieved party and the decision of the architect or contract administrator will constitute the "dispute" within the meaning of section 108 of the 1996 Act.*
>
> *(ii) If the contractor makes successive applications for extension of time on the same grounds, the architect or contract administrator will, no doubt, reiterate his original decision. The aggrieved party cannot refer this matter to successive adjudications. He is debarred from doing so by paragraphs 9 and 23 of the Scheme and section 108(3) of the 1996 Act.*
>
> *(iii) Subject to paragraph (iv) below, where the contractor is resisting a claim for liquidated and ascertained damages in respect of delay, pursued in adjudication proceedings, the contractor may rely by way of defence upon his entitlement to an extension of time.*
>
> *(iv) However, the contractor cannot rely by way of defence in adjudication proceedings upon an alleged entitlement to extension of time which has been considered and rejected in a previous adjudication."*

In my judgment, these principles are a correct analysis for the purposes of the present case. Mr Holt, for the appellant, attempted to persuade us, unsuccessfully in my view, that the judge's paragraph (i) was wrong – see later in this judgment.

The judge's decision

22. Applying his principles to the present case, the judge held that the dispute identified in the first notice of adjudication was the architect's failure to give any extension of time in response to Vascroft's application letters of 2nd September 2004 and 22nd April 2005. Other documents did not affect this. In relation to extensions of time, the adjudicator's decision in the first adjudication focussed principally on the two application letters. The adjudicator held that they were contractually valid notices, but his decision was that Vascroft had not established any entitlement to extension of time.

23. In the third adjudication, Quietfield were claiming liquidated damages for delay. Vascroft were entitled to advance any available defence, irrespective of whether that defence had been notified when the relevant dispute arose. This they did by means of Appendix C. Of this, the judge said: *"Appendix C is a far cry from the two application letters dated 2nd September 2004 and 22nd April 2005. It is perhaps regrettable that Appendix C was not advanced in the first adjudication. Appendix C identifies a number of causes of delay which do not feature in the two application letters. Further, Appendix C appears to be a structured and logical document, which sets out to demonstrate what the critical path was and how individual events did or did not impact upon the final date for completion. Whether, at the end of the day, the submissions in Appendix C will prevail, I do not know. This will be a matter for the adjudicator or, possibly, the arbitrator to decide. I am, however, quite satisfied that Vascroft's alleged entitlement to an extension of time as set out in Appendix C is substantially different from the claims for extension of time which were advanced, considered and rejected in the first adjudication."*

Grounds of Appeal

24. There are essentially two grounds of appeal. First, it is said that the judge misconstrued the scope of the first adjudication. Second, it is said with less than complete enthusiasm that the judge should have held that Appendix C advanced the same claim for extension of time as had been advanced in the first adjudication, but upon different evidence and improved analysis.

25. The second ground does not bear examination. Mr Holt had to accept that the judge was correct, certainly for the purpose of summary judgment, that Appendix C identifies a number of causes of delay which did not feature in the two application letters; and that the claims for extension of time in Appendix C were substantially different from those which had been considered and rejected in the first adjudication. I have myself looked at Appendix C in some detail. I am quite satisfied that Mr Holt was correct not to try to persuade us that Appendix C really comprised the same claims as were advanced in the two notification letters dressed in different clothes. Nor is this

a case where the only differences between the claims in Appendix C and those advanced in the first adjudication were tendentious additions designed to make what was substantially the same claim look different. Mr Holt also accepted a further important point put to him by Smith LJ. Appendix C has a fairly sophisticated and new critical path analysis. It could well be that grounds for extension of time, which were not established individually in the first adjudication, could nevertheless legitimately feature in Appendix C, in conjunction with other grounds not advanced in the first adjudication, as being on a critical path affected by those other causes of delay. In principle, such a composite claim might legitimately be seen as outside the dispute which the first adjudicator determined.

26. Quietfield's first ground of appeal, upon which Mr Holt mainly concentrated, was in principle capable of succeeding, if it was in truth correct that the scope of what was decided in the first adjudication was much broader than the judge found, so as to embrace, not only the specific grounds for extension of time in the two letters, but also all claims for extension of time capable of extending the Date for Completion to 23rd September 2005. But I am quite unpersuaded that this is so.

27. Mr Holt was inclined to address, so as to refute, submissions made by Mr Jinadu, rather than to advance arguments why the judge was wrong. He submitted, for instance, that the judge made an error of principle in paragraph 42(i) of his judgment, which I have quoted, in saying that an adjudication cannot go beyond claims which have previously been made. But that is not what paragraph 42(i) says. And the judge did not proceed on the basis which Mr Holt seeks to attribute to him.

28. Mr Holt submitted that the first Notice of Adjudication could be read as a broad request for an extension of time. It was not, he said, clear that it was not. The judge should not have looked at the Notice of Adjudication only. He should also have looked at the Referral Document and Vascroft's Rejoinder. [The judge in fact did this – see paragraphs 45 to 47 of the judgment.] Mr Holt pointed out that the Referral Document spoke of a "comprehensive" extension of time claim. He submitted that Vascroft were building a picture and asking the first adjudicator to look at everything, whether it had been previously notified or not. They claimed a full extension of time to 23rd September 2005. The scope of the first adjudication should be construed as embracing all claims for extension that might have been made. It is said that Quietfield so understood the scope of the first adjudication. They regarded the first adjudication as in substance determining, for the temporary purposes of adjudication at least, their entitlement to liquidated damages. There was nothing in Appendix C which could not have been put forward in the first adjudication. Certainly; but the question is whether matters in Appendix C were put forward in the first adjudication.

29. Mr Holt pointed to passages in the Rejoinder document which referred to other documents notifying delay as showing the enlarged scope of the first adjudication. I found this last point entirely unpersuasive. In their context, the passages in the Rejoinder were dealing with Quietfield's contention, which the adjudicator rejected, that Vascroft had not given due contractual notice. I am afraid that I just did not follow another submission of Mr Holt's to the effect that, if the judge were right and if Vascroft had succeeded in persuading the adjudicator in the first adjudication that they were entitled to a full extension of time, Quietfield could nevertheless have claimed an entitlement to liquidated damages in a second adjudication. This is in my view plainly a false corollary.

Discussion and decision

30. In my judgment, the judge came to the right conclusion for the right reasons, and I would dismiss this appeal. I shall give my reasons briefly in my own words.

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.

34. In the present case, the judge correctly analysed the documents relevant to the scope of the first adjudication. The Particulars appended to the Notice of Adjudication dated 1st August 2005 stated that a dispute had arisen in respect of Vascroft's entitlement to an extension of time. Vascroft had applied for two extensions of time which the architect had failed to grant. The adjudicator was requested to decide that Vascroft were entitled to an extension of time which revised the Date for Completion to 23rd September 2005 or any other such date as the adjudicator should decide. In the context, the dispute to which this refers was plainly Vascroft's claims for

extension of time in the two letters. The judge correctly so decided in paragraph 16 of his judgment. Vascroft's Referral Document dated 5th August 2005 was to the same effect. Section 4 of that document spoke of "a Crystallised Dispute regarding Entitlement to an Extension of time". Vascroft had submitted a *"… comprehensive extension of time document under cover of its letter dated 2nd September 2004. This document detailed the Relevant Events relied upon … VCL requested an extension of time … revising the Due Date for Completion to 9th June 2005. A copy of this submission is contained within Appendix 2.6 of this Referral".* (paragraph 4.1.6)

And then *"On 22nd April 2005, VCL wrote to QL and requested a further Extension of Time until 23rd September 2005. A copy of this letter is contained at Appendix 2.9 of this Referral."* (paragraph 4.1.14)

As with the Notice of Adjudication, the adjudicator was requested to decide that Vascroft were entitled to an extension of time revising the Date for Completion to 23rd September 2005 or any other such date as the adjudicator should decide.

35. It is, in my view, as clear as may be that the dispute referred for adjudication was Vascroft's disputed claim for extension of time on the grounds advanced in the two letters. I have already explained that the passages in the Rejoinder Document which Quietfield rely on did not alter that. The Rejoinder Document itself concluded by saying that Vascroft's position remained unaltered and as set out in the Notice of Adjudication, the Referral and in the Rejoinder (paragraph 14.1).

36. The adjudicator's decision covered a lot of pages deciding that Vascroft's letters of 2nd September 2004 and 22nd April 2005 were effective notices of delay within the provisions of clause 25.2.1 of the Contract Conditions. He defined the issue as whether Vascroft were entitled to an extension of time of 84 weeks or any such other period (paragraph 8.3.3.0). Vascroft's case was that by application of its notices of delay it was entitled to an extension of time of 84 weeks thereby refixing the Date for Completion as 23rd September 2005 (paragraph 8.3.3.1). The adjudicator's decision was that Vascroft had failed to discharge the burden of proof to establish that or any other extension of time (paragraph 8.3.3.14).

37. In the result, in my judgment both the dispute referred for adjudication and the dispute which the adjudicator decided in the first adjudication was Vascroft's disputed claims for extension of time in the two letters. Since Vascroft's Appendix C in the third adjudication identified a number of causes of delay which did not feature in the two letters and was substantially different from the claims for extension of time which were advanced, considered and rejected in the first adjudication, the adjudicator was wrong in the third adjudication not to consider Appendix C.

38. I would, therefore, for these reasons dismiss the appeal.

Lord Justice Dyson:

39. I agree that this appeal should be dismissed. As May LJ has shown at paras 34-37, the dispute which was the subject of the first adjudication was substantially different from the dispute which was the subject of the third adjudication. That is sufficient to dispose of this appeal. I add a few words of my own to expand upon the first two of the principles enunciated by Jackson J, which are quoted at para 21 above.

40. The contract does not provide expressly for "*applications for extensions of time",* although it is convenient to use that phrase as the judge did. In fact, the contract provides by clause 25.2.1.1 that *"if and whenever it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed the Contractor shall forthwith give written notice to the Architect of the material circumstances including the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event".* So what the contractor has to do is give notice of the material circumstances and identify any Relevant Event whenever it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed. Clause 25.2.2 provides that in respect of each Relevant Event identified in the notice, the contractor shall, if practicable in the notice itself, otherwise in writing as soon as possible after the notice, (i) give particulars of the expected effects of the Relevant Event and (ii) estimate the extent, if any, of the expected delay to the completion of the Works beyond the contract Completion Date.

41. The contract contains no express provision limiting the number of such written notices that may be given by the contractor in respect of any particular Relevant Event or the number of times that the contractor may, in respect of any Relevant Event, give particulars of the expected effects or make estimates of the expected delay to the completion of the Works beyond the Completion Date. Nevertheless, I would hold that, upon the true construction of the contract or by necessary implication, the contractor cannot give successive notices of the same material circumstances including the same cause or causes of delay or identify the same Relevant Event as he has given and included in a previous written notice. Nor can he successively give the same particulars of the expected effects of the same Relevant Event or make the same estimates of the expected delay to completion as he has previously given or made. In other words, the contractor cannot merely repeat himself, hoping that the architect may, on a reconsideration of substantially the same material that he has already considered reach a different conclusion. In practice, of course, the contractor is rarely likely to consider that there is any point in doing this.

42. In my judgment, therefore, the contractor must present some new material which could reasonably lead the architect to reach a different conclusion from that on which he based his earlier decision or decisions. The judge did not explain what he meant by *"different grounds"* in his first principle. I can see no reason to construe clause 25 so as to prohibit the contractor from relying on the same Relevant Event as he relied on in support of a previous application for extension of time, giving materially different particulars of the expected effects and/or a different estimate of the extent of the expected delay to the completion of the Works. If the position were

otherwise, the contractor could not make good shortcomings of one application by a later application, and would be obliged to refer the matter to arbitration. That cannot have been intended by the contract. There is nothing in the express language which prevents the contractor from making good the deficiencies of an earlier application in a later application.

43. So much for the position under clause 25. The judge's first principle may appear to suggest that every dispute arising from the rejection of an application for an extension of time may be referred to adjudication. I do not consider that that is necessarily the case. The question whether a contractor may make successive applications for extensions of time depends on the true construction of clause 25 and any term necessarily to be implied. The question whether disputes arising from the rejection of successive applications for an extension of time may be referred to adjudication depends on the effect of section 108(3) of the 1996 Act and paragraph 9(2) of the Scheme.

44. There are obvious differences between successive applications for extensions of time under the contract and successive referrals of disputes to adjudication. In the real world, there is often a regular dialogue between contractor and architect in relation to issues arising from clause 25. If an architect rejects an application for an extension of time pointing out a deficiency in the application which the contractor subsequently makes good, it would be absurd if the architect could not grant the application if he now thought that it was justified. To do so would be part of the architect's ordinary function of administering the contract. But referrals to adjudication raise different considerations. The cost of a referral can be substantial. No doubt that is one of the reasons why the statutory scheme protects respondents from successive referrals to adjudication of what is substantially the same dispute.

45. Paragraph 9(2) provides that 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. It must necessarily follow that the parties may not refer a dispute to adjudication in such circumstances.

46. This is the mechanism that has been adopted to protect respondents from having to face the expense and trouble of successive adjudications on the same or substantially the same dispute. There is an analogy here, albeit an imperfect one, with the rules developed by the common law to prevent successive litigation over the same matter: see the discussion about ***Henderson v Henderson*** (1843) 3 Hare 100 abuse of process and cause of action and issue estoppel by Lord Bingham of Cornhill in ***Johnson v Gore Wood & Co (a firm)*** [2002] 2 AC 1, 30H-31G.

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.

48. 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.

49. In the present case, I am in no doubt that the judge reached the right conclusion. The first disputed claim which was the subject of the first adjudication was substantially different from the second disputed claim. The written notices which formed the basis of the second claim identified Relevant Events which were substantially more extensive than those which formed the basis of the first claim. The particulars of expected effects were very different too. There will be some borderline cases where it is a matter of judgment whether the two claims are substantially the same and where there may be room for more than one view. In my view, this is not a borderline case.

Lady Justice Smith: I agree with both judgments.

Matthew Holt (instructed by Kennedys Solicitors) for the Appellant
Abdul Jinadu (instructed by Clarkslegal LLP) for the Respondent