



Neutral Citation Number: [2022] EWHC 1400 (TCC)

Case No: HT-2021-000388

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 08/06/2022

Before:

MRS JUSTICE O'FARRELL DBE

Between:

ESSENTIAL LIVING (GREENWICH) LIMITED

Claimant

- and -

ELEMENTS (EUROPE) LIMITED

Defendant

Mathias Cheung (instructed by **Taylor Wessing LLP**) for the **Claimant**
Alexander Nissen QC (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 8th December 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

“This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 8th June 2022 at 10:30am”

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This is a Part 8 Claim by the claimant (“Essential Living”) for declaratory relief arising out of the adjudication decision of Dr Franco Mastrandrea dated 22 July 2019 (“the Adjudication Decision”).
2. The issue for determination by the court is whether, and if so, to what extent, the Adjudication Decision is binding on the parties for the purpose of the ongoing final account process under the contract and any further adjudication, pending final resolution of the matters determined in the adjudication by legal proceedings or settlement.
3. Essential Living’s position is that, in respect of any matters assessed and decided by the adjudicator, the Adjudication Decision is binding for the purposes of calculating the final contract sum, fixing the completion period under the contract and any subsequent adjudication.
4. The defendant (“Elements”) opposes the relief sought on the ground that the adjudication related to an interim application for payment, shortly before the occurrence of practical completion; the Adjudication Decision does not impact on the final account process or the contractual review of the period for completion following practical completion. Further, the claim requires a detailed examination of disputed facts and is unsuitable for resolution as a Part 8 claim.

The Contract

5. The underlying dispute arises out of a project for a mixed-use development at Greenwich Creekside, East Creek Road, Greenwich, London SE8, comprising residential apartments, amenity floors and ground floor retail units in two multi-storey buildings with a shared basement.
6. By a contract dated 1 December 2016, Elements was engaged by Essential Living for the design, supply, manufacture and installation of modular units for the project (“the Contract”).
7. The Contract incorporates the JCT Construction Management Trade Contract 2011, subject to further amendments agreed by the parties.
8. Article 2A specifies that the Trade Contract Sum is £25,751,956 and states:

“The Employer shall pay the Trade Contractor that sum or such other sum as on the Adjustment Basis becomes payable in accordance with this Trade Contract (“the **Final Trade Contract Sum**”) at the times and in the manner stated.”
9. Part 3 of the Trade Contract Particulars provides that the agreed period for completion the works is 38 weeks after the expiry of the period of notice to commence works. The notice to commence works on site required Elements to commence works on 20 March 2017, giving an initial period for completion of the works that expired on 11 December 2017.

10. The Construction Manager appointed by Essential Living was InnC UK Ltd (“InnC”). In about September 2019, InnC became insolvent and Essential Living took over the role of Construction Manager under the Contract until after completion of the works.
11. The Contract contains provisions for periodic interim payments to be made as set out in clauses 4.10 and 4.17:

“4.10.2 Where periodic payments apply, the due dates in respect of the period up to practical completion of the Works shall be the monthly dates specified in the Trade Contract Particulars up to either the date of practical completion or the specified date within one month thereafter...

...

4.10.4 The sum due as an interim payment shall be the gross Valuation under clause 4.17 less the aggregate of:

- .1 any amount which may be deducted and retained by the Employer as provided in clauses 4.19 to 4.21 (“the Retention”);
- .2 the cumulative total of the amounts of any advance payment that have then become due for reimbursement to the Employer in accordance with the terms stated in the Trade Contract Particulars for clause 4.9;
- .3 the sums stated as due in previous Interim Certificates;
- .4 any sums paid in respect of an Interim Payment Notice given after the issue of the latest Interim Certificate, whether as adjusted by a Pay Less Notice or otherwise. ...

...

4.17 The Gross Valuation shall be the total of the amounts referred to in clauses 4.17.1 and 4.17.2 less the total of the amounts referred to in clause 4.17.3, applied up to and including a date not more than 7 days before the due date of an interim payment.

4.17.1 The total values of the following which are subject to Retention shall be included:

- .1 the work properly executed by the Trade Contractor ...

4.17.2 The following which are not subject to Retention shall be included:

...

.6 any other amount which is required by this Trade Contract to be added in the calculation of the Final Trade Contract Sum.

4.17.3 The following shall be deducted:

.1 any amounts deductible under clause ... 2.36 [defects] ...”

12. Clause 4.1 provides that, where the Adjustment Basis applies (as in this case), the Final Trade Contract Sum shall be calculated in accordance with clause 4.3.1:

“On the Adjustment Basis the Final Trade Contract Sum shall be the Trade Contract Sum adjusted by the amount stated in any Variation Quotations for which the Construction Manager has issued a Confirmed Acceptance and by the amount of any Variations thereto as valued under clause 5.3.3 and are set out in clauses 4.3.2 and 4.3.3.”

13. Clause 4.3.2 identifies the deductions to be made to the Trade Contract Sum, for items such as omissions of work, and clause 4.3.3 identifies the additions to be made, including the Valuation of Variations as provided for in clauses 5.3 to 5.12 of the Contract.

14. The Contract sets out the timetable and procedure for calculation and payment of the Final Trade Contract Sum:

“4.6.1 Not later than 3 months after the issue by the Construction Manager of the certificate of practical completion of the Works, the Trade Contractor shall provide the Construction Manager with all documents necessary for calculating the Final Trade Contract Sum.

4.6.2 Not later than 3 months after receipt by the Construction Manager of the documents referred to in clause 4.6.1 the Construction Manager shall prepare and send to the Trade Contractor a provisional calculation in accordance with clause 4.3 or 4.4, as applicable...

...

4.16.1 The Construction Manager shall issue the Final Statement to the Trade Contractor and not later than 2 months after whichever of the following occurs last:

.1 the Final Release Date ...

- .2 the date of issue of the Certificate of Making Good under clause 2.38...
- .3 the date on which the Construction Manager sends to the Trade Contractor a copy of the statement to be prepared under clause 4.6.2.

4.16.2 The Final Statement shall set out:

- .1 the Final Trade Contract Sum; and
- .2 the sum of amounts already stated as due in Interim Certificates ...

and ... the final payment shall be the difference (if any) between the two sums, which shall be shown in the Final Statement as a balance due to the Trade Contractor from the Employer or to the Employer from the Trade Contractor, as the case may be. The Final Statement shall state the basis on which that amount has been calculated.”

15. Clauses 2.25 to 2.28 of the Contract provide for Elements to give notice of delay to progress, identifying any Relevant Event specified in the Contract causing delay to completion of the works, and for the Construction Manager to make such adjustment to the Completion Period in respect of any delay caused by those Relevant Events as he estimates to be fair and reasonable.
16. Clause 2.27.5 provides for a fresh assessment of the Completion Period to be carried out following expiry of the same or completion of the works:

“After the expiry of the Completion Period for the Works ... if this occurs before the date of practical completion, the Construction Manager may, and not later than the expiry of 12 weeks after the date of practical completion shall, by notice to the Trade Contractor ...

- .1 fix a Completion Period for the works ... later than that previously fixed if in his opinion that is fair and reasonable having regard to any Relevant Events, whether on reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Trade Contractor under clause 2.26.1; or
- .2 ... fix a Completion Period shorter than that previously fixed if in his opinion that is fair and reasonable having regard to any instructions for Relevant Omissions issued after the last occasion on which a new Completion Period was fixed for the Works ...; or

.3 confirm the Completion Period previously fixed.”

17. Clauses 2.32 and 8.7A of the Contract (as amended) provide that if Elements fails to complete the works within the Completion Period, it shall pay or allow to Essential Living liquidated damages, at the rates set out, subject to an overall cap, and payment of £300,000 in respect of financing costs.
18. Article 7 of the Contract provides that either party may refer any dispute or difference arising under the Contract to adjudication in accordance with clause 9.2. Clause 9.2 states:

“If a dispute or difference arises under this Trade Contract which either party wishes to refer to adjudication, the Scheme shall apply ...”
19. The “Scheme” is defined as Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998.
20. 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.”
21. Paragraph 23(2) of the Scheme provides:

“The decision of the adjudicator shall be binding on the parties, 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 otherwise agree to arbitration) or by agreement between the parties.”

The adjudication

22. Delays occurred to the works and completion was not achieved within the original Contract Period. On 5 July 2019, the works were certified as practically complete on 31 May 2019.
23. Disputes arose between the parties as to Elements’ entitlement to adjustments to the Trade Contract Sum, claims for variations, extensions of time and loss and/or expense, and Essential Living’s claims for liquidated damages and financing costs.
24. By a notice of adjudication dated 9 April 2019 Essential Living commenced the adjudication. The dispute identified was the correct valuation of Elements’ account, as set out in Elements’ latest application for payment of 11 March 2019 and the Construction Manager’s valuation of 20 March 2019.
25. The following relief was sought by Essential Living:

“(1) A declaration that the sum due to Elements for the original scope of works performed (less omitted works) to date is

£24,395,338 or such other sum as the adjudicator shall determine;

(2) A declaration that the sum due to Elements for variations is £1,842,044 or such other sum as the adjudicator shall determine;

(3) A declaration that the sum due to Essential for the extra-over cost of completing the works omitted from Elements' original scope of works, and for remedying defects in Elements' works is £10,461,024.00 or such other sum as the adjudicator shall determine;

(4) A declaration that the sum due to Essential for liquidated damages is the capped sum of £1,287,598 (incorrectly identified as £1,587,598 in the Notice) or such other sum as the adjudicator shall determine;

(5) A declaration that the sum due to Essential under clause 8.7A is £300,000 or such other sum as the adjudicator shall determine;

(6) An order that Elements must pay the sum of £11,368,610.76 within 14 days of the date of the decision, or such other sum as the adjudicator shall see fit;

(7) An order that Elements shall pay interest on the sum due under (6) above accruing daily at the rate of 4% per annum over the Bank of England Base Rate (the Contract Rate) or at such other rate as the adjudicator may determine.”

26. In its Response, Elements identified the dispute at paragraphs 33 and 34 as follows:

“33. ... this Adjudication concerns the sum due in respect of:

33.1 Elements' application for payment issued on 11 March 2019; and

33.2 InnC's valuation/payless notice dated 20 March 2019.

34. In other words, the Adjudicator is required to value Elements' interim payment application...”

27. In its response submissions, Elements relied on reports by its delay expert, Ted Scott of Secretariat International, and quantum expert, Kevin Hallett of Secretariat International.

28. Dr Franco Mastrandrea was appointed as the adjudicator.

29. On 22 July 2019 the adjudicator issued his (corrected) decision. The dispute was described in his decision at paragraph 2.1:

“The dispute before me is over the “latest interim” valuation of completed Elements works, and liability for contra charges and liquidated damages.”

30. The decision made by the adjudicator in the Adjudication Decision was as follows:
- i) the sum due to Elements for the original scope of works performed to date is £24,673,360.34;
 - ii) the sum due to Elements for variations is £2,346,650.46;
 - iii) the amount to which Essential Living is entitled for remedying defects in Elements’ works was £1,423,096;
 - iv) the amount to which Essential is entitled for liquidated damages is the capped sum of £1,287,598;
 - v) the amount to which Essential is entitled under clause 8.7A is £300,000;
 - vi) an order that Elements pay to Essential Living the sum of £1,842,360.64 within 14 days of the date of the decision, together with interest; and
 - vii) the parties each pay 50% of the adjudicator’s fees and expenses.
31. On 12 August 2019, Essential Living commenced legal proceedings to enforce the Adjudication Decision. Those proceedings were compromised by a consent order dated 16 October 2019, whereby Elements agreed to pay the award, excluding the remedial costs in respect of water damage, to which Essential Living was no longer entitled, following a subsequent adjudication decision on 2 October 2019.

Final Account submissions

32. On 8 October 2019, Elements submitted to the Construction Manager, then Essential Living, its documents for the purpose of calculation of the Final Trade Contract Sum.
33. On 10 February 2021 David Somerset of Somerset Consult was appointed as the Construction Manager.
34. On 10 May 2021 Elements issued to Mr Somerset its submissions on the adjustment to the Completion Period, for the purpose of the review following practical completion under clause 2.27.5 of the Contract, and a provisional calculation of the Final Trade Contract Sum, pursuant to clause 4.6.2 of the Contract. The submissions include increased claims for variations, full extensions of time (based on a new delay analysis report by John Hunter), no deductions for liquidated damages or clause 8.7A damages, and additional prolongation and disruption costs.
35. On 30 June 2021 Essential Living issued its corrected submissions for Mr Somerset to consider, setting out its position that the awards in the Adjudication Decision, including the adjudicator’s valuation and determination in respect of adjustments to the Trade Contract Sum, variations, liquidated damages and extensions of time, were binding on the parties.

36. On 8 July 2021 Elements set out its position, namely, that the valuation and determination of those matters for the purpose of the Adjudication Decision was limited to the disputed interim payment application and, therefore, did not affect the Construction Manager's determination of the Final Trade Contract Sum.
37. On 19 July 2021 Mr Somerset issued a document to both parties, raising queries and requests for clarification. On 30 July 2021 Essential Living provided its response and on 6 August 2021 Elements provided its response, both parties maintaining their positions as set out in earlier exchanges.
38. The Final Trade Contract Sum process has not yet been completed.

Proceedings

39. On 7 October 2021 Essential Living issued these proceedings, seeking declaratory relief as follows:
 - i) a declaration that Essential Living is entitled to the sums awarded by the adjudicator by way of liquidated damages and clause 8.7A damages and can retain those sums, unless and until the Adjudication Decision is overturned, modified or altered by the Court;
 - ii) a declaration that Elements is not entitled to any extensions of time beyond those already assessed and awarded by the Adjudication Decision, unless and until those are overturned, modified or altered by the Court;
 - iii) a declaration that nothing in clause 2.27.5.1, clause 4.6 or any other provision of the Trade Contract allows the Construction Manager to review, reopen, modify or alter the extensions of time, liquidated damages, clause 8.7A damages and valuations assessed and decided by the Adjudication Decision;
 - iv) a declaration that Elements is not entitled to claim any loss and/or expense for extended on-site preliminaries, unless and until the Adjudication Decision is overturned, modified or altered by the Court;
 - v) a declaration that Elements is not entitled to claim any loss and/or expense for factory production disruption costs, unless and until the Adjudication Decision is overturned, modified or altered by the Court;
 - vi) a declaration that Elements is not entitled to claim any loss and/or expense for preliminaries thickening based on alleged delay events which were considered and rejected by the adjudicator, unless and until the Adjudication Decision is overturned, modified or altered by the Court;
 - vii) a declaration that Elements is not entitled to claim or pursue any deductions to the Trade Contract Sum for the cantilevered balcony works and/or preliminaries which differ from the values and/or basis already decided by the adjudicator, unless and until the Adjudication Decision is overturned, modified or altered by the Court;
 - viii) a declaration that Elements is not entitled to claim or pursue any sums which differ from the values and/or basis already decided in respect of the variations

considered and assessed by the adjudicator (including but not limited to those set out in the witness statement appended hereto), unless and until the Adjudication Decision is overturned, modified or altered by the Court;

- ix) a declaration that Elements is not entitled to claim any balconies testing costs and/or any associated overheads and profit, unless and until the Adjudication Decision is overturned, modified or altered by the Court;
- x) [this declaration is no longer pursued]; and
- xi) a declaration that Elements is not entitled to re-adjudicate on any of the matters and claims decided by the adjudicator, and that at all events, any subsequent adjudicator is bound by the Adjudication Decision on such matters and claims and/or lacks the requisite jurisdiction to reopen or determine such matters and claims.

40. The court has the benefit of witness statements from:

- i) Jonathan Hutt of Taylor Wessing LLP, solicitors acting for Essential Living – first statement dated 7 October 2021 and second statement dated 18 November 2021;
- ii) Colin Fraser of Pinsent Masons, solicitors acting for Elements – statement dated 4 November 2021; and
- iii) Simon Underwood, Chief Executive Officer of Elements – statement dated 4 November 2021.

The issues

41. The issues before the court concern the binding effect of the Adjudication Decision and its impact on subsequent contractual processes, including dispute resolution; in particular:

- i) the impact of the Adjudication Decision on claims for extensions of time, liquidated damages and delay damages;
- ii) the impact of the Adjudication Decision on evaluation of the Final Trade Contract Sum, including variations and loss and/or expense; and
- iii) the impact of the Adjudication Decision on any subsequent adjudication.

42. Further, the court must consider whether the Part 8 procedure is appropriate for determining the issues raised in the claim and whether it is appropriate for the court to grant the declaratory relief sought.

Parties' submissions

43. Mr Cheung, counsel for Essential Living, submits that the parties have a contractual obligation to comply with adjudication decisions, pending any final resolution of the dispute by legal proceedings, arbitration or settlement. The contractual mechanism for interim and final payments, and the granting of extensions of time, must be construed

in a manner which is consistent with the parties' overarching obligation to comply with an adjudicator's decision and not to adjudicate twice on the same or substantially the same dispute.

44. It is not accepted that the claims now put forward by Elements are different from the claims advanced in the adjudication; the underlying dispute and causes of action remain the same or substantially the same as those before the adjudicator. In any event, Essential Living has already been awarded liquidated damages and clause 8.7A damages up to the contractual cap as part of the Adjudication Decision, based on the adjudicator's rejection of Elements' extension of time and loss and/or expense claims. The Adjudication Decision has already determined Elements' claims for adjustments to the Trade Contract Sum.
45. Mr Cheung submits that in respect of each of the claims which Elements is seeking to reopen and reargue before the Construction Manager, and most likely in a subsequent adjudication, the Construction Manager is bound by the matters decided by the Adjudication Decision and Elements is not entitled to re-adjudicate on any of those matters.
46. Mr Nissen QC, leading counsel for Elements, submits that the Adjudication Decision is legally irrelevant to the next contractual steps which the Construction Manager must now fulfil, both in respect of the calculation of the provisional Final Trade Contract Sum, and in the fixing of the Completion Period after the issue of the practical completion certificate.
47. He submits that the binding effect of the Adjudication Decision entails consideration of the nature of the dispute referred. The dispute referred related to the valuation of an interim payment application, rather than the computation and payment of the Final Trade Contract Sum. Elements' cause of action for an interim payment as decided in the adjudication was conceptually different from the cause of action for the final payment. Further, the dispute referred did not include the 12-week fixing of the Completion Date, as practical completion had not yet occurred. The right to a post practical completion decision in respect of extensions of time arises under clause 2.27.5 and is conceptually different from any earlier decision that may have been reached during the currency of the works under clauses 2.26 and 2.27.1.
48. Mr Nissen submits that it is a matter for the Construction Manager to consider how much, if any, weight to give to the Adjudication Decision when evaluating the material submitted by the parties for the purpose of the Final Trade Contract Sum and post-completion Contract Period.

Applicable legal principles

49. Paragraph 23(2) of the Scheme provides that the decision of an adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, arbitration or by agreement.
50. The temporary binding effect of an adjudicator's decision was summarised in *Aspect Contracts (Asbestos) Limited v Higgins Construction plc* [2015] UKSC 38 per Lord Mance, giving the judgment of the Court:

“[14] By providing that the decision of an adjudicator is binding and that the parties shall “comply with it”, paragraph 23(2) of the Scheme makes the decision enforceable for the time being. It is enforceable by action founded on the contractual obligation to comply with the decision combined, in a normal case, with an application for summary judgment... But the decision is only binding and the obligation to comply with it only lasts “until the dispute is finally determined” in one of the ways identified. By use of the word “until” paragraph 23(2) appears to contemplate that there will necessarily be such a determination. The short time limits provided by paragraph 19(1) also indicate that adjudication was envisaged as a speedy provisional measure, pending such a determination. But there is nothing to prevent adjudication being requested long after a dispute has arisen and without the commencement of any proceedings. Further, it seems improbable that the Scheme imposes on either party any sort of obligation to start court or arbitration proceedings in order to confirm its entitlement. Either or both of the parties might understandably be content to let matters rest.

[15] ... it seems clear that neither party is obliged ever to commence legal proceedings, and that if neither does the adjudicator’s decision continues to bind...”

51. In this case, it is common ground that effect has been given to the Adjudication Decision by the Consent Order dated 16 October 2019 and the agreed payment made by Elements to Essential Living.

52. However, Lord Mance also observed that:

“[17] Adjudication is conceived as a provisional measure. At a cashflow level, [the successful party] remains entitled to the payment unless and until the outcome of legal proceedings, arbitration or negotiations, leads to a contrary conclusion. But at the deeper level of the substantive dispute between the parties, the parties have rights and liabilities, which may differ from those identified by the adjudication decision, and on which the party making a payment under an adjudication decision must be entitled to rely in legal proceedings, arbitration or negotiations, in order to make good a claim to repayment on some basis.”

53. Although an adjudication decision is binding temporarily on the parties, so that they must comply with, and give effect to it, in the absence of any agreement to the contrary, it does not affect the underlying rights and obligations of the parties under their contract or displace the agreed contractual procedures for determining those rights and obligations.

54. The consequence of the binding effect of an adjudication decision on a dispute or difference is that an adjudicator has no jurisdiction to determine matters which are the same or substantially the same in a subsequent adjudication: *Quietfield Ltd v Vascroft*

Construction Ltd [2007] BLR 67 (CA) per May LJ at [31]-[33] and Dyson LJ at [44]-[48]; *Matthew Harding v Paice* [2016] BLR 85 (CA) per Jackson LJ at [57]-[58].

55. The relevant principles were set out in *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC) per Ramsey J at [38] and summarised by Coulson J (as he then was) in *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 at [34]:

“(a) The parties are bound by the decision of an adjudicator on a dispute or difference until it is finally determined by court or arbitration proceedings or by an agreement made subsequently by the parties.

(b) The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision by an adjudicator.

(c) The extent to which a decision or a dispute is binding will depend on an analysis of the terms, scope and extent of the dispute or difference referred to adjudication and the terms, scope and extent of the decision made by the adjudicator. In order to do this the approach has to be to ask whether the dispute or difference is the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided a dispute or difference which is the same or fundamentally the same as the relevant dispute or difference.

(d) The approach must involve not only the same but also substantially the same dispute or difference. This is because disputes or differences encompass a wide range of factual and legal issues. If there had to be complete identity of factual and legal issues then the ability to re-adjudicate what was in substance the same dispute or difference would deprive Clause 39A.7.1 of its intended purpose.

(e) Whether one dispute is substantially the same as another dispute is a question of fact and degree.”

56. Further guidance is provided in *Carillion Construction Ltd v Smith* [2011] EWHC 2910 per Akenhead J at [56]:

“In my judgement, the following factors, amongst others, can be deployed in considering whether the same or substantially the same dispute has been referred to or resolved in an earlier adjudication:

(a) One needs to consider what is and was the ambit and scope of the disputed claims which is being and was referred to adjudication. That of course will vary from dispute to dispute. One has however to take a reasonably broad brush approach in determining what the referred claims were. The reason for this is

to avoid repeat references to adjudication of what is essentially the same dispute.

(b) The fact that different or additional evidence, be it witness, expert or documentary, over and above what was relied upon in the earlier adjudication, is deployed in the later claim to be referred to a second or later adjudication, will not usually alter what the essential dispute is or has been. The reason is that evidence alone does not generally alter what is the essential dispute between the parties. One needs to differentiate between the essential dispute and the evidence required to support or undermine one party's or the other's case or defence.

(c) The fact that different or additional arguments to support or enhance a claiming party's position are deployed in the later adjudication will not usually of itself mean that it is a different dispute to that which was referred earlier. Again, the reason is that different or even better arguments that are deployed in a later adjudication do not usually create an essentially different dispute.

(4) The fact that the quantum is different or is claimed on a different quantification basis in the later reference to adjudication from that claimed in the earlier adjudication is not necessarily a pointer to the referred disputes being in substance different. If for example in Adjudication A the referring party claims for the value of 100 m³ of supplying and installing concrete, £20,000, at a rate of £200 per cubic metre, a claim for the same concrete work on a time plus materials basis in Adjudication B is essentially the same claim, albeit put on a different basis. There is nothing to stop the referring party in the subsequent arbitration or litigation claiming on each alternate basis but the claim is a claim for payment for the supply and installation of concrete.

(5) One should be particularly cautious about being over-awed in the exercise of comparison of two sets of documents purporting to set out the disputed claims for two adjudications by the amount or bulk of the detail, evidence, analysis, submissions or annexures attached to either.

(6) It is legitimate to look at the expressed motivation by the party in the later adjudication for bringing it and the given reasons for the basis of formulation of the later adjudication claim.

(7) One must bear in mind that Notices of Adjudication and Referral Notices are not required to be in any specific form; they may be more or less detailed and they may or may not be drafted by people with legal expertise. They do not need to be interpreted as if they were contracts, pleadings or statutes.

(8) One strong pointer as to whether disputes are substantially the same is whether essentially the same causes of action are relied upon in the earlier and later Notices of Adjudication and Referral Notices. One must bear in mind that one dispute (like one Claim in Court proceedings) may encompass more than one cause of action.”

Impact of the Adjudication Decision on extensions of time, liquidated damages and delay damages

57. Clause 2.26 of the Contract requires Elements to give notice of actual or likely delay, identifying the causes of such delay and identifying any event which is a Relevant Event specified in the Contract. Clause 2.27.1 obliges the Construction Manager to consider any notice of delay and, if in his opinion, completion of the works is likely to be delayed by a Relevant Event, obliges the Construction Manager to give an extension of time by making such adjustment to the Completion Period as he then estimates to be fair and reasonable.
58. If a dispute arises between the parties as to the extension of time granted or refused by the Construction Manager, either party may refer such dispute to adjudication. An adjudication decision on that dispute will be binding on the parties pending final determination by litigation or settlement.
59. On a proper construction of this Contract, once the Construction Manager has reached a decision under clause 2.27.1, it is not open to the contractor to give further notices in respect of the same delay, relying on the same Relevant Event, unless there is new material which could reasonably lead the Construction Manager to reach a different conclusion. Further, once a disputed claim for extension of time has been determined in adjudication, it is not open to either party to refer the same dispute to a subsequent adjudication.
60. As explained by Dyson LJ in *Quietfield v Vascroft* (above):

“[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.”

61. Essential Living's case is that Elements is seeking to re-open the delay issues determined by the adjudicator in the Adjudication Decision. Substantial portions of the Hunter report and the fresh submissions to Mr Somerset, the Construction Manager, rely on the same events and causes of delay as previously argued in the adjudication. In any event, the underlying dispute and causes of action remain the same or substantially the same as in the adjudication.
62. There is force in that argument to the extent that it is simply concerned with an attempt to overturn, or modify, the Adjudication Decision. However, it ignores the limited scope of the dispute referred to adjudication, namely, the correct valuation of Elements' account, as set out in its application for payment of 11 March 2019 and the Construction Manager's valuation of 20 March 2019. In the Adjudication Decision, the adjudicator expressly stated that the dispute before him was the latest interim valuation.
63. Regard must be had to the contractual procedure set out in clause 2.27.5, mandating the Construction Manager, not later than 12 weeks after the date of practical completion, to determine the Completion Period for the works that is fair and reasonable, by reviewing a previous decision or otherwise, and whether or not the Relevant Event has been specifically notified under clause 2.26. Clause 2.27.5 contemplates that this post-completion exercise could produce a Completion Period for the works that differs from earlier assessments under clause 2.27.1.
64. The time for the clause 2.27.5 exercise had not expired when the Adjudication Decision was issued and no such exercise had in fact occurred by then. Nothing in the Contract or the Scheme suggests that resolution of a dispute as to the Completion Period under clause 2.27.1 would displace the Construction Manager's obligation to assess the Completion Period under clause 2.27.5. The latter provision mandates a separate exercise and expressly permits the Construction Manager to review any previous decision. Therefore, the Adjudication Decision could not (and did not purport to) determine any dispute arising out of any fixing of the Completion Period under clause 2.27.5.
65. The Adjudication Decision determined Essential Living's entitlement to liquidated damages and finance costs by reference to the Completion Period as at March 2019. The Adjudication Decision did not purport to, and could not, override the contractual mechanism requiring a subsequent assessment to be made by the Construction Manager following practical completion, with the potential to produce a different result.
66. Mr Cheung relies on *Mailbox (Birmingham) Ltd v Galliford Try Building Ltd* [2017] Bus LR 2103, a case in which the court granted declarations in similar terms to those sought by Essential Living in this case, namely, that the employer was entitled to the sums awarded by the adjudicator by way of liquidated damages, and the contractor was not entitled to any extensions of time beyond those awarded by the adjudicator, unless and until the adjudicator's decision was overturned, modified or altered by the court. Coulson J (as he then was) stated at [55]:

“In my view, it is beyond argument that Mailbox are entitled to retain the entirety of the liquidated damages awarded by the adjudicator (and the subject of the enforcement judgment of O'Farrell J), unless and until the liquidated damages claim is challenged in court and the court reaches a contrary view on the

detailed claims. That is the effect of the decision in the first adjudication. That entitlement cannot be reduced or modified either under the contract or in a subsequent adjudication.”

67. However, that case can be distinguished on its facts. The contract had been terminated and, as a result, there was no post-completion review of the contractor's entitlement to extensions of time. Further, the first adjudicator expressly considered and rejected the contractor's submission that the dispute referred was limited to an interim determination of liquidated damages. Therefore, on analysis, the issue of liquidated damages under the contract had been determined on a final basis by the adjudicator. The *Mailbox* case serves to emphasise the importance of analysing the contractual and factual matrix within which the adjudication decision is made for the purpose of considering its scope and impact.
68. It follows that the Adjudication Decision is not binding on the parties for the purpose of the Construction Manager's final determination of the Completion Period under clause 2.27.5, from which would flow any liability on the part of Elements for liquidated damages and finance charges.

Impact of the Adjudication Decision on the Final Trade Contract Sum

69. As set out above, the Adjudication Decision determined the interim valuation of Elements' account, as set out in its application for payment of 11 March 2019 and the Construction Manager's valuation of 20 March 2019.
70. The Contract contains a separate contractual mechanism to determine the Final Trade Contract Sum, by clauses 4.3, 4.6 and 4.16, set out above.
71. Elements' case is that a cause of action relating to an interim valuation is distinct from a cause of action relating to a final valuation, even if the two sums happen to be the same: *Henry Boot Construction Ltd v Alstom Combined Cycle Ltd* [2005] BLR 437 (CA) per Dyson LJ at [54]- [56].
72. It is clear from the face of the Adjudication Decision that the adjudicator did not purport to determine the Final Trade Contract Sum. However, it does not follow necessarily that the Adjudication Decision could not bind the Construction Manager, in respect of specific matters determined by the adjudicator, for the purpose of ascertaining the Final Trade Contract Sum. Unlike the exercise under clause 2.27.5 for fixing the Completion Period, the Final Trade Contract Sum on the adjustment basis does not require the Construction Manager to remeasure the works. This can be contrasted with a remeasurement contract, such as the contractual scheme that applied in *Sherwood & Casson Ltd v Mackenzie* [1999] EWHC 274 (TCC) -see His Honour Judge Thornton QC at [33]-[34].
73. Under the Contract, the Construction Manager is not required, or permitted, to reconsider or revalue variations that have been accepted and valued in accordance with the contractual procedure. Clause 5.5 provides that effect shall be given, in the calculation of the Final Trade Contract Sum, to agreed variations and valuation of such variations, including direct loss and/or expense incurred thereby. The Contract does not provide for those matters to be re-opened at the final account stage.

74. Therefore, to the extent that variations were agreed, or disputed and determined in the adjudication, the Adjudication Decision is binding, pending any final resolution by litigation or settlement.
75. Mr Nissen's submission that the Adjudication Decision is no longer relevant, and can be ignored by the Construction Manager, goes too far. If, and to the extent that, the Adjudication Decision has determined a dispute as to any contractual entitlement to a variation, or its value, such determination is binding on the parties for the purpose of the Final Trade Contract Sum.
76. Further, a determination by the adjudicator on a discrete issue of dispute referred to the adjudicator and decided in the Adjudication Decision, such as whether the parties reached any concluded agreement on the Deeds of Variation, is binding on the parties pending any final resolution by litigation or settlement.
77. A careful analysis is required to ascertain whether any claim now sought to be advanced by Elements is subject to a binding decision by the adjudicator in the Adjudication Decision. It is not sufficient for Essential Living simply to point to similarities in the arguments or show that the sums claimed are the same. Regard must be had to the basis of the claim made, whether it amounts to a new cause of action and whether such claim is permitted under the terms of the Contract.
78. It is a matter for the Construction Manager, carrying out his obligations under the Contract, to consider the arguments and evidence put forward by the parties on each element of the final account that is disputed. In respect of each disputed element, the Construction Manager must determine whether it is agreed under the Contract, determined in the Adjudication Decision and binding, or whether there is a fresh basis of the claim that requires or permits him to make a fresh assessment.
79. It is not a matter that the court can resolve by way of a general declaration. It is a matter of fact and degree, requiring careful analysis of the evidence and argument on each disputed item. That necessitates a detailed inquiry into the substance of each claim that is not suitable for a Part 8 claim.

Impact of the Adjudication Decision on any further adjudication

80. The declaration sought is that Elements is not entitled to re-adjudicate on any of the matters and claims decided by the adjudicator. That is unlikely to be controversial and is established in the authorities referred to above. However, the real issue in this case is whether any dispute that might be referred to a further adjudication would be the same, or substantially the same, dispute as decided by the Adjudication Decision.
81. The difficulty that arises is that, unlike the authorities in which this issue has been considered, in this case there is no further adjudication. There is no notice of adjudication, no referral or response documents, and no decision that can be considered by the court to determine whether, on analysis, it is the same or substantially the same as the dispute determined by the Adjudication Decision.
82. In this case, the Adjudication Decision was stated clearly to determine the latest interim valuation of the works, as at March 2019 but, as part of that exercise, the adjudicator considered and decided a number of discrete issues as to the parties' contractual

entitlement. Some of those issues give rise to a binding decision that could not be reopened in a subsequent adjudication. Other issues give rise to a binding decision that could be reviewed under the Contract and therefore, if disputed, could be referred in a subsequent adjudication. Further issues may, on analysis, be part of the adjudicator's reasoning but not form part of the Adjudication Decision.

83. It is a matter of fact and degree as to whether any matters which Elements might seek to refer to a subsequent adjudication are the same, or substantially the same, as the matters determined by the Adjudication Decision. It would not be appropriate for the court to speculate on the scope of any future adjudication or provide a declaration based on hypothetical disputes that might be referred to adjudication.

Summary of conclusions

84. For the reasons set out above:
- i) the parties are bound by the Adjudication Decision on any dispute or difference determined therein until it is finally determined by the court or by subsequent settlement;
 - ii) the parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of the Adjudication Decision;
 - iii) the Adjudication Decision is not binding on the parties for the purpose of the Construction Manager's final determination of the Completion Period under clause 2.27.5, from which would flow any liability on the part of Elements for liquidated damages and finance charges;
 - iv) the Adjudication Decision is not binding on the parties for the purpose of determining the Final Trade Contract Sum;
 - v) the Adjudication Decision is binding in respect of variations considered and assessed by the adjudicator, unless and until the Adjudication Decision is overturned, modified or altered by the court, or unless either party identifies a fresh basis of claim that permits such variation claim to be opened up and reviewed under the terms of the Contract;
 - vi) it is a matter of fact and degree, requiring careful analysis of the evidence and argument on each disputed item, as to whether the Adjudication Decision is binding on any other discrete issue referred to and determined by the adjudicator, unless and until the Adjudication Decision is overturned, modified or altered by the court;
 - vii) it is a matter of fact and degree as to whether any matters which Elements might seek to refer to a subsequent adjudication are the same, or substantially the same, as the matters determined by the Adjudication Decision; absent any Notice of Adjudication before the court, it is not possible for this issue to be determined.
85. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including the form of the order, any

applications for costs or permission to appeal, and any time limits are extended until such hearing or further order.