Neutral Citation Number: [2024] EWHC 591 (TCC)

Case No: HT-2023-000393
Case No: HT-2023-000416

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 15/03/2024

Before :

Mr Alexander Nissen KC

- -

Between :

BATTERSEA PROJECT PHASE 2 DEVELOPMENT COMPANY LIMITED

Part 8 Claimant/Part 7 Defendant

- and -

Q.F.S. SCAFFOLDING LIMITED

Part 8 Defendant/Part 7 Claimant

- -
- -

Lucy Garrett KC (instructed by **Walker Morris LLP**) for the **Part 8 Claimant/Part 7 Defendant**
Marion Smith KC and **David Sawtell** (instructed by **Ward Hadaway LLP**) for the **Part 8 Defendant/Part 7 Claimant**

Hearing date: 27 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 15th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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ALEXANDER NISSEN KC

Mr Alexander Nissen KC:

Introduction

1. This is a judgment resulting from a combined hearing of a Part 8 claim and a Part 7 claim to enforce the decision of an adjudicator. It raises a topic which has already been addressed by a number of cases, namely the interplay between a "conclusive evidence" provision (in this case relating to a Final Payment Notice) and adjudication proceedings issued for the purposes of preventing the "conclusive evidence" provision from taking effect.

2. The adjudicator considered the provision did not take effect in the circumstances which arose and undertook a true value of the amount due. By the Part 8 proceedings (Action No. HT-2023-000393), the Claimant in that action, Battersea Project Phase 2 Development Company Ltd, ("BPS"), seeks declaratory relief that the Final Payment Notice was conclusive of the matters set out in the relevant provision, namely clause 1.8.1. By the Part 7 proceedings (Action No. HT-2023-000416), the Claimant in that action, QFS Scaffolding Ltd, ("QFS") seeks summary judgment in respect of the monetary consequence of the adjudicator's decision on the true value of the Final Sub-Contract Sum, namely £3,177,462.85 excluding VAT.

3. The parties were agreed that the two actions should be heard on the same day and that the Part 8 claim should be heard first. It was also agreed that there was no defence to the Part 7 claim other than in respect of the issue raised by the Part 8 claim.

4. Ms Garrett KC appeared for BPS. Ms Smith KC and Mr Sawtell appeared for QFS. I am grateful to them all for their assistance.

The Sub-Contract

5. The issue in this dispute arises from a sub-contract for the asbestos scaffolding package dated 12 November 2015 undertaken as part of the impressive development of the Grade II listed Battersea Power Station. The Sub-Contract Sum was £6,157,764 but, as matters turned out, the Final Sub-Contract Sum has exceeded £30m, whichever party is right about the appropriate sum to be adopted.

6. The Form of Subcontract was the JCT standard DBSub/A 2011 Design and Build Subcontract Agreement 2011, subject to bespoke amendments. The key provisions were not amended in any material respect.

7. Pursuant to the Articles, BPS was named as the Contractor and QFS was named as the Sub-Contractor. A curious feature was that the Employer was also BPS. The intention had been to novate the role of Contractor to an unincorporated venture between Skanska Construction UK Ltd and Skanska Rashleigh Weatherfoil Ltd but, in the event, this did not happen so BPS remained the Contractor. Nothing turns on this.

8. The following provisions were part of the Sub-Contract:

   Article 4

"4.1 If any dispute or difference arises under this Sub-Contract either Party may refer it to adjudication/negotiation in accordance with the Dispute Resolution Procedure set out at Annex 8."

Annex 8

"1.3 Death of Adjudicator – Inability to adjudicate

If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, either Party may select another person from the list of Adjudicators in item 16 of the Sub-Contract Particulars to the Articles of Agreement to replace the Adjudicator, or if none of the persons so named are able or willing to act, either Party may apply to the Nominator for the nomination of an adjudicator to adjudicate that dispute or difference; and the Parties shall execute the JCT Adjudication Agreement with the appointed Adjudicator.

1.4 Dispute or difference – notice of intention to refer to Adjudication – Referral

.1 Where pursuant to Article 4 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. The referring Party shall refer the dispute or difference to the Adjudicator (the "Referral") within seven days of the notice. The Referral shall include particulars of the dispute or difference together with a summary of the contentions on which the referring Party relies, a statement of the relief or remedy which is sought and any materials it wishes the Adjudicator to consider. The Referral and its accompanying documentation shall be copied simultaneously to the other Party".

"1.5 Conduct of the Adjudicator

.5 In reaching his decision the Adjudicator shall act impartially, set his own procedure and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:

...

.2 opening up, reviewing and revising any certificate, direction, opinion, decision, requirement or notice issued given or made under the Sub-Contract as if no such certificate, direction, opinion, decision, requirement or notice had been given or made;"

"*1.7 Effect of Adjudicator's Decision*

.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given."

Clause 1.8.1

"1.8 Effect of Final Payment Notice

.1 Except as provided in clauses 1.8.2 and 1.8.3 (and save in respect of fraud), the Final Payment Notice under clause 4.12.2 shall have effect in any proceedings under or arising out of or in connection with this Sub-Contract (whether by adjudication, arbitration or legal proceedings) as:

.1 not used

.2 conclusive evidence that any necessary effect has been given to all the terms of this Sub-Contract which require that an amount is to be taken into account in the calculation of the Final Sub-Contract Sum save where there has been any accidental inclusion or exclusion of any work, materials, goods or figure in any computation or any arithmetical error in any computation, in which event the Final Payment Notice shall have effect as conclusive evidence as to all other computations;

.3 conclusive evidence that all and only such extensions of time, if any, as are due under clause 2.18 have been given;

.4 conclusive evidence that the reimbursement of direct loss and/or expense, if any, to the Sub-Contractor pursuant to clause 4.19.1 is in final settlement of all and any claims which the Sub-Contractor has or may have arising out of the occurrence of any Relevant Sub-Contract Matters, whether such claim be for breach of contract, duty of care, statutory duty or otherwise; and

.5 conclusive evidence that the reimbursement of direct loss and/or expense, if any, to the Contractor pursuant to clause 4.21 is in final settlement of all and any claims which the Contractor has or may have arising out of any of the matters referred to in clause 4.21, whether such claim be for breach of contract, duty of care, statutory duty or otherwise.

.2 If adjudication, arbitration or other proceedings are commenced:

.1 by either Party prior to or within 10 days after the date of receipt of Final Payment Notice; or

.2 by the Employer at any time within the periods referred to in clause 1.8 of the Main Contract, where such proceedings relate in whole or in part to the Sub-Contract Works or other matters connected with this Sub-Contract and the Sub-Contractor is either a party to those proceedings or (if not then party to them) is notified of them within 14 days of their commencement; or

.3 by the Contractor in relation to the subject matter of any proceedings by the Employer within clause 1.8.2.2 if the Employer's proceedings are commenced after the Final Payment Notice, provided that the Sub-Contractor (if not then a party to the Employer's proceedings) has been notified in accordance with that clause and the Contractor commences his proceedings within 28 days of the commencement of the Employer's proceedings,

the Final Payment Notice shall not have the effects specified in clause 1.8.1 in relation to the subject matter of those proceedings pending their conclusion. Upon such conclusion, the effect of the Final Payment

Notice shall be subject to the terms of any decision, award or judgement in or settlement of such proceedings.

.3 *In the case of a dispute or difference on which an Adjudicator gives his decision on a date after the date of the Final Payment Notice, if either Party wishes to have that dispute or difference determined by arbitration or legal proceedings, that Party may commence arbitration or legal proceedings within 28 days of the date on which the Adjudicator gives his decision.*

.4 *If the Final Payment Notice is not given in accordance with clause 4.12.2, references in this clause 1.8 to that notice and its effects shall be read and construed as references to any Default Payment Notice given under clause 4.12.6*".

The background to the issue

9. On 1 February 2022, Mace (who were the agents/construction managers for BPS) gave notice that practical completion had been achieved on 27 January 2022. On 27 February 2022, QFS provided the documents necessary for calculation of the Final Sub-Contract Sum. On 21 October 2022 Mace provided a statement of the Final Sub-Contract Sum. On 21 November 2022, QFS gave notice that it disputed the content of that statement in its entirety.

10. QFS started three adjudications within a short space of time. These were Adjudication Nos. 8, 9 and 10, commenced, respectively, on 25 November, 15 and 16 December 2022. Mr Molloy, a very experienced adjudicator, was dealing with each of these, as he had done in respect of all the previous adjudications.

11. On 19 December 2022, QFS issued another notice of intention to refer a further dispute to adjudication. It was titled Adjudication No.11. The dispute referred was:

    "the calculation of the Final Sub-Contract Sum i.e., the true value of the Final Sub-Contract Sum"

12. QFS calculated the Final Sub-Contract Sum to be £71,587,425 plus VAT. Based on Mace's notice of 21 October 2022, it recorded BPS's calculation of the Final Sub-Contract Sum to be £30,607,869 plus VAT. A declaration that the former represented the correct calculation was sought.

13. On 22 December 2022, Mace issued a Final Payment Notice to QFS which now identified a Final Sub-Contract Sum of £31,041,884 excluding VAT (or £37,250,260.80 including VAT). This was an increase from the amount contained in the 21 October 2022 notice. As QFS had already been paid £31,938,119, there was said to be a balance owing to BPS. At one stage, QFS reserved the right to argue that this was not a valid Final Payment Notice but that contention was not pursued in these proceedings. This is the Final Payment Notice which, on BPS's case, became evidentially conclusive of the matters set out in clause 1.8.

14. The Final Payment Notice was expressed to be subject to the finalisation of all current adjudications. The decision in Adjudication 8 had been reached shortly before the Final Payment Notice was issued.

15. As set out above, clause 1.8.1 provides that a Final Payment Notice is conclusive of various matters listed unless (relevantly) clause 1.8.2 (which I shall refer to as "the saving provision") is engaged. The matters in respect of which the Final Payment Notice is conclusive include, essentially, that the Final Sub-Contract Sum has been correctly calculated and takes account of all extensions of time and loss and expense.

16. The saving provision is engaged if (amongst other things) adjudication proceedings are commenced prior to or within 10 days after the receipt of the Final Payment Notice. In this case, as I have already recorded, Adjudication No.11 was commenced a few days before receipt of the Final Payment Notice. Accordingly, the saving provision was engaged by reason of clause 1.8.2.1. The alternative means of engaging the saving provision, in clauses 1.8.2.2 and 1.8.2.3 respectively, do not arise.

17. The parties are in dispute both about what happened thereafter and about the legal consequences of what happened. Summarising somewhat, BPS contends that QFS failed to serve a Referral within the time required, with the effect that Adjudication No.11 concluded without a decision. It then contends that, on a proper construction of clause 1.8.2, as the adjudication was concluded, the Final Payment Notice is not subject to any financial adjustment. Alternatively, it contends that QFS abandoned Adjudication No.11 which yields the same outcome. QFS contends that the parties had agreed that time for service of the Referral would be generally extended so there was no failure as alleged. When QFS came to pursue the subject matter of Adjudication No.11, in May 2023, it served a new notice of intention to refer only because the adjudicator proposed it but the subject matter of the dispute was identical to that contained within its earlier notice. It submitted that in those circumstances, the adjudicator, who duly accepted the appointment, was not bound by the conclusive evidence clause. It rejects the argument that it ever abandoned its prosecution of the proceedings. On its construction of clause 1.8.2, the Final Payment Notice was to be adjusted by the adjudicator's determination of the true value of the Final Sub-Contract Sum.

18. In order to unravel this dispute, I must consider what happened to the adjudication as a matter of fact and law before turning to address the proper construction of the provision itself.

Extension of time for Referral – the facts

19. The factual narrative must be understood in light of the legal context. As noted, paragraph 1.4.1 of Annex 8 to the Sub-Contract provides that the referring party must refer the dispute or difference to the adjudicator within seven days of the notice. This is a mandatory requirement ("shall") which means that, if it is not complied with, any ensuing adjudication will be a nullity: see the discussion in Coulson on Adjudication 4th edition at paragraphs 5.18 and 5.19. This context is not controversial.

20. At 08.44 on 19 December 2022, QFS's consultant (Mr Hale) issued the Notice of Adjudication in respect of Adjudication No.11 by email. In accordance with Annex 8, the Referral should have been due within seven days thereof (noting that there were Public Holidays intervening). BPS objected to the proposed appointment of the adjudicator on the grounds that the adjudication would breach natural justice given the other on-going adjudications. Its suggestion was that the parties should agree to Mr Molloy acting in respect of Adjudication No.11 once all the other current adjudications

had been concluded. Mr Molloy was sympathetic to the submissions in Adjudication No.11 (which I take to include the Referral) following the decision in Adjudication No.10.

21. At 12.42 on 19 December 2022, Mr Hale made an offer to alleviate the concerns raised by BPS in respect of a breach of natural justice. The parties are in dispute about the terms and effect of that offer which was conveyed through the medium of the adjudicator. It said:

> *"QFS offers the following to seek to alleviate his concerns:*
>
> *1. QFS will not serve its Referral in Adjudication 11 before Friday 13 January 2022.*
>
> *2. Thereafter, the usual timetable will follow in Adjudication 11 unless otherwise extended by the parties' mutual consent or by the Referring Party by up to fourteen days, pursuant to Annex 8, clause 1.5.3.*
>
> *3. The Referring Party's rights are preserved, pursuant to Annex 8, clause 1.5.3, to extend the period within which the Adjudicator shall reach his decision by up to fourteen days without the Respondent's consent.*
>
> *4. Accordingly, the extension to the timetable required to effect the above is agreed to be with the consent of both parties.*
>
> *5. If for some unforeseen or unforeseeable reason QFS is delayed in serving its Referral in Adjudication 11 until after Friday 13 January 2022 then the parties both consent to extend the period within which the Adjudicator shall reach his decision by the same number of days that the service of the Referral is delayed. This consent shall not need further ratification by either party."*

22. The balance of the email was consistent with an offer which recognised that the Referral in Adjudication No.11 could be issued prior to the decisions in Adjudication Nos. 9 and 10 having been reached but with their effect accounted for by the time a decision in Adjudication No.11 was required.

23. At 13.15 on 19 December 2022, BPS said that, provided the Referral was not served prior to 13 January 2023, this was acceptable to it i.e., it would not pursue any contention that a decision in Adjudication No.11 would breach natural justice. At the hearing, both parties treated this as an acceptance of the five terms set out in the earlier email. The email was sent through the medium of the adjudicator.

24. Later that day, Mr Molloy confirmed his agreement to act in Adjudication No.11.

25. On 11 January 2023, Mr Hale wrote to update Mr Molloy and BPS about service of the Referral. He said:

> *"QFS does not currently intend to serve the Referral on Friday 13 January 2023 and anticipates that it may be the week after next before it does so."*

26. He sought confirmation from both Mr Molloy and BPS that this was acceptable. Mr Molloy had no issue with it. BPS did not reply.

27. The last working day which would have amounted to "the week after next" would have been 27 January 2023. No Referral was served by that date. Instead, on 31 January 2023, Mr Hale wrote:

> *"Just to update you on Adjudication Nr.11, I shall be writing to you at some point soon in relation to Adjudication 11 timetable but advise that QFS expect it to be another two weeks or so before submission."*

28. By email on the same day, Mr Molloy noted this. Again, on the same day, BPS said it was not happy with the further delay. In its email of 15.38, it said that it had waived its right to receive the Referral within seven days of the Notice and to raise a jurisdictional challenge provided that the Referral was served no earlier than 13 January 2023. It said the waiver was suspensory and, given that a further two weeks or so was being asked for, this was unacceptable. It gave notice that its waiver would end on 3 February 2023.

29. Mr Hale replied on 3 February 2023 objecting to the approach adopted by BPS. QFS's position was that there was an enforceable contractual agreement between the parties to extend the procedure, not a waiver, and the agreement for a delayed Referral was for an open-ended extension with no long stop to it. He said it was not open to BPS to bring that arrangement to an end.

30. That same day, Mr Molloy expressed the view that the agreement to delay service of the Referral was probably effective but said he would not be entirely comfortable with proceeding with the adjudication absent either express confirmation that no point would be taken about the delayed service of the Referral or re-service of the Notice of Adjudication. As Ms Garrett noted, at this point Mr Molloy was unaware that the Final Payment Notice had been issued, because QFS had not told him. Accordingly, his suggestions as to the appropriate course must be understood in that light.

Extension of time for Referral – analysis

31. The submissions of the parties reflected the positions adopted in correspondence albeit with some refinements. BPS contended that all it had done was waive its right to receive the Referral within seven days of the Notice. It submitted that such agreement as there was to extend time in respect of service of the Referral was not a legally binding contract because there was no intention to enter into legal relations in respect of it. On a proper construction of the waiver, it had only consented to a delay up to 13 January 2023 or a later date if QFS could establish unforeseen or unforeseeable reasons which delayed the Referral beyond that date. Even if that was not the case, BPS was entitled to give notice bringing the waiver to an end by giving reasonable notice which it did by requiring delivery of the Referral by 3 February 2023, three working-days later. By contrast, QFS contended that the parties had reached an agreement to vary the procedure in Annex 8 so that it was entitled to serve the Referral at a date of its choosing, there being no fixed date in place. As such, BPS was not entitled to withdraw that agreement as it sought to do. In any event, it was said that the notice requiring service by 3 February 2023 was unreasonable. QFS goes as far as to say that the parties agreed that Adjudication No.11 would proceed after the decisions in Adjudication Nos. 9 and 10 had been reached.

32. The first point to address is what was agreed. Although BPS had been keen to reach an agreement which would have delayed the Referral until all the current adjudications had finished, it is clear that Mr Hale was not prepared to wait that long. Instead, he made clear that the decisions in those adjudications could simply be accounted for within the decision on Adjudication No.11. I therefore reject the submission made by QFS that the parties agreed that Adjudication No.11 would proceed only after decisions in those adjudications had been reached. I am also satisfied that what was agreed was not an open-ended arrangement whereby QFS could serve its Referral whenever it wanted and I reject QFS's submission to that effect. Read on its own, I agree that clause 1 of the offer could be read as only specifying a 'not before' date but it is important to read clauses 1 and 5 of the arrangement together. Clause 5 is engaged when and if the Referral is served after 13 January 2023. Importantly, as Ms Garrett said, it does not give QFS the exclusive power to extend its own time. Rather, clause 5 imposes a fetter on QFS's ability to serve after that date, namely that it is only entitled to do so if unforeseen or unforeseeable reasons for delay arise. QFS suggested I should give little weight to clause 5 but I see no reason for doing so as it was an integral part of the offer. In any event, it sheds light on and qualifies clause 1.

33. In summary, I construe the agreement to be that QFS was obliged to serve the Referral on 13 January 2023 unless an unforeseen or unforeseeable reason arises which precludes service on that date. If such were to occur, it was agreed that there would be an extension to cater for that reason and the time for reaching a decision would be extended in like manner.

34. Ms Garrett contended that the exchanges were merely about timetabling and not intended to give rise to a legally binding contract. The two features on which she relied in this context were, firstly, that the discussions were conducted jointly with and through the adjudicator and, secondly, that it was different from a commercial transaction where something is bought or sold. The first of these is irrelevant. The fact that the adjudicator was sent the exchanges does not mean that a variation to those terms was not taking place as between the parties whose contractual terms were under consideration. Only they could reach agreement in respect of the proposed change. As to the second point, this was a variation to a term within a contractual dispute resolution provision in a commercial construction contract. As such, the presumption is that the parties intended to enter legal relations in respect of that variation: see Chitty on Contracts at 4-208.

35. For what it is worth, I therefore consider there was an agreed variation to the requirement in paragraph 1.4.1 of Annex 8 whereby, instead of the Referral being served within seven days of the Notice, it would be served on 13 January 2023 or such later date as may be appropriate in the event of an unforeseen or unforeseeable event. This was a mutually agreed variation to the Sub-Contract for which there was consideration, namely that BPS would not pursue any contention that the prosecution of the adjudication in accordance with the original timescale would give rise to a breach of natural justice. I am satisfied that both parties intended that variation to be legally effective and binding upon them.

36. For completeness (although QFS did not argue otherwise) I should add that I do not consider the agreement altered the mandatory nature of the requirement to serve the

Referral. That is to say, the agreement did not change the nature of the agreement to one which was merely directory in character. Nothing was said to suggest that at all.

37. For present purposes, I do not believe that it matters whether the proper analysis is, as I have found, that BPS reached an agreement that it would not receive a Referral by a given date or, instead, is that BPS waived its right to receive a Referral by a given date. Ms Garrett's submission was one of waiver. It does not matter because, either way Ms Garrett accepted the arrangement was enforceable.

38. When the Referral was not served on 13 January 2023, QFS was in breach of its obligation to serve the Referral on that date unless it could establish an unforeseen or unforeseeable reason which had caused delay at that point. It is right to note that no explanation for delay was given by QFS in the email of 11 January 2023. Nor has any reason of that type been advanced since. It can therefore be discounted.

39. BPS did not reply to the email of 11 January 2023. It would have been helpful if it had done so. However, its silence could not be taken as an agreement to extend time again.

40. When QFS said on 31 January 2023 that it intended to issue its Referral in another two weeks or so, it still gave no unforeseen or unforeseeable reason for the further delay. However, BPS could not be sure that no unforeseen or unforeseeable reason for the further delay would subsequently be relied. In those circumstances, I consider BPS was justified in giving notice to QFS that it now required service of the Referral within a reasonable time of that point. This would, at least, have prompted any suggestion that there had been an unforeseen or unforeseeable reason for the delay. In the absence thereof, granting more time could be seen as a forbearance or waiver in circumstances where the original date which had been agreed, namely 13 January 2023, had now passed.

41. I reject QFS's submission that the notice period was too short. In circumstances where the original period for service of the Referral was seven days, a further extension of three days is perfectly reasonable even if, as Ms Smith pointed out, it came at a different time from that originally envisaged. Ms Garrett was right to point out that at no stage did QFS say it could not comply with the new date. Nor does the evidence served by QFS in these proceedings seek to demonstrate that the period was too short. Significantly the evidence of Mr Clifford served in the adjudication, but also relied on in these proceedings, confirms that a Referral had, in fact, already been prepared by 26 January 2023. Presumably, it would have needed some modification to take account of the decisions in Adjudication Nos. 9 and 10. (In fact, I was told that Adjudication No.10 gave rise to no financial difference.) I also note that the adjudicator also considered three days to be a reasonable period: see [35] of his decision. It is for these reasons that I conclude that reasonable notice was given.

42. QFS did not serve a Referral on 3 February 2023. On this basis, absent any further agreement or waiver (neither of which is suggested), the prosecution of an effective adjudication based on the Notice of Adjudication dated 19 December 2022 was bound to fail because QFS had not served its Referral by the agreed date.

The proper construction of clause 1.8.2

43. I now turn to clause 1.8.2. It is necessary to briefly outline the principles of construction which should be applied to clauses of this type. General principles of construction are too well known to require detailed citation and are not in issue. The authoritative position is explained by Lord Hodge in Wood v Capita Insurance Services [2017] UKSC 24 and summarised by Lord Hamblen in Sara & Hossein Holdings Ltd v Black Outdoor Retail Ltd [2023] UKSC 2 at [29].

> *"The relevant general principles are authoritatively explained by Lord Hodge in his judgment in Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 at paras 10 to 15. So far as relevant to the present case, they may be summarised as follows:*
>
> *(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
>
> *(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.*
>
> *(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated."*

44. This is a commercial construction contract in which the parties were sophisticated entities. No particular factual background has been relied upon.

45. As a conclusive evidence clause is a form of exclusion of what would otherwise be a party's right to adduce evidence, the principles identified in Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd [1974] AC 690 and Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29 are engaged here. I understood that to be common ground between the parties. In Triple Point, Lord Leggatt JSC said:

> *"108. The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations.*
>
> *109. The first and still perhaps the leading statement of this principle is that in Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] AC 689*

> *("Gilbert-Ash"). The question was whether the parties to a building contract had agreed to exclude the contractor's common law and statutory right to set off claims for breach of warranty against the price. The right allegedly excluded was thus one which would diminish the value of the claim otherwise maintainable against the contractor. Lord Diplock said (at 717H):*
>
> > *"It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law ... But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."*

46. The purpose of conclusive evidence clauses was discussed in Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd [2015] EWHC 70 (TCC). There, Coulson J (as he then was) said:

> *"9. As to the purpose of Final Certificates and conclusive evidence clauses, the following citations are relevant:*
>
> > *(a) Conclusivity clauses "provide some limits to uncertainties and expense of arbitration and litigation": see Lord Denning in Agro Company Canada Ltd v Richmond Shipping ("the Simonburn") [1973] 1 Lloyds Rep 292.*
> >
> > *(b) Conclusive evidence clauses were devised "to obviate cumbersome and painstaking enquiries to prove out-standings on running accounts…": see VK Rajah J in the High Court of Singapore in Standard Chartered Bank v Neocorp International Ltd [2005] SGHC 43.*
> >
> > *(c) Conclusive evidence clauses are intended "to provide contractually agreed limits to the scope of disputes and to provide clarity as to the parties' obligations once a project is complete": see the recent judgment of Carr J in University of Brighton v Dovehouse Interiors [2014] BLR 432, which concerned the same clause of the JCT Contract as the present case."*

47. I must therefore construe the clause with those principles and purposes in mind.

48. BPS contends that, in the circumstances, the proceedings validly commenced by the Notice of Adjudication dated 19 December 2022 reached a conclusion. No effective adjudication could be pursued once 13 January 2023, alternatively 3 February 2023, had passed given that no unforeseen or unforeseeable reasons for that date being missed have been relied on. Therefore, those proceedings were a nullity. On a proper construction of clause 1.8.2, a "conclusion" was a wide concept that did not require either a decision, award or judgment or a settlement. An adjudication could foreseeably come to a conclusion without either of those things having occurred. So, in circumstances where the proceedings had become a nullity, there had been a conclusion of them. They had come to an end. If there was a conclusion resulting from either a

decision, award or judgment or a settlement then the Final Payment Notice would take effect subject thereto but, if there was a conclusion which did not result from either of those things, no change to the Final Payment Notice was required. In that respect, BPS emphasised the word "any" in the penultimate line, because, it said, it recognised that there may not be a decision, award etc. despite the fact that the proceedings have concluded. Taking these two points together, the proceedings had concluded, but the Final Payment Notice remained unchanged as there was no decision or settlement which impacted upon it.

49. QFS submits that clause 1.8.2 does not require a decision, award or judgment in or settlement in order for the first part of the saving provision to be effective. However, QFS contends that proceedings only reach a conclusion once and if there has been either a decision, award or judgment or a settlement. When that occurs, the Final Payment Notice takes effect subject to those matters. In this context the word "any" in clause 1.8.2 simply means any of a decision, award (of any type) or judgment or a settlement. QFS submits that, in the circumstances of this case, the adjudication proceedings were concluded by the decision of Mr Molloy in September 2023.

50. In resolving this issue, it is appropriate to refer to three previous cases: Mr Tracy Bennett v FMK Construction Ltd [2005] EWHC 1268 (TCC) ("Bennett"); University of Brighton v Dovehouse Interiors Ltd [2014] EWHC 940 (TCC) ("Dovehouse") and Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd [2015] EWHC 70 (TCC) ("Marc Gilbard"). None of them is directly on point because they were not concerned with the word "conclusion" and the ambit of the saving provision was differently worded as I will shortly explain. Nonetheless, I have found the approaches taken in those cases to be helpful in a broader context.

51. In one key respect the saving provision in clause 1.8.2 is the same as that considered in Bennett and Dovehouse. In another key respect it is different. It is the same in providing that the trigger for the application of the saving provision is that adjudication or other proceedings are "commenced". In Bennett, HHJ Havery QC concluded that adjudication proceedings were commenced by the issue of a notice of adjudication. In Dovehouse, Carr J (as she then was) reached the same conclusion. There was and could be no dispute in this case that the saving proviso in this case was triggered by the Notice of Adjudication issued on 19 December 2022.

52. The respect in which the saving provision is different from that set out in Bennett and Dovehouse is that the effect of those proceedings on the Final Payment Notice is set out in a different way and, additionally, changes over time. There are two phases. Pending the conclusion of the proceedings, which is the first phase, the Final Payment Notice does not have any of the effects specified in clause 1.8.1 "in relation to the subject matter of those proceedings". Then, upon the conclusion of the proceedings, which starts the second phase, the Final Payment Notice is subject to the terms of any decision, award, judgment or settlement. This is not a distinction which had previously been made.

53. The first case is Bennett. I gratefully adopt the summary of that case provided by Coulson J in Marc Gilbard at [11]. He said:

> *"The first case in time was the decision of HHJ Havery QC in Bennett v FMK Construction Ltd [2005] ADJ. L.R. 06/30. This involved the effect of potential procedural difficulties on the validity of a notice of adjudication which challenged the Final Certificate. Judge Havery concluded that the first notice of adjudication in that case was sufficient to prevent the Final Certificate from becoming conclusive evidence, even though that first notice was later replaced by a second notice of adjudication that was served outside the period prescribed by the contract. At paragraph 15 of his judgment, the judge agreed that, if the referring party abandoned adjudication proceedings by failing to pursue them, then the saving provision (clause 1.9.3 in the present case) would no longer apply. But he said that that was not the position in the case before him."*

54. Ms Garrett sought to argue that case had no relevance to the present one because it was concerned with a resignation for which there was an agreed contractual procedure (one that did not require service of a further notice of adjudication), and because it was a contract with different wording. As to the former, the fact that the contract in Bennett contained a procedure in clause 41A.3 which did not require a further notice of adjudication to be given was not material to the conclusion which the judge reached. It is clear from [16] that the judge did not consider it necessary to determine whether the procedure in clause 41A.3 was applicable (though he went on to give an answer). Whilst I acknowledge the latter distinction, I nonetheless consider the case to be a useful indicator of a general approach. At [17], the judge construed "those proceedings" in the saving provision to be wide enough to include new adjudication proceedings brought by a referring party in relation to the same subject matter as was contained in earlier proceedings which had become abortive. This is, therefore, at least an indicator that "such proceedings" in clause 1.8.2 should be construed in a similar way.

55. The next case is Dovehouse. Like Bennett, it was a case concerned with "commencement of proceedings". Both parties acknowledged the potential relevance of this case. QFS contended it was on all fours with it. BPS submitted again that, on this issue, the contractual wording of the saving provision was materially different.

56. In terms of the general approach to construction of such clauses beyond that set out above, I refer to [49] and [65] in which Carr J emphasised the need to consider commercial common sense. She said:

> *"[49] In summary, where the consequences for a referring party in missing the deadline imposed in clause 1.9.2 may (indeed are likely to) be severe, the parties can be taken to have intended and wanted certainty and control over the date of commencement of proceedings. Construing the Scheme in the manner contended for by the University does not achieve that control or certainty and does not accord with commercial common sense. This is not to re-write the Contract but to apply a purposive commercial construction to it."*

> *"[65] Ramsey J referred to the judgment of Coulson J in Cubitt Building Interiors Ltd v Fleetglade Ltd [2007] 110 Con LR 36. There, having considered his earlier decision in Hart Investments Ltd v Fidler [2006] 109 Con LR 67, Coulson J stated that clause 41A "had to be operated in a sensible and commercial way".*

57. At [78] Carr J said:

> *"What was required was the giving of a notice to the University that complied substantively with paragraph 1(3) of the Scheme. The University was driven in this regard to submit in reply that the commencement of proceedings for the purpose of clause 1.9.2 should be construed so as to mean the doing of everything in the power of the referring party to reach a full and final adjudication. This is an unwarranted extension of the phrase "commencement of proceedings" which, for the reasons set out above, requires no more than the giving of a valid notice under paragraph 1(3) of the Scheme."*

58. Carr J concluded that the invalidity of the referral and the resignation of the first adjudicator did not negate the sufficiency of the notice of adjudication for the purposes of commencing proceedings: see [83]. At [87], she said:

> *"This conclusion is not inconsistent with the view expressed in Tracy Bennett v FMK Construction Ltd (supra) at paragraph 15. There the court accepted that if a referring party abandons adjudication proceedings by simply not pursuing them, the saving proviso would fall away. Subject to Lanes Group plc v Galliford Try Infrastructure Ltd (supra) as discussed further below, that view could be seen as consistent with an objective view of the parties' intention at the time of the contract. Otherwise a party could simply abuse the ability to commence proceedings under the Scheme by serving a notice of intention to proceed and removing the conclusive effect of the Final Certificate without any intention to resolve the dispute under the Scheme. Parties would not objectively be taken to have intended in such circumstances the saving proviso to have remained effective."*

59. She then considered Lanes Group plc v Galliford Try [2011] EWCA Civ 617 and said this:

> *"[93] In any event, to the extent that any material inconsistencies exist, there is recent appellate guidance to be found in Lanes Group v Galliford Try (supra). There the main contractor ("Galliford"), having commenced adjudication proceedings, then terminated them by simply not serving its statement of case on the adjudicator. It took the view at the time (wrongly so it turned out) that the selected arbitrator could not properly act. It then, after a period of time, served a new notice and sought a fresh appointment on the same dispute. It effectively "started again", adjudicating the same dispute before a different adjudicator.*
>
> *[94] At paragraphs 36 to 39 Jackson LJ said:*
>
> > *"36. …. The argument ... is that ... clause 18B of the sub-contract conditions permit a party to refer a dispute to adjudication on one occasion only. If the party seeking adjudication….does not follow through the reference, that is the end of the matter. The right to adjudication of the dispute notified in the adjudication is lost forever. Therefore, argues Mr Wilmot-Smith, Galliford having allowed the adjudication before Mr Klein to lapse could not commence a fresh adjudication in respect of the same subject-matter.*

> *37. The court was initially attracted by Mr Wilmot-Smith's submission. The proposition that a claimant can allow an adjudication to lapse because it disapproves of the appointed adjudicator and then start a fresh adjudication before a different adjudicator is not an appealing one…Mr Marrin has persuaded me, however, that there are formidable difficulties in the case which Lane advances. First it does sometimes happen that adjudication is not pursued further after the preliminary steps have been taken. There is no authority to suggest that as a consequence the claimant loses its right to adjudicate that dispute for all time.*
>
> *38. Secondly, both the Blue Form sub-contract, the ICE Adjudication Procedure and the Scheme recognise a right to restart an adjudication in a variety of circumstances…. It is possible to think of many situations, not all of which are provided for by express terms, in which the adjudication procedure would be thwarted if there were no right to re-start an abortive adjudication. For example, suppose there is a postal delay which prevents the referral documents being served within two days as required by paragraph 4.1 of the ICE Adjudication Procedure. It cannot be right that the claimant's entitlement to adjudicate the dispute is irretrievably lost.*
>
> *39. Mr Wilmot-Smith seeks to overcome these difficulties by arguing that the claimant only loses the right to adjudicate if he deliberately and without good reason fails to serve referral documents by the due date. In my view, however, it is quite impossible to imply a term of this nature either into the present contract or into the 1996 Act and the Scheme. Furthermore, if such an elaborate provision were to be implied, an expensive factual investigation would be required in some cases in order to determine whether the claimant had or had not lost the right to adjudicate."*

[95] The University says that the Court of Appeal was not there dealing with a conclusive evidence clause. But the approach in principle is in my judgment still applicable, not least since the Court of Appeal was expressly considering the Scheme and the effect of the lapse of adjudication under the Scheme.

[96] As set out above, the Court of Appeal eschewed the notion that where adjudication is not pursued (for whatever reason) the right to adjudication is lost forever. It drew no distinction between circumstances where adjudication was thwarted by error on the part of the referring party or for some other reason. It expressly rejected the invitation to alter the result by reference to the cause of the adjudication proceedings not continuing to their end.

[97] Objectively construed, the parties would have intended the saving proviso in clause 1.9.2 to be and remain engaged in circumstances where a notice of adjudication that was valid under paragraph 1 of the Scheme inadvertently identified the wrong nominating body for referral purposes. The error would not lead to the loss of the entitlement to the saving proviso in clause 1.9.2 of the Contract. This is what the reasonable person as envisaged Rainy Sky SA v Kookmin Bank (supra) would have understood the parties to have intended.

> *[98] In short, an invalid referral does not render invalid a notice of adjudication for the purpose of commencing adjudication proceedings within the meaning of clause 1.9.2."*

60. It is clear from this case that, in the determination of what constituted "commencement", Carr J was not attracted to any distinction being drawn between circumstances where the failure in the adjudication process was the result of error by the referring party and it having resulted for some other reason. She concluded this was in line with the approach taken by the Court of Appeal in Lanes. I respectfully agree: see [39] thereof.

61. In his summary of the case in Marc Gilbard Coulson J said this at [14]:

> *"The points in dispute were similar to those in Bennett. Carr J reached a similar decision, namely that, whatever the technical difficulties with the first notice of adjudication in that case, it had achieved its substantive purpose in commencing proceedings, and therefore the Final Certificate had been validly challenged. The judge concluded that this was so, even if (because the wrong nominating body had been referred to), a further notice of adjudication was required."*

62. The third case is the Marc Gilbard case itself. It was primarily concerned with a different topic, namely where a party originally issues court proceedings and then, much later, wants to commence adjudication proceedings. As such, is most helpful in the present context for its analysis of the earlier cases.

63. I cannot accept the submission made on behalf of BPS that an adjudication which becomes a nullity has reached a conclusion. The first and most obvious difficulty is that the "conclusion" which the whole provision envisages is necessarily either a decision etc, or a settlement. An adjudication which ends up being a nullity results in neither of these. I do not accept that "any" presupposes that circumstances may arise where there is a conclusion without one of those being present. I agree with Ms Smith that "any" in this context merely means any of a decision, award, judgment or settlement. She made the point, which I accept, that "any" also had to be broad enough to cover a decision, award or judgment resulting from a dispute between the Employer and Contractor as contemplated by clause 1.8.2.2 or clause 1.8.2.3. As such, it was not just a decision, award, judgment or settlement as between the parties to the Sub-Contract but any decision which could impact upon the Final Payment Notice.

64. The second difficulty is that, as Ms Garrett accepted, this construction has the potential to result in a harsh outcome. Let it be supposed that a valid and timely Notice of Adjudication was issued, challenging the Final Payment Notice, but the resulting decision was unenforceable because the adjudicator breached natural justice during the course of the adjudication for reasons entirely unattributable to the referring party. That adjudication would be a nullity and would not have produced an enforceable decision. Nonetheless, on BPS's case, the adjudication would have reached a "conclusion" and it would be too late for any subsequent notice to have an impact on the conclusive effect provided by clause 1.8.1 The referring party would thereafter be precluded from adducing any evidence contrary to the Final Payment Notice. Ms Garrett said that that harsh outcome was merely an expression of the preferential choice for finality which the parties had chosen to make. In circumstances where the consequences of missing the deadline are likely to be severe (see Dovehouse at [49]), I do not consider that

sensible businessmen would contract on terms which could produce such a harsh and random result.

65. It is also clear from the approach in Dovehouse (informed by Lanes at [39]) that no distinction should be drawn between those adjudications which are rendered a nullity by reason of fault of the referring party and those which are rendered a nullity for reasons outside its control. Whilst Dovehouse was primarily concerned with "commenced" and related to a differently worded provision, I consider that the same approach should apply in this context. What matters, in my view, is that the adjudication which became a nullity is not one which has ever reached a conclusion irrespective of the cause of it having become a nullity. It follows from this that it does not matter that a second Notice of Adjudication had to be issued in order for the adjudication proceedings to reach a conclusion.

66. Subject to the question of abandonment to which I will shortly turn, I therefore construe clause 1.8.2 in the following way. The first phase of the saving provision in clause 1.8.2 is engaged upon the commencement of relevant proceedings and continues to apply until the subject matter of proceedings has been concluded. Then the second phase of the saving provision is applicable. It is notable that clause 1.8.2 uses the expression "subject matter" in respect of the scope of that which is, pending a decision or settlement, not caught by the conclusive evidence. This shows the importance placed by the contracting parties upon the content of the underlying dispute. Whilst I accept QFS's submission that the first phase of the saving provision does not require a decision, award or judgment in or settlement of the proceedings in order to be effective, it necessarily assumes that one or other of those things will, in due course, occur. That is clear from the phrase "pending their conclusion". It is not, therefore, appropriate to look at the first phase in isolation without considering the second phase. QFS submitted that the phrase "pending their conclusion" indicates that the saving provision remains in operation, awaiting their conclusion. On this basis, it argued that a conclusion of the proceedings was not required in order to continue with the suspension of conclusivity in the first phase. I do not agree. The clause as a whole contemplates that proceedings had to be commenced and, thereafter, concluded. The parties did not intend that the suspension of conclusivity in the first phase could continue to infinity.

67. In the context of clause 1.8.2, "conclusion" means either a decision, award or judgment (as appropriate) or a settlement. Therefore, a "conclusion" does not include the ending of an adjudication which has become a nullity. Ms Garrett submitted that it would be surprising if a foreseeable set of events, such as this, was not covered by the provision. But, in my view, the provision does cover it. As set out in the first part of the saving provision, the Final Payment Notice does not have conclusive effect in relation to the subject matter of those adjudication proceedings pending their conclusion.

68. Ms Garrett also submitted that it would be an odd construction, inconsistent with the object of finality, to have no end point in view once the first adjudication had become a nullity. In my view, there is no such period of permanent limbo. The conclusive effect of the Final Payment Notice will have been challenged by the commencement of proceedings and, pending their conclusion, there is no conclusive effect given to the Final Payment Notice in respect of its subject matter. That is what the first phase of the saving provision says. However, one way or another the proceedings which have been

commenced will yield a conclusion, thereby engaging the second phase, unless they have been abandoned in the meantime.

69. As I have said, QFS also submitted that, in this case, the conclusion of "such proceedings" occurred when Mr Molloy issued his decision. It said the Final Payment Notice is, therefore, subject to the terms of that decision pursuant to the saving provision. Ms Garrett responded that this cannot be right because it would have the effect that the "adjudication proceedings" which had been commenced (thereby triggering the saving provision) would be different to "such proceedings" at the end of the clause. I do not agree. The reference to adjudication proceedings is generic. In my view, the expression "such proceedings" is broad enough to encompass adjudication proceedings relating to the same dispute as was the subject of the initial notice raised within time in respect of the Final Payment Notice. There is no necessity for the adjudication decision in question to be responsive to the specific Notice of Adjudication by which the adjudication proceedings were commenced. Consistent with the approach in the cases to which I have referred, including Bennett at [17] and Dovehouse at [97], what matters (in line with the expectation of sensible businessmen) is that the decision is responsive to the subject matter of the dispute raised within time in respect of the Final Payment Notice. Overall, I consider that to be a sensible, business-like construction of "such proceedings".

70. It is also the approach adopted by Mr Molloy at [30]. There he said:

> *"The subject matter of the second Notice is also the calculation of the Final Sub-Contract Sum, i.e., the same subject matter as the first Notice, which means that once a Decision is made regarding the matter referred on 17th May 2023, there will be a decision in relation to the subject matter of the proceedings commenced by the first Notice."*

71. I respectfully agree with that approach for the reasons I have given.

72. Although QFS relied on it, I would not regard the fact that Mr Molloy was, again, appointed in respect of the second Notice of Adjudication as material in this context. That would have meant that the conclusivity of the Final Payment Notice would depend on the happenstance of whether it was possible to appoint the same adjudicator. That cannot be significant. What mattered was the substance of the dispute was the same as that originally notified.

Consequences

73. It follows from this that, although I have decided that the adjudication started on 19 December 2022 became a nullity because QFS failed to serve its Referral by the date which had been agreed, or even within the further time which BPS had been prepared to allow, that has no bearing on the question of whether the adjudication proceedings reached a conclusion.

74. As I have said, there is no dispute that adjudication proceedings were validly commenced by the Notice of Adjudication issued on 19 December 2022. In those circumstances, the first part of the saving provision was engaged i.e., the Final Payment Notice did not have the effects specified pending a conclusion in respect thereof. The

proceedings were not concluded either on 13 January 2023 or 3 February 2023. Instead, they were concluded by the adjudicator's decision on 29 September 2023 unless, by then, QFS had already abandoned the proceedings.

75. Standing back, I consider this outcome strikes the right balance between, on the one hand, recognising the benefits of a conclusive evidence provision (see Marc Gilbard at [9]) and, on the other hand, allowing a true value of the works to be undertaken and paid for on the other. BPS had known that the Final Sub-Contract Sum was in dispute even before the Final Payment Notice was issued. In accordance with clause 1.8.2, QFS had challenged the Final Payment Notice within time. From that moment, BPS will have understood that it could not, by that short cut, obviate the need for the parties to investigate the true value of the account. That exercise was duly undertaken by the adjudicator.

Abandonment – the principle

76. Abandonment was considered in Bennett. At [15], HHJ Havery QC said this:

> *"I accept Mr. Mort's argument to this extent: that if the referring party abandons adjudication proceedings by simply not pursuing them, then the salvo in clause 30.9.3 ceases to apply. However, that is not this case."*

77. As Ms Garrett submitted, that passage was referred to in Marc Gilbard at [11], without any suggestion that the principle was not correct.

78. I have cited [87] in Dovehouse in which Carr J considered that it was consistent with the parties' intention at the time of the contract that, where a party abused its ability to commence proceedings by lacking any intention to resolve the dispute pursuant to those proceedings, the saving provision should not remain effective.

79. Abandonment did not occur on the facts of either case. But it is instructive to note Carr J's explanation of why she considered that was so in Dovehouse. At [88] she said:

> *"On the facts here there is no consider a question of abandonment "by [Dovehouse] simply not pursuing [the adjudication proceedings]" as envisaged in Tracy Bennett FMK Construction Ltd (supra). Dovehouse has always had every intention of pursuing the adjudication proceedings. It issued them within time, albeit containing an error in relation to the nominating body. As soon as the error was identified and the First Adjudicator resigned (in the afternoon of Friday 21st February 2014), Dovehouse amended the First Notice with the Second Notice on the next working day, Monday 24th February 2014. The adjudication proceedings have only not proceeded because of the stay agreed by the parties pending the outcome of this claim. Thus the situation is materially different to one of abandonment."*

80. In [87], Carr J had expressed her view on the principle of abandonment as being "Subject to Lanes Group" although she does not expressly return to that point when that case is considered by her. Since she addressed abandonment on the facts in [88], she

cannot have concluded that there was anything in Lanes Group which precluded her from doing so. I would agree with that.

81. Although the wording in clause 1.8.2 is different to that considered in those cases, I do not consider that to be material so far as the principle of abandonment is concerned. I respectfully agree with Carr J that it would be consistent with an objective view of the parties at the time of this Sub-Contract that, if adjudication proceedings had been timeously commenced pursuant to clause 1.8.2, but were subsequently abandoned, the saving provision would fall away. Indeed, in the present case, it was accepted by both parties that, in circumstances where proceedings had been abandoned, the benefits of the saving provision would be lost. Unsurprisingly, however, they took very different positions on the facts, to which I now turn.

Abandonment- the primary facts

82. I do not need to repeat my factual findings made earlier but take them into account in this context.

83. On 23 January 2023, Mr Parrish of BPS sent an email to Mr Clifford of QFS headed "Without Prejudice – settlement of QFS account" stating:

> *"Prior to your crazy consultant launching the Final Adjudication do you want to have a chat?"*

84. Mr Clifford replied the same day saying he was happy to do so.

85. The next day, 24 January 2023, Mr Parrish said this in his reply:

> *"I am wondering whether it would be better having a chat after the outcome of Adj 9 & 10 but before we embark on Adj 11.*
>
> *Any discussion would need to be on a without prejudice basis and to avoid doubt, I wouldn't want you to suspend any of the current proceedings or hold off from what you need to do."*

86. Mr Clifford replied: *"Understood*." It was left to Mr Parrish to get in touch when it suited him.

87. The decision in Adjudication No.9 was issued on 27 January 2023. The decision in Adjudication No.10 was issued on 30 January 2023.

88. As noted earlier, 3 February 2023 was the last date by which BPS had said it was prepared to accept the Referral. That date passed without service of the Referral. The second paragraph of Mr Parrish's email cited above should be understood to mean that the proposed without prejudice discussions should not be taken as a reason for not serving the Referral if that was what QFS needed to do. As I have found, QFS did not serve the Referral. It needed to do that if it wanted to maintain the efficacy of the adjudication commenced on 19 December 2022.

89. On 24 February 2023, following some suggestion of a missed call, Mr Parrish picked up the without prejudice exchanges, asking if Mr Clifford was available for a chat in the near future.

90. A meeting was arranged for 7 March 2023 and took place on that day.

91. On 17 March 2023, Mr Clifford emailed Mr Parrish in these terms:

> *"As mentioned during our recent meeting, we will be reissuing adj 11 imminently.*
>
> *With that in mind, should we put Lee and Paul in a room to agree on figures as figures where they can?"*

92. Mr Parrish replied:

> *"Yes seems sensible – I assume you mean before formally issuing Adjudication No 11?"*

93. Mr Clifford replied:

> *"Yes, Nigel, before issuing. I will ask Paul to contact Lee to arrange a suitable date and time."*

94. On 28 March 2023, Mr Parrish sent an email following discussions he had had internally with lawyers. The potentially significant impact of the conclusive evidence clause had clearly loomed into view. Mr Parrish said:

> *"I refer to our recent email exchanges in respect of Lee and Paul meeting up in an attempt to agree individual account items in advance of a possible Adj No.11.*
> *...*
> *BPS is willing to engage in discussions with QFS on a strictly without prejudice basis to explore whether the disputes can be resolved commercially without recourse to further proceedings.*
>
> *However, BPS does not waive any of its rights under the contract or at law. This includes, without limitation and for the avoidance of doubt:-*
>
> *a. BPS does not waive its position set out in email of 31 January 2023 that the Referral Notice for Adjudication No.11 ought to have been issued by 4pm on 3 February 2023, and accordingly any purported Referral Notice served now or in the future will be late and a fundamental procedural flaw rendering the Adjudicator without jurisdiction;*
>
> *b. BPS does not waive the conclusive effects of the Final Payment Notice issued on 22 December 2022 including (without limitation) determination of the Final Sub-Contract Sum."*

95. On 30 March 2023, Mr Clifford replied saying:

> *"The intention behind my email dated 17th instance was for Paul and Lee to agree on 'figures as figures' before Adj 11 is submitted to save time and cost in the adjudication….*
>
> *While I am open and have always been available to have without prejudice meetings to try to resolve the account, it must be the account as a whole….*

> *Regarding your email, I'm afraid I have to disagree with points a. and b. I understand you have a position, and I will not attempt to address them here and leave that to others.*
>
> *If you see any value in Paul and Lee meeting to agree on 'figures as figures' before we reissue Adj 11, I remain open to that, provided any agreements made are firm and unchangeable."*

96. On 3 April 2023, Mr Parrish replied that he thought there was merit in Paul and Lee meeting to agree "figures as figures" on the basis that they would be subject to final agreement between Mr Parrish and Mr Clifford. He proposed a further meeting between the two of them if Paul and Lee made progress.

97. A meeting between Paul and Lee took place. On 13 April 2023, Mr Clifford wrote to Mr Parrish in these terms:

> *"I understand that Paul and Lee have met, and Paul has briefed me on the details. If Lee has also provided you with an update, would a final meeting between us help conclude this account or should we press on with adj 11?"*

98. Mr Parrish considered a meeting would be "good" and could do no harm but thought it would be helpful for BPS to set out its position in writing first. He did that on 25 April 2023, in which he made clear the position of BPS was that the Final Payment Notice was now binding.

99. In reply, Mr Clifford said:

> *"We are fully prepared for the process ahead, despite the potential time and cost involved. Moreover, based on extensive legal advice, we are confident in our position….*
>
> *Please let me know if you would like to proceed with this meeting tomorrow. Otherwise, we will continue with the current course of action."*

100. There were then various settlement exchanges which have been redacted from view. The last of these is dated 5 May 2023. On that day, Mr Clifford wrote to inform Mr Parrish that he would ask Mr Hale to reissue Adjudication No.11.

101. On 10 May 2023, Mr Hale issued BPS with a second Notice of Adjudication for Adjudication No.11 on behalf of QFS. It is common ground that this is in materially identical terms to the Notice of Adjudication dated 19 December 2022. In other words, it advanced the same dispute as that contained in the first Notice of Adjudication. The Referral was served on 17 May 2023.

102. In his decision, Mr Molloy addressed abandonment in this way:

> *"[31] Although Bennett indicates that the saving proviso may fall away if a Referring Party "abandoned" proceedings by not pursuing them, both Bennett and Dovehouse suggest that this would not be the case if the Referring Party always had the intention of pursing (sic) adjudication proceedings. On the facts that is precisely the position here; QFS clearly wished to pursue adjudication proceedings in relation to the calculation of the Final Sub-Contract Sum.*

> *[36] With the benefit of hindsight, it may have been prudent for QFS to have protected its position, e.g., by attempting to agree a standstill. However, the key factor is that it was clear that QFS was not foregoing its right to obtain a decision in respect of the calculation of the Final Sub-Contract Sum, and I therefore reject any suggestion that the current proceedings represent an abuse of process or that QFS was not intent on pursuing adjudication proceedings in the event that the parties' discussions did not result in a settlement of the dispute in respect of the Final Sub-Contract Sum. I therefore do not accept that the fact that the adjudication proceedings in respect of the first Notice were effectively "timed out" renders the Final Payment Notice conclusive in respect of the matters referred to me in Adjudication No.11."*

Abandonment - submissions

103. Based on Bennett and Dovehouse, BPS equates abandonment with not pursuing the adjudication proceedings which were the subject of the Notice of Adjudication. BPS submitted that QFS abandoned those proceedings on 3 February 2023 by taking a conscious decision not to serve the Referral on that date despite it having been ready to do so. Ms Garrett points to the fact that QFS had been ready to serve its Referral by 26 January 2023. QFS took the decision not to serve the Referral despite being invited to do so by the adjudicator and in circumstances where it fully understood the significance of Adjudication No.11 to the conclusivity of the Final Payment Notice. In that respect, Ms Garrett refers to evidence from Mr Clifford who acknowledged there would have been a need to serve a Notice of Adjudication on or before 3 January 2023. In short, her submission was that QFS took the decision to delay service of the Referral despite it being aware of the time limits (and significance) relating to the conclusive evidence provision. QFS could not save itself from having abandoned the proceedings by saying it never intended to do so. What mattered was what it did, objectively viewed, not what it said.

104. BPS submitted that the communications between Mr Parrish and Mr Clifford were of no consequence. In January, there were brief exchanges during which Mr Clifford said he understood that he was not to suspend the current proceedings or hold off from doing what he needed to do. Nothing further happened for a month, the deadline of 3 February 2023 having long since passed. Then, the exchanges were sporadic and to be understood against the backdrop of BPS having made clear that none of its rights were waived in relation to conclusivity. Thus, Ms Garrett submitted, there was no possibility of QFS's relevant decision making having been affected by the negotiations. Nor of QFS having misunderstood BPS's intention to take the point about the conclusive effect of the Final Payment Notice.

105. Ms Garrett contrasted the present case with Dovehouse where, as soon as the error was notified, the referring party corrected it and issued a second notice the next working day.

106. On behalf of QFS, Ms Smith submits that it did not abandon the proceedings at any stage. Throughout, it had every intention of pursuing them, as BPS well knew. QFS never indicated that it was giving up a claim for a greater sum than had been certified in the Final Payment Notice. The negotiations initiated by BPS on 23 January continued

until 5 May 2023 and explain why it was not until after that date that QFS issued its second Notice of Adjudication. It was only when the negotiations failed that a new Notice became necessary. If it had been obliged to serve a Referral on 3 February 2023, it was the result of an error on its part that it did not do so.

107. At one stage QFS submitted that it would be helpful to draw an analogy with the case law on abandonment in respect of arbitration proceedings but that submission was not ultimately pursued by Ms Smith. BPS' position had been that there was no analogy, noting that a comparison with arbitration was not undertaken in Bennett or Dovehouse.

Abandonment – analysis

108. I do not accept BPS is right to approach the question of abandonment looking solely at the pursuit of the specific adjudication which was the subject of the timely Notice of Adjudication. At [15] of Bennett, HHJ Havery QC speaks of abandonment of "adjudication proceedings" in generic terms and this is the same language used by Carr J in Dovehouse at [87]. The same expression is reported by Coulson J in Marc Gilbard at [11]. The question, therefore, is whether QFS abandoned adjudication proceedings by not pursuing them.

109. In light of the authorities to which I have referred, I need to consider whether QFS abused its timely commencement of proceedings either by lacking or losing any genuine intention to resolve the underlying dispute raised by the Notice. If so, it will be taken to have abandoned the adjudication proceedings. I accept that this should be analysed objectively. It would not be enough for QFS privately to have intended to pursue the adjudication proceedings if it did not in fact make its intention manifest. It could do that by its words or conduct (or both) although I accept there may come a point when words would, in themselves, be insufficient to demonstrate that proceedings had not been abandoned. Ms Garrett argued that it ought not to be possible to keep adjudication proceedings "in limbo" forever, simply by repeating that you intend to pursue them but without taking action. I agree. When it becomes necessary to take action depends on the circumstances.

110. I agree that the authorities on abandonment in arbitration are not helpful in the context of adjudication. They could be relevant in a case where the issue of possible abandonment arises following a timely notice of arbitration challenging the Final Payment Notice.

111. For the reasons I have already given, in my view it is necessary to consider whether QFS manifested an intention to abandon the underlying dispute which was the subject of its timely Notice of Adjudication. It does not automatically follow from the fact that it failed to pursue the specific adjudication which immediately followed the timely Notice that it intended to abandon the underlying subject matter of the dispute identified in that Notice.

112. The principal reason that QFS did not serve a Referral on 3 February 2023 was because it erroneously concluded that it did not need to. It was not because it intended to abandon the adjudication proceedings (construed in the way that I do) commenced on 19 December 2022.

113. It is also material that, in the period which started immediately prior to the date on which BPS says QFS abandoned the proceedings, namely 3 February 2023, BPS invited a without prejudice discussion on settling the account. As Ms Smith noted, a successful settlement is one of the things to which the conclusivity of the Final Payment Notice was subject in clause 1.8.2. The express basis for such discussions was, in BPS's own words "before we embark on Adj 11" (my emphasis). The substantive negotiations themselves took a while to arrange but in that period the common understanding was always that, whenever the substantive discussions took place, they would be sequenced before Adjudication No.11 was embarked upon.

114. As Ms Smith further submitted, throughout the exchanges which followed, it was made manifestly clear to BPS that QFS intended to pursue Adjudication No.11 unless a settlement could be reached. The emails of 17 March, 30 March, 13 April and 25 April 2023 are all examples of this being made clear. As soon as those negotiations had failed, QFS issued its second Notice of Adjudication in exactly the same terms as the first one. As such, although the period during which the adjudication proceedings were not actively pursued was considerably longer than it had been in Dovehouse, it is explicable. I do not accept Ms Garrett's characterisation of the exchanges as "sporadic". Either party could have brought them to an end if that was thought to be the case but neither did so. There is no indication that QFS was dragging its heels in the negotiations or that BPS was dissatisfied with the speed at which the discussions were taking place. Even if they had been sporadic, the fundamental point was that they were taking place with the objective of avoiding the need for Adjudication No.11 entirely or, at least, to reduce the scope of the dispute which would otherwise proceed to adjudication by agreeing figures as figures in advance. In those circumstances, as Ms Smith submitted, no particular vigour was required to show that QFS was not abandoning the adjudication proceedings.

115. Whilst it is perfectly true that BPS warned QFS that it should not hold off from doing what it needed to do, and that QFS said it understood that point, BPS cannot realistically have thought that QFS was giving up its intention to pursue a resolution of the dispute concerning the value of the Final Sub-Contract Sum. Whilst it is also true, as I have found, that not serving the Referral by 3 February 2023 had the consequence that QFS could no longer rely on the first Notice of Adjudication to obtain an effective adjudication decision, it did not follow that QFS intended to abandon its pursuit of the subject matter of the dispute. QFS plainly held a different and, as I have concluded, erroneous view that it was entitled to serve a Referral whenever it liked despite what BPS had said on 31 January 2023. QFS clearly explained its stance on 3 February 2023 so BPS knew that this was QFS's position even if it disagreed with it. Accordingly, BPS knew that QFS was not intending to abandon the subject matter of the dispute identified in that first Notice but had, instead, simply fallen into error by not serving its Referral within the agreed time.

116. In respect of the exchanges on 28 and 30 March 2023, which in any event post-date the point in time when BPS says QFS had abandoned the proceedings, the parties were in disagreement about the legal effect of what had occurred on 3 February. BPS wanted to ensure that QFS understood that, by participating in the without prejudice discussions, BPS was not waiving its rights. QFS did understand the position but that does not demonstrate any intention by QFS to abandon the adjudication proceedings. Although Ms Garrett pointed out that QFS still failed to issue its second Notice of

Adjudication once it had received the email of 28 March, and took until 10 May to do so, I do not see where that point goes. If QFS had already abandoned the adjudication proceedings by failing to issue a Referral by 3 February, nothing cautioned in that email could save it now. The further period is entirely explicable by the shared desire to have meetings to see if any agreement could be reached before a second Notice of Adjudication was issued. At this point, there was nothing that QFS needed to do in terms of prosecuting the adjudication proceedings for so long as that shared desire continued.

117. The commercial context of this is also significant. Pursuant to the first Notice of Adjudication, QFS calculated the Final Sub-Contract Sum to be £71,587,425 plus VAT. (The same figure was in the second Notice). This was to be contrasted with the Final Payment Notice issued by Mace which had calculated the Final Sub-Contract Sum at £31,041,884 plus VAT. The difference between the parties was therefore in excess of £40m. As BPS submitted, QFS was aware of the significance of the conclusive evidence clause and BPS itself knew that QFS was aware of it. Given the difference between the respective financial positions of the parties, and the draconian consequences which would flow from the conclusive evidence provision being effective, it was surely obvious that QFS would not lightly abandon its right to pursue the claim for the difference.

118. Whilst I am not bound by his finding, it is also material to note that the experienced adjudicator reached the conclusion that QFS had not abandoned the pursuit of adjudication proceedings in relation to the calculation of the Final Sub-Contract Sum: see the passages cited above.

119. It follows from my analysis that QFS did not abuse the position or demonstrate that it lacked the requisite intention to resolve the dispute. In short, it had not abandoned the adjudication proceedings.

Consequences

120. There was no conclusion of the adjudication proceedings until the adjudicator had reached a decision in Adjudication No.11. Nor was there any abandonment prior to that. The second part of the saving proviso in clause 1.8.2 was therefore effective. The Final Payment Notice is subject to the terms of the decision rendered by the adjudicator on 29 September 2023.

Interest

121. The dispositive relief granted by the adjudicator on 29 September 2023 was a declaration that the true value of QFS's account and/or the correct calculation of the Final Sub-Contract Sum is £35,115,581.85. In other words, he did not make any order for payment by BPS to QFS. Necessarily, the adjudicator did not make any award of contractual interest either. No order for payment, or interest, had been sought in the Notice of Adjudication.

122. In the Part 7 proceedings for enforcement of the decision, QFS pleaded at [33] that:

> *"The Claimant has received interim payments from the Defendant totalling £31,938,119.00 (exclusive of VAT) and if given proper effect,*

> *the declarations contained in the Decision result in monies being due to the Claimant of £3,177,462.85 (plus VAT).”*

123. At paragraph [40] QFS pleaded that the BPS had failed to provide payment by the final date for payment of 22 January 2023. It claimed contractual interest from that date.

124. Even though the adjudicator’s decision gave rise to no substantive right to payment and was declaratory in nature, BPS does not dispute that, were the Part 8 claim to fail, summary judgment can be given in this case for the balancing amount which reflects the valuation declared by the adjudicator. However, it disputes the claim for interest backdated to 22 January 2023 not least because it pre-dates the decision of the adjudicator.

125. In their skeleton argument, Ms Smith and Mr Sawtell took a different commencement date for contractual interest from that which QFS had pleaded, namely 22 March 2023. The basis for this was said to be clause 4.12.7 of the Sub-Contract. This clause provides for payment of contractual interest if the Final Payment is not made by the final date for payment. Neither evidence nor explanation was provided to justify that either 22 January or 22 March 2023 was the final date for payment of the Final Payment calculated in accordance with clause 4.12.3. In the circumstances I have no basis for concluding that contractual interest was incontrovertibly due on either of those dates and I therefore dismiss the claim for summary judgment in respect thereof.

126. It will be for QFS to decide whether it wishes to pursue a claim for contractual interest beyond the present enforcement application.

127. No separate claim has been pleaded for discretionary interest pursuant to s.35A Senior Courts Act 1981. Nonetheless, I will hear the parties on whether any such interest should be awarded and, if so, upon what terms.

Summary

128. I summarise my conclusions as follows:

(1) In order to render the adjudication commenced on 19 December 2022 effective, QFS should have issued its Referral on 13 January 2023 or, as a result of a forbearance or waiver, by 3 February 2023 at the latest.

(2) On a proper construction of clause 1.8.2, “conclusion” means either a decision, award or judgment (as appropriate) or a settlement. Therefore, a “conclusion” does not include the ending of an adjudication which has become a nullity.

(3) Clause 1.8.2 necessarily contemplates that the adjudication, arbitration or other proceedings will be concluded by a decision, award or judgment (as appropriate) or a settlement.

(4) On a proper construction of clause 1.8.2, the expression “such proceedings” is broad enough to encompass adjudication proceedings relating to the same dispute as was the subject of the initial notice raised within time in respect of the Final Payment Notice. What matters is that the decision, which constitutes the conclusion of such proceedings, is responsive to the subject matter of the dispute raised within that notice.

(5) On a proper construction of clause 1.8.2, if adjudication proceedings have been timeously commenced, but have subsequently been abandoned, the saving provision in clause 1.8.2 falls away and clause 1.8.1 becomes effective.
(6) QFS did not abandon adjudication proceedings in respect of the subject matter of its Notice of Adjudication dated 19 December 2022.
(7) The adjudication proceedings were only concluded when Mr Molloy reached his decision on 29 September 2023.
(8) The second phase of the saving provision in clause 1.8.2 was effective. The Final Payment Notice is subject to the terms of the decision rendered by Mr Molloy on 29 September 2023.
(9) The declaration sought in the Part 8 claim is refused.
(10) There being no other defence to the Part 7 claim, there should be summary judgment for the agreed monetary consequence of the adjudicator's decision in the Part 7 proceedings, namely £3,177,462.85 plus VAT.

129. In light of this, I dismiss the declaration sought in the Part 8 proceedings and give judgment summarily enforcing the agreed monetary consequence of the adjudicator's decision in the Part 7 proceedings. Accordingly, there will be summary judgment for £3,177,462.85 plus VAT. I dismiss the claim for summary judgment in respect of contractual interest.

130. I will hear the parties on consequential matters including any claim for discretionary interest pursuant to s.35A Senior Courts Act 1981 and in respect of QFS's proposals, if any, for disposal of its contractual interest claim.