OUTER HOUSE, COURT OF SESSION

[2024] CSOH 36

P192/23

OPINION OF LORD YOUNG

In the petition

ENGENDA GROUP LIMITED

Petitioner

against

PETROINEOS MANUFACTURING SCOTLAND LIMITED

Respondent

Petitioner: R Howie KC; Gilson Gray
Respondent: G Moynihan KC; BTO

26 March 2024

Issue

[1] This is a petition for judicial review seeking reduction of a decision by Brandon James Malone, FCI Arb, issued on 13 February 2023. The decision was issued in the fourth adjudication (Adjudication 4) between the parties arising out of a contract relating to the execution of works by the petitioner at the respondent's premises at Grangemouth.

[2] The petitioner contends that the adjudicator's decision was arrived at in excess of the jurisdiction accorded to him. The petitioner argues that the adjudicator was not entitled to find that the respondent could plead a right to set off a claim for unliquidated damages in Adjudication 4 to defeat the petitioner's right to payment of their final account since the

adjudicator had decided in a previous adjudication (Adjudication 3) that the respondent's claim for unliquidated damages had not been proved. The essential issues for this court to determine are what the adjudicator actually decided in Adjudication 3 and whether that was the same or similar dispute which he was being asked to determine in Adjudication 4.

Chronology of the adjudications

[3] In November 2021, the parties entered into a contract of a turnaround nature relating to certain works upon the respondent's plant at Grangemouth. The contract was entered into on a standard form of engineering contract (NEC 3) as amended by various annexes agreed between the parties. The contract was entered into on "Option C" which featured a target price and an activity schedule for the contract works. The contract also provided for Option W2 which detailed the right to adjudicate any dispute. In due course, disputes did arise between the parties and a series of adjudications took place. The first and second adjudications were completed in 2022 and it is not necessary to say any more about the detail of those disputes.

[4] Adjudication 3 commenced at the instigation of the respondent on 22 August 2022. In terms of its notice of intention to refer to adjudication, the respondent sought a series of declarators and an order for payment of £1,134,547.15 as damages for various breaches of contract on the part of the petitioner. Mr Malone accepted appointment as adjudicator in Adjudication 3 and he issued his decision on 29 November 2022 which was then finalised on 2 December 2022. In that decision, he found that the respondent was entitled to various declarators that the petitioner had been in breach of contract but he declined to order payment of damages. In the light of that decision, the petitioner submitted a demand for payment of £1,134,547.15 which sum had been withheld by the respondent. On 9 December

2022, the respondent responded to that demand by serving a pay less notice on the petitioner in respect of this amount. As a consequence, the petitioner served a notice of intention to refer to adjudication the dispute which had arisen in relation to the petitioner's entitlement to the sum of £1,134,547.15 which the respondent continued to withhold. Mr Malone accepted appointment for Adjudication 4. In his decision in Adjudication 4, the adjudicator found that the respondent was entitled to prove, and had proved, that it had suffered damages in excess of the disputed sum as a consequence of the petitioner's failure to complete the works by the completion date. Accordingly, he made no order for payment in favour of the petitioner.

Relevant parts of the referrals and decisions

[5] In its referral for Adjudication 3, the respondent sought *inter alia* the following decisions and/or declarations:

> "5.1
>
> d) Engenda was in breach of the Contract as a result of its failure to complete its works under the Contract by the contractually agreed completion date of 17 November 2021; and/or
>
> e) Engenda was in breach of the Contract by causing 12 days culpable critical delay (or such other period of culpable critical delay as the Adjudicator considers appropriate) to the 'Feed In' date; and/or
>
> f) Petroineos is entitled to payment (whether by way of set-off or paid as a debt) from Engenda of the sum of £1,134,547.15, or such other sum as the Adjudicator may determine; and/or
>
> g) Engenda shall pay (whether by way of set-off or paid as a debt) the sum of £1,134,547.15, or such other sum as the Adjudicator may determine, to Petroineos forthwith;"

[6] In his decision in Adjudication 3, the adjudicator held at paragraph 9.126 that under the NEC contract, there was a distinction between a failure to meet a key date under the

contract, a failure to meet a sectional completion date, and a failure to meet a final completion date. For failure to meet key dates, he concluded that the respondent's remedy in terms of clause 25.3 was restricted to the additional costs occasioned thereby. As the respondent had not set out what additional costs had been incurred and had not framed its claim on that basis, there was no relevant claim before the adjudicator for loss arising from a failure to comply with key dates. However, at paragraphs 9.135 and 9.140 of the decision, he accepted the respondent's argument that the contract did not exclude its right to claim unliquidated damages where there was a failure to complete by the completion date.

[7] Under a section entitled "Is there a relevant claim for damages?" the adjudicator set out his reasoning for the findings which he ultimately made in relation to the respondent's claim. For the purposes of the current proceedings, the relevant paragraphs from his decision are as follows:

> "9.141. Petroineos do not have a liquidated and ascertained damages provision in the contract. The question of damages is at large, and Petroineos are obliged to prove their loss.
>
> 9.145. Accordingly, in my view, Petroineos are entitled to claim for unliquidated damages to the extent that they are able to establish that Engenda's late completion (failure to complete by the completion date) has caused them loss.
>
> 9.148. Petroineos' claim is therefore limited to unliquidated damages for failure to complete the works by the Completion Date.
>
> 9.149. Mr Sung's report does not approach the question of delay from the point of view (*sic*) late completion of the works (i.e. failure to complete the works by the Completion Date). Presumably because he has not been instructed to do that. In the Joint Expert Statement, Mr Sung notes that he has not carried out an analysis on the Engenda Completion Date.
>
> 9.150. At the hearing, I asked the experts to provide me with a view on the delay occasioned to the completion date (in addition to the delays the feed in date) by each of the delay events, but ultimately, given my decision on the effect of Clause 25.2, it is only the delay to the completion date that could possibly give rise to the type of damages that Petroineos is seeking, since they have not sought the increased costs that clause 25.2 contemplates.

9.156. That leaves a failure to complete by the Completion date, which has always been part of Petroineos' case. However, as noted above, this does not in my view give a right to claim any damages on the basis of a lack of regular progress, but merely for late completion. In that context, Engenda's criticisms of the Petroineos case for claiming 12 days critical delay in respect of a 5 day delay to completion makes sense. However, regard must be had to the omission of works from the scope.

9.157. The position is that Petroineos has not instructed, and does not therefore had (*sic*) an expert report which demonstrates the effect of Engenda completing its works late on the Feed In Date

9.159. I have accepted the position on the windows analysis, but in the absence of an expert report demonstrating that the late completion of Engenda's work (as opposed to any failure to meet key dates or to make regular progress) I cannot see that there is any contractual basis for me to make a finding of unliquidated damages for late completion.

9.160. To base analysis on the windows analysis would be to award damages for a failure to meet key dates, which is restricted by clause 25.3 as noted above. To establish a case for unliquidated damages, Petroineos would need to demonstrate that a failure to complete by the completion date (as opposed to any intermediate key date) (whatever that completion date ought to have been having regard to the reduced scope) has caused a delay to the feed in date. Whilst it may be common sense that a delay to the completion date of the Engenda works would indeed cause delay to the Feed In Date, there is nothing before (*sic*) upon which I am able to base a decision.

9.161. It follows that Petroineos have not established their case since it has not been brought on the correct basis.

9.162. In summary then, I have reached the conclusion that whilst Engenda have met a number of key dates in the programme, and whilst these delays may have caused delay to the feed in date, and therefore loss of revenue to Petroineos, Engenda's liability for the failure to meet key dates is restricted by clause 25.3, and no claim has been made out under that clause. Engenda is liable for failure to meet the completion date in terms of clause 30.1, but in the context of this contract, where failure to make progress is regulated by clause 25.3, the cause of action arises from failure to complete the works by the completion date, and Petroineos have neither framed their case on that basis, nor provided an expert report demonstrating the consequences of that failure. Accordingly, whilst they are in my view entitled to recover a loss of revenue in principle, they have not proved any entitlement to such an award, and accordingly, their case fails.

9.164. As regards the redress sought by Petroineos I do find that Engenda was in breach of the Contract as a result of its failure to Provide the Works in accordance with the whole terms and conditions of the Contract; and as a result of its failure to

> complete the works in accordance with the Contract; and as a result of its failure to Provide the Works in accordance with the Works Information (that included carrying out its works in accordance with the Petroineos Manufacturing Scotland Limited 2021 CREF TAR Level 3 Plan); and was in breach of the Contract as a result of its failure to complete its works under the Contract by the contractually agreed completion date of 17 November 2021. However, I am not able to find that Engenda was in breach of the Contract by causing 12 days culpable critical delay (or any other period) to the 'Feed In' date since that has not been established, and I am not able to find that Petroineos is entitled to payment (whether by way of set-off or paid as a debt) from Engenda of the sum of £1,134,547.15, or any other sum. Accordingly, I will not order Engenda to pay (whether by way of set-off or paid as a debt) the sum of £1,134,547.15, or any other sum."

[8] It was a matter of agreement at the substantive hearing that the word "not" appeared to have been omitted in error at the end of the first line of paragraph 9.162 between the words "have" and "met". It was also suggested by the petitioner that the word "contractual" in line 4 of paragraph 9.159 was likely an error and that the word "evidential" made more sense in the context of the discussion at that paragraph and the subsequent paragraph.

[9] As a consequence of his reasoning, the adjudicator's formal decision in Adjudication 3 contained the following findings:

> "11.2.4. Engenda was in breach of the Contract as a result of its failure to complete its works under the Contract by the contractually agreed completion date of 17 November 2021.
>
> 11.3. Without prejudice to the parties joint and several liability for the adjudicator's fees and expenses, I find the parties equally liable for my fees and expenses amounting to £56,235 including VAT. Payment is due on receipt of invoice.
>
> 11.4. I dismiss all other reliefs sought"

[10] In Adjudication 4, the adjudicator acknowledged at paragraph 9.3 that he was bound by his decision in Adjudication 3. However, he concluded that the respondent's position in Adjudication 4 was sufficiently different to that advanced in Adjudication 3. After referring to paragraphs 9.162 and 9.164 from his previous decision, he stated:

> "9.47. The position of Engenda is that I have no jurisdiction to consider, in this adjudication, the new evidence advanced by Petroineos in support of their position that they are entitled to set off sums due them in respect of unliquidated damages because I have already decided that their claim for unliquidated damages has 'failed'.
>
> 9.48. Engenda seems to set a great deal of store in my use of the phrase 'their case fails' and I understand why they wish to do so. However, as I think I make clear in the decision, I have not considered a case by Petroineos that they are entitled to unliquidated damages because of a failure on the part of Engenda to complete the contract by the completion date, because, as I set out in my decision, Petroineos did not frame their case on that basis, and did not provide an expert report demonstrating the consequences of that particular contractual failure.
>
> 9.49. I am content that the defence in the present adjudication is being advanced on a different basis to that in the previous adjudication. The previous adjudication concerned a claim by Petroineos that Engenda had failed to progress works in accordance with key dates, and that Engenda had failed to make regular progress of the works. I found that this was not the correct basis of claim. The defence in this adjudication is that Petroineos has a claim for unliquidated damages on the basis of Engenda's failure to complete the works by the completion date. It is supported by a new report by Mr Sung analysing the delay on that basis. Thus, the claim has a different contractual underpinning and is supported by new evidence. The question is whether or not Petroineos' position is sufficiently different to that in respect of which there has already been an adjudication decision.
>
> 9.62. I have come to the view that the defence advanced by Petroineos in this adjudication, namely that they are entitled to set off losses incurred as a result of Engenda's failure to complete the works by the completion date against Engenda's claim, is a matter which has not previously been determined in an adjudication decision, and is a defence 'available' to Petroineos.
>
> 9.63. Petroineos are advancing a different legal argument, as I have noted above, and have supported that argument, with a new expert report. Having regard to the relevant authorities noted above, it would in my view be wrong to exclude consideration of this argument and report.
>
> 9.64. It is in my view Waksman J's sixth principle, rather than his seventh, which applies here."

[11] The relevant authorities which he was referring to in paragraph 9.63 included *Quietfield Limited* v *Vascroft Construction Limited* [2006] EWHC 174 (TCC) and [2006] EWCA Civ 1737, *Hitachi Zosen Inova AG* v *John Sisk & Son Ltd* [2019] EWHC 495 (TCC), and *Lewisham Homes Limited* v *Breyer Group plc* [2021] EWHC 1290. Having decided that he was

able to consider the respondent's claim for damages, he concluded on the evidence that the respondent had proved damages for late completion in excess of £1,134,547 with the consequence that the petitioner's claim for payment was defeated. He made no order beyond one relating to the payment of his own fees.

The legal principles

[12] There was no significant disagreement between the parties as to the legal principles in play when dealing with successive adjudications. Parties are bound by the decision of an adjudicator until the dispute is finally determined by legal proceedings, arbitration or agreement, (Housing Grants, Construction and Regeneration Act 1996, section 108(3)). An adjudicator is bound by previous decisions in adjudications between the same parties and has no jurisdiction to determine a dispute which has been the subject of a prior decision. The parties' disagreement related to the application of the principles derived from the authorities to the facts of the present case.

[13] The approach to determining whether the same or a similar dispute has been determined in an earlier adjudication between the parties has been synthesised in a series of decision in England (see *Carillion Construction Limited* v *Smith* [2011] EWHC 2910(TCC) per Akenhead J at para [56] and *Brown* v *Complete Building Solutions Ltd* 2016 EWCA Civ 1 per Simon LJ at para [20]). The most recent iteration is set out in *Lewisham Homes Ltd* v *Breyer Group plc,* by Waksman J at paragraph 34, which the Court of Appeal in *Sudlows Limited* v *Global Switch Estates 1 Limited* [2023] EWCA Civ 813 at paragraph [53] was content to adopt. Waksman J set out the following ten principles,

> "34. I echo the need to avoid misleading paraphrase and tendentious interpretation. Synthesizing that case law into a set of principles that builds on those

set out by Coulson J (as he then was) in *Benfield*, I would, for my part, express them as follows.

> (1) The parties are bound by the decision of the adjudicator on a dispute or difference until it is finally determined by the court, or an arbitration or agreement.
>
> (2) Parties cannot seek a further decision by the adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision by an adjudicator.
>
> (3) The extent to which a decision or dispute is binding will depend upon the analysis and the terms, scope and extent of the dispute or difference referred to the adjudication and the term, scope and extent of the decision made by the adjudicator. In order to do this the approach has to be to ask whether or not the dispute or difference is the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided the dispute or difference which is the same or fundamentally the same as the relevant dispute or difference now before him.
>
> (4) The emphasis on what the adjudication actually decided, however the issue referred was described or formulated, is important. This is because ultimately it is what the first adjudicator decided which determines how much or how little remains for consideration by the second adjudicator.
>
> (5) The fact that the bar to a further adjudication is engaged not only where the dispute in question is the same, but also where it is substantially the same is again important. It 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 para. 9.2 of the scheme of its intended purpose.
>
> (6) Whether the dispute is substantially the same as another is a question of fact and degree. It seems to me that the inquiry is likely to focus on the key elements of the dispute before and the decision of the first adjudicator, even if the underlying subject matter is the same. For example, an application for an extension of time based on a particular relevant event. The particulars of its expected effects and/or the evidence used to prove them may lead to the conclusion that overall the dispute second time round is not the same as the first. Another example of that can be seen in *Hitachi* itself where the issue concerned whether the adjudicator in a second adjudication had decided about the variation which had to be valued, which in fact he did not value, and whether that was substantially the same. In that particular case, the first adjudicator had decided there was a variation that required a valuation, but for want of evidence decided that no sum was payable for the purpose of one particular payment application. He went on to find that the valuation for any

> other purpose in the context of the claim had not been decided, and therefore the jurisdiction point did not run. That is a good illustration of how the exercise of comparison is one of fact and degree.
>
> (7) On the other hand the mere fact of some differences between the way the case is put on each side is not necessarily sufficient. It is especially so if in truth the second adjudication is no more than an attempt at an improved version of the first. Of relevant here, but not determinative, will be whether the point now taken could have been taken before. It seems to me overall that the exercise of comparison in addition should be conducted in a realistic and common-sense fashion.
>
> (8) Since the jurisdictional point will usually be taken before the adjudicator in the second adjudication, their decision to reject it should be given significant weight, although of course that decision does not bind the parties or the court. The reason for according that respect, as it is put in some of the cases, is simply that the second adjudicator is the decision-maker and is being asked to say what that particular decision entails or does not entail and is therefore particularly well placed to undertake that analysis. All the more so if, as here, the identity of the second adjudicator is the same as the first.
>
> (9) I would add that where a particular contract provision governs the point as opposed to para. 9.2 of the scheme, the court will need to consider whether the particular language of that provision affects the exercise to be undertaken.
>
> (10) Since the underlying bar is expressly provided for in para .9.2 of the scheme or in a related contractual provision, the juristic basis for it is of secondary importance, but it can be seen as a straightforward absence of jurisdiction or a process which is unfair to whichever party had the benefit of the prior decision."

[14] In *Sudlows Limited* v *Global Switch Estates 1 Limited*, at paragraphs [55]-[58], Coulson LJ identified three over-arching principles which underpinned the approach in these cases. First of all, the purpose of construction adjudication is to deal with disputes in a robust and speedy manner which gives rise to at least temporary finality. Serial adjudications will often challenge that basic aim. In the second place, the focus should be to look at what was decided "in reality" in the earlier adjudication to see if the later adjudication would be impinged by that previous decision. In the third place, the fact and degree test for assessing whether the earlier decision is the same or similar to the later

dispute provides a degree of flexibility which should not bar new or wider claims, but can be used to prevent re-adjudication of the same or similar claims.

Decision

[15] In the passages from his decision in Adjudication 4 set out in paragraph [10] above, the adjudicator concluded that he had not previously determined the entitlement of the respondent to unliquidated damages for a failure to complete the works by the completion date. As set out in the eighth principle of *Lewisham Homes Ltd* v *Breyer Group plc,* that view is to be accorded weight although it cannot bind parties or this court. The respondent urged me to accept the adjudicator's own view of his jurisdiction as a tenable one which should only be discounted if plainly wrong thereby echoing the words of Coulson LJ in *Sudlows Limited* v *Global Switch Estates 1 Limited* (at para [65]) that the court should only interfere if the adjudicator's view was "clearly wrong".

[16] In my view, the adjudicator's reasons in Adjudication 4 do not stand up to scrutiny and I am satisfied that he was "clearly wrong" in his comparison of the issues for decision in the two adjudications. His statement that the respondent did not frame their case on the basis that they were entitled to unliquidated damages due to the petitioner's failure to complete by the completion date (see para 9.48 of Adjudication 4 decision) is contradicted by numerous references in his decision in Adjudication 3. For example, at paragraphs 5.1.4, 5.4.1 and 5.5 of his decision in Adjudication 3, he summarises the dispute before him as including the respondent's claim for unliquidated damages for breach of contract caused, *inter alia,* by a failure to complete by the completion date. In the analysis section and after dealing with other aspects of the respondent's claim for damages, he states at paragraph 9.156 "That leaves a failure to complete by the Completion date, which has

always been part of Petroineos's case". He then proceeds in paragraphs 9.158-9.162 to consider whether there is expert evidence to prove the extent of damage caused by the petitioner's failure to complete by the completion date and concludes that, as their expert had not analysed loss on the appropriate basis for that particular breach of contract, the respondent had not proved an entitlement to an award. He gives effect to his reasoning by way of his formal finding at paragraph 11.2.4 that

> "Engenda was in breach of the contract as a result of its failure to complete its works under the Contract by the contractually agreed completion date of 17 November 2021"

but without making any formal finding on damages. I find it impossible to agree with the adjudicator that the respondent did not frame its case in Adjudication 3 based, at least in part, on a failure to complete by the completion date. In a decision where the adjudicator sets out the framing of such a case in his decision; discusses the evidence (and lack of evidence) relative to that case; and makes a finding of liability based on that case, the only logical conclusion is that the respondent did advance a case on that basis which was then determined by the adjudicator when he upheld the liability finding but rejected the claim for damages.

[17] The adjudicator states at paragraph 9.49 of his decision in Adjudication 4 that the respondent's claim in that adjudication being "for unliquidated damages on the basis of Engenda's failure to complete the works by the completion date" thereby "has a different contractual underpinning" to that in the previous adjudication. This is simply not borne out by an analysis of either the respondent's own referral for Adjudication 3 or the adjudicator's decision in Adjudication 3. I set out at paragraph [5] of this Opinion the terms of the referral which makes clear that one of the contractual claims underpinning the respondent's request for damages was for failure to complete by the contractual date. There would be no reason

for the adjudicator in his decision in Adjudication 3 to discuss the failure to complete by the completion date or make a finding in relation to that if it was not part of the respondent's case before him.

[18] The petitioner made a submission that it was a well-established principle in Scots law that an adjudicator required to exhaust the matters referred to him for decision. An adjudicator had to determine each issue referred to him. Thus, it was argued, where it was clear that the respondent had referred the issue of damages for breach of contract on account of a failure to complete, there was a "presumption of regularity" that the adjudicator dealt with that in his decision leaving no scope for a gap between what was referred and what was decided. This, it was argued, created a presumption when construing the decision in Adjudication 3 that it had included a decision in relation to this particular claim for damages for breach of contract. I do not consider that there is any assistance to be gained from resorting to such a presumption in this case. For the reasons set out in paragraphs [16]-[17] above, I had no difficulty finding on an objective assessment of the decision itself that Adjudication 3 did purport to deal with the respondent's claim for damages due to a failure to complete by the completion date.

[19] The adjudicator refers at paragraphs 9.48, 9.49 and 9.63 of his decision in Adjudication 4 to the lack of expert evidence in the earlier adjudication to establish damages on the appropriate basis, and the new expert evidence which was before him in the later adjudication. He also expressed his view at paragraph 9.64 that the sixth principle outlined by Waksman J in *Lewisham Homes Ltd* v *Breyer Group plc*, rather than the seventh principle, was applicable in this case. The sixth principle emphasises that it is a question of fact and degree as to whether the matter in dispute has been the subject of an earlier decision. In expanding upon that point, Waksman J discussed the decision in *Hitachi Zosen Innova AG* v

John Sisk & Son Ltd. It may be that in aligning the present case to the sixth principle, the adjudicator was viewing the approach in *Hitachi* as comparable to the present case and I shall come to deal with *Hitachi* shortly. The seventh principle which the adjudicator indicates is of lesser or no importance in the present case is that the later adjudication should not be "no more than an attempt at an improved version" of the earlier one. In considering whether that is the case, it is relevant to consider whether the point being taken in the later adjudication could have been taken before in the earlier adjudication.

[20] From the earliest authorities, the English courts have been alert to the risk of an unsuccessful party seeking to make good a shortcoming in an earlier adjudication by re-raising the matter in a subsequent adjudication with the benefit of improved evidence, (*Quietfield Ltd* v *Vascroft Construction Limited* per Dyson LJ at paragraph [48]). The fact that different or additional evidence is deployed in the later claim will not normally alter what the earlier decision was about and whether the later adjudication gives rise to the same or a similar dispute, (*Carillion Construction Ltd* v *Smith* at para [56(b)]. The Court of Appeal has recently – in a decision which post-dates the decision in Adjudication 4 - underscored that the existence of further more detailed evidence is not a factor of any real significance in support of the notion that the new dispute differs from the previous decision, (*Sudlows Limited* v *Global Switch Estates 1 Limited*, per Coulson LJ at paras [68] & [87]). Insofar as the adjudicator at paragraph 9.49 and 9.62 of his decision viewed the existence of a new expert report as a factor in support of the proposition that a different issue was before him in adjudication 4, I consider that he was in error. New evidence does not, in itself, say anything about whether the subsequent dispute is different from the previous decision taken.

[21] In the course of the substantive hearing, the petitioner sought to distinguish the decision in *Hitachi Zosen Inova AG* v *John Sisk & Son Ltd* while the respondent placed some emphasis on the similarity between its position and that of the sub-contractor in *Hitachi*. It is important to analyse what was actually decided in that case.

[22] In that case, Hitachi were the principal contractors for the design and construction of a multi-fuel power plant. Sisk provided design and construction services by way of a sub-contract which included the right of either party to refer disputes to adjudication. Additional works instructed by Hitachi were called "Events" under the contract. Sisk sought payment under payment application no. 6 of which approximately £1m related to what was categorised as Event 1176. Hitachi refused to make payment for various items of work including Event 1176 and claimed that Sisk had been overpaid. Sisk referred the dispute to adjudication. This was the second adjudication between the parties. The adjudicator found that Event 1176 was a variation instructed by Hitachi which required to be valued but went on to say "I do not have sufficient details to value the works and hence for the purposes of Payment Notice 6 my value is £nil" (see *Hitachi* per Stuart-Smith J at para 8(v)). The adjudicator also stated

> "I have been unable to conclude a valuation for the purposes of Interim Application/Payment Notice 6. This is not to say that no value is due on a subsequent application, but rather, that none could be ascertained as due for this Application 6/Payment Notice 6".

The following year, Sisk made a further attempt to recover monies for Event 1176 within a further application for payment. Once again, Hitachi refused to make payment for Event 1176 and Sisk instigated an eighth adjudication between the parties. The same adjudicator was appointed for the eighth adjudication as had dealt with the second adjudication. Despite Hitachi's argument that Adjudication 2 had decided the value to be

placed on Event 1176 as nil, the adjudicator decided that he did have jurisdiction to determine a valuation for Event 1176 and, after hearing valuation evidence, awarded Sisk £825,703 of the monies it had sought. Hitachi challenged the adjudicator's jurisdiction to make this decision in the eighth adjudication but this was rejected by Stuart-Smith J.

[23] The position in Hitachi has some similarities to the present position in that the earlier adjudication did not result in an entitlement to payment as the adjudicator was not satisfied that adequate evidence had been led to prove the sum due. However, I consider that the petitioner was correct to focus on the critical part of the reasoning of both the adjudicator (see *Hitachi*, at para [8]) and Stuart-Smith J (see *Hitachi* at paras [35]-[39]). In his decision in the earlier adjudication, the adjudicator stressed that he was not purporting to value the Event other than for the purpose of payment application no 6. He expressly held open the possibility that a value could be ascribed to the variation on a subsequent application for payment. When the same adjudicator required to assess his own jurisdiction in the eight Adjudication 8 he stated,

> "249. My decision was that the Event 1176 Works constituted a Variation that require a valuation, that is, I decided the liability issue as between the parties.
>
> 250. I cannot and do not reconsider that decision here, but I accept that in reaching a decision as to the valuation of the Event 1176 Works, such decision having not been made in the Second Adjudication, I do need to consider whether the requirements of the Contract have been met as regards that valuation."

[24] Stuart Smith J concluded that when the whole of the earlier decision was considered, it became clear that the adjudicator's decision was restricted in its scope. Given the want of substantiating detail, the adjudicator had expressly limited the approach taken by making clear that he was not purporting to decide if there was any value for Event 1176 and he was leaving that issue to be decided at a later date on a subsequent application. Properly understood, his value of "£nil" was not a valuation of the variation at all. He was not

expressing any view about the appropriate valuation for that Event, nor was he deciding whether Sisk should be reimbursed in due course on later applications for payment. Stuart-Smith J concluded that the decision in the second adjudication had not decided the valuation of Event 1176 so it was open for the valuation to be determined in the eighth adjudication. This is a subtle distinction, effectively distinguishing between a situation where the decision maker says that the lack of appropriate evidence is such that he or she is not making any decision on the issue at all, and a situation where the decision maker makes a decision that the claim has failed due to lack of proof.

[25] In the present case, when issuing his decision in Adjudication 3, the adjudicator did not seek to limit the scope of his determination that the respondent had failed to prove their damages claim. The language used is of a failure to prove its case as opposed to declining to take a decision on quantum at all. He did not state that damages could be valued in a subsequent adjudication as he was confining his decision to one on liability alone. He did not expressly decline to make a decision on remedies due to the lack of evidence (see *Lewisham Homes Ltd* v *Breyer Group plc* at para [12] where this possibility was identified in the referral). Indeed, at paragraph 9.150 of the decision, he narrates that he asked the experts at the hearing for their further views on the delay occasioned to the completion date. While I agree with Mr Moynihan that paragraph 9.150 is somewhat obscure, it does indicate that the adjudicator was actively seeking further guidance relevant to the quantification of damages. This further supports the conclusion that the adjudicator was seeking to decide the issue of damages for failure to complete by the completion date in this adjudication. I also agree with Mr Howie that an important background factor in the present case is that the respondent's referral for Adjudication 3 proceeded after the works had been completed and the petitioner was off site. This was not an ongoing contractual relationship with

developing rights and obligations as the contractual works played out. The respondent ought to have been able to put forward their definitive case for damages for failure to complete. It seems to me that Mr Howie's observation is supported by *Sudlows Limited* v *Global Switch Estates 1 Limited* per Coulson LJ at paragraph 78 who notes that the substantive issue in dispute did not change between the two adjudications in that case, even if the documentation changed. For these reasons, I agree with the petitioner that *Hitachi* falls to be distinguished from the present case.

[26] There are also two other features of *Hitachi* which are special and which make the ultimate decision in that case readily understandable. In the first place, the contract between Hitachi and Sisk contained a clause that if an adjudicator's decision was not referred to the Court within ten business days it became final and binding on the parties (*Hitachi* at para [4(vi)]). Stuart-Smith J at paragraph 42 was concerned that Hitachi's arguments coupled with this clause could cut off a right to payment for variations in inequitable situations. The second feature which is worth noting is that in an intermediate adjudication between Hitachi and Sisk, Hitachi's position had been that Adjudication 2 had determined liability but not quantum in relation to the various events (see *Hitachi* at paras [11]-[16]). While this was not part of Stuart-Smith J's reasoning, it is hard not to conclude that Hitachi's prior attitude fully supported the adjudicator's own view of what he had decided in the second adjudication.

[27] In my view, *Hitachi* falls to be regarded as a somewhat unusual case on its facts in which the adjudicator expressly limited what he was deciding and made that clear in his decision to the parties. In relation to adjudications where a party seeks but fails to prove its loss due to a lack of evidence led before the adjudicator, the normal consequence will be that a further adjudication seeking to establish the loss will be barred. That, in my view, is borne

out by the decision in *Carillion Construction Ltd* v *Smith*. In *Carillion Construction Ltd*, an adjudicator found in the earlier adjudication that there had been delays and disruption caused by additional works and variations but that the sub-contractor had not proved any direct loss and/or expense flowing from this (as per Akenhead J at para [22]). After an analysis of the issue raised in the new adjudication, Akenhead J at paragraph [67] concluded that the new information advanced by the sub-contractor related to the same issue which the sub-contractor had failed to prove previously. Accordingly, the adjudicator in the subsequent jurisdiction had no jurisdiction to consider this new evidence and award payment to the sub-contractor. The court declared the decision of the subsequent adjudicator to be of no effect. *Carillion Construction Ltd* supports the proposition that, a failure to prove quantum in a contractual claim due to inadequate documentary substantiation will normally prevent the unsuccessful party seeking to re-adjudicate that issue.

[28] For these reasons, I consider that the adjudicator has erred as to the extent of his jurisdiction in Adjudication 4. He ought to have concluded that he had no jurisdiction to re-consider the respondent's claim for damages for late completion which claim was being put forward as a defence to the petitioner's claim for payment. Having sought but failed to prove its loss in Adjudication 3, the respondent was not entitled to re-raise that issue as a defence in a subsequent adjudication. Rather, the respondent's remedy was to advance that claim in litigation or arbitration proceedings.

Disposal

[29] I shall sustain the petitioner's plea-in-law and grant decree reducing the decision. I was not addressed in relation to expenses so I shall make no order at this time. If parties are

unable to reach agreement on expenses, they should ask for the matter to be put out by order so that I can be addressed on that issue.