

Neutral Citation Number: [2005] EWHC 138 (TCC)

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
HIS HONOUR JUDGE PETER COULSON QC**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th January 2005

Before

HIS HONOUR JUDGE PETER COULSON QC

BETWEEN

WILLIAM VERRY (GLAZING SYSTEMS) LTD

- v -

FURLONG HOMES LTD

Transcript by MARGARET WORT & CO ,

(Official Court Reporters)

Edial Farm, Edial, Burntwood, Staffordshire, WS7 0HZ

Mr. Manus McMullan appeared on behalf of the Claimant

Mr. Anthony Bingham appeared on behalf of the Defendant

JUDGMENT

HIS HONOUR JUDGE PETER COULSON QC :

A. BACKGROUND AND RELEVANT DOCUMENTS

1. By their Part 8 Claim dated 21st December 2004, the Claimant, William Verry (Glazing Systems) Ltd, whom I shall call Verry, seeks a declaration that the adjudicator's Decision dated the 26th October 2004 was valid and binding upon both parties until the matters referred to in that Decision are finally determined by the Court. The Defendant, Furlong Homes Ltd, whom I shall call Furlong, contends that the Decision was invalid because the adjudicator exceeded his jurisdiction in arriving at his conclusions, or alternatively acted unfairly in reaching that Decision. As a result of the detailed nature of the dispute between the parties it is necessary for me to set out a number of important matters by way of background.

2. By a Contract dated the 6th March 2003 and signed in June 2003, Verry agreed to carry out certain works for Furlong. Those works were described as "design, supply and erect curtain walling, long

span cladding, aluminium soffits, fascias and copings to high levels including all necessary fire stopping and sealing". The Contract sum was £1,150,024.75. The Contract completion date was late 2003. Clause 3(b) was the contractual mechanism by which that completion date might be extended by Furlong if the delay was caused 'by any act, instruction, default or omission' of Furlong themselves.

3. The works progressed during 2003 and were not finally completed until the end of July 2004. Therefore, on any view, there were significant delays. Furlong granted Verry two extensions of time to 2nd February 2004 but Verry maintained that they were entitled to a much longer extension. On the 2nd July 2004 Verry submitted to Furlong in writing a claim for an extension of time down to the 24th June 2004, together with their final account claim. Their letter of the 2nd July concluded as follows:

"In summary, taking into account our completion date of the 19th December 2003,

we calculate our revised completion date as follows:

Items 1 - 7 inclusive + 23 weeks = 27th May 2004

Item 8 - variations + 4 weeks = 24th June 2004

Our revised completion date is therefore the 24th June 2004.

We have not taken into consideration the works we are currently carrying out on site such as retail units, east elevation gutter, door installation etc. which are solely dependant on Furlong Homes Ltd allowing us access to these areas.

Based on the above calculation you will see we are not in fact in delay as you have stated, your claims relating to your level of set-off against our account are therefore unfounded and without substance.

We enclose our Final Account Schedule for your perusal and trust this matter can be settled amicably despite your Company's reluctance to pay our account in line with our discussions in April 2004.

It should be noted however, that the enclosed documentation excludes any loss and expense items incurred as a result of the additional works and resequencing/prolongation of our contract works."

4. Furlong responded on the 13th August 2004. Their final account figure was £1,036,088.13. In response to Verry's extension of time claim, Furlong were brusque:

"As far as item 16 and extension of time is concerned, you have provided nothing that would add to the extension of time to the 2nd February 2004 previously granted. You appear to be of the opinion that despite your various breaches previously acknowledged in correspondence and your progress reports, that you are entitled to an extension of time to completion. The works were delayed by you. We have recognised that you are entitled to payment for the period between the 9th December 2003 and the 2nd February 2004."

5. Furlong then set out details of their calculation of the Verry final account and, because the sum which they had previously paid was greater than the amount which Furlong now claimed the final account was worth, they sought repayment of a net sum of £143,898.15. The letter concluded:

"In the event that we do not receive payment or payment proposals by the 19th August 2004, or you disagree with our account we will confirm that we are in dispute with you and refer the matter to adjudication and issue a Notice for Adjudication."

6. It should be noted that there was no response in the letter itself to the detail of the Verry claim made on the 2nd July, a point that the adjudicator was to make in paragraph 65 of his Decision. There were, however, some 'Notes' on the extension of time claim produced by Furlong and allegedly sent with this letter, although there was some debate as to whether these were ever received by Verry.

7. On the 24th August Verry replied to this letter by recorded delivery, and said that they were disappointed with Furlong's stance. Amongst other things they said:

"We are disappointed that despite waiting around six weeks for your response to our assessment you continue to issue generalised comments which totally lack any substantiation.

We have previously stated that your own assessment is flawed, our own extension of time assessment has merely taken on board the lead-in periods stated within the Contract and the periods for each activity indicated on our November 2003 programme. Indeed until recently we had not even been given access to complete the remainder of our works."

8. Further assertions were made by Verry in this letter about the lack of substantiation for the claims being made by Furlong, and they ended their letter:

"In conclusion, may we reiterate that we disagree entirely with your own assessment of our account, including your assessment of unsubstantiated Liquidated and Ascertained damages and the value you purport that is outstanding to your Company.

You will note our earlier comments that we have only just been given the necessary access to complete our works, so any suggestion that we could have finished earlier is in our view unacceptable... We confirm that a dispute now exists between our respective Companies and this matter will now be dealt with by the Adjudication procedure unless you are prepared to address the matters realistically within the next seven days".

9. Furlong had already written on the 16th August, extending the deadline in relation to their own payment proposal until Friday 27th August 2004. It was therefore clear that by that date, on any view, a dispute existed between the parties in relation to the value of the final account.

10. On the 31st August 2004, Furlong, through their Agents Henry Cooper Consultants Limited, whom I shall refer to as HCC, sent Verry a Notice of Adjudication. In his submissions to me Mr Bingham submitted that this Notice "was the foundation for the scope of jurisdiction of the adjudicator". I agree with that: the Notice identified plainly the parameters of the dispute that was being referred to the adjudicator. In those circumstances, it is sensible for me to set out the Notice in full:

"We are instructed to write to you on behalf of Furlong Homes Ltd of Wellington House, Trust Road, Waltham Cross, Hertfordshire. You confirmed by Recorded Delivery letter that you were in dispute with Furlong with regard to the sum due to you in respect of your final account.

You have been sent details of your final account that takes into account variations, loss and expense, common liquidated damages and costs incurred by Furlong. You have also received Furlong's assessment of extension of time that leads to your loss and expense and Furlong's reason for deducting liquidated damages and charging you for direct costs caused by your delay.

Accordingly, by copy of this letter we confirm that the dispute exists and make application to the President and Vice President of the Royal Institute of Chartered Surveyors to refer this dispute to an Adjudicator appointed by them for his decision.

The decision sought will be as follows:-

(1)

The Adjudicator will be requested to decide that the extension of time granted by Furlong to the 2nd February 2004 is correct.

(2)

The Adjudicator will also be requested to decide whether the Final Account figure, inclusive of variations, loss and expense payments and deductions of liquidated damages and direct costs as a consequence of delay is £1,036,088.13 or such other amount that the Adjudicator may decide.

(3)

The Adjudicator will be requested to decide that William Verry will be responsible for payment of the Adjudicator's fees and expenses.

(4)

The Adjudicator will be requested to decide that William Verry will be responsible for payment of the application fee to the RICS".

11. It is important to note two things about this Notice of Adjudication. First, it referred to adjudication the entirety of the dispute about the Verry final account figure. This meant that Furlong wanted the adjudicator, during the statutory twenty-eight days, to reach decisions about disputed variations, extensions of time, loss expense and liquidated damages. In other words, all the potential disputes which can arise under a Building Contract were here being referred to adjudication. There was no express limitation or qualification on the range of matters for decision. It was, to use the vernacular, a 'kitchen sink' final account adjudication. Whilst such adjudications are not expressly prohibited by the Housing Grants, Construction and Regeneration Act 1997 as it presently stands, there is little doubt that composite and complex disputes such as this cannot easily be accommodated within the summary procedure of adjudication. A referring party should think very carefully before using the adjudication process to try and obtain some sort of perceived tactical advantage in final account negotiations and, in so doing, squeezing a wide-ranging final account dispute into a procedure for which it is fundamentally unsuited.

12. The second point about the Notice of Adjudication concerns Verry's claimed entitlement to an extension of time. One dispute which was set out in the Notice was a request that the adjudicator decide whether or not 'the extension of time granted by Furlong to the 2nd February 2004 is correct' (my emphasis). In other words, there was no attempt to limit the dispute to earlier claims made or information previously provided by Verry and considered by Furlong. The dispute was whether the existing extension is - present tense - correct. Furthermore, such a broad definition of the extension of time dispute was entirely consistent with the reference to the adjudicator of the dispute about Furlong's entitlement to liquidated damages. The adjudicator could not decide Furlong's existing entitlement to liquidated damages without first deciding Verry's existing entitlement to an extension of time. The two have to be considered together.

13. The width and range of the 'dispute' being referred to the adjudicator was also apparent from the written application to the RICS to appoint the adjudicator, also dated the 31st August 2004. In the RICS form (in common with other standard forms of this type) there is a section dealing with the nature of the dispute. That was filled in by HCC in these terms, that the dispute was a 'dispute over final account together with extension of time and damages.' It seems to me again that that definition of the perceived dispute was again unlimited and unqualified.

14. On the 3rd September Mr John Sims, the well known arbitrator and adjudicator, was appointed to act as the adjudicator in this case. In a Referral Notice of the 7th September, Furlong described the dispute as to the extension of time in slightly different terms to those of the Notice of Adjudication. At paragraph 3.01 they asked the adjudicator to decide that “the extension of time granted to Verry by Furlong is correct based on the information provided. The date is the 2nd February 2004. Alternatively the adjudicator is requested to decide the appropriate extension of time.” It is to be noted that this alternative formulation, that the adjudicator should decide the appropriate extension of time, was again unlimited and unqualified. That was consistent with the other references in the Referral Notice to which Mr McMullan has referred today, including the very first page of the Referral Notice, which refers to the dispute as concerning “the final account and extension of time”. Other relevant references include paragraph 2.01, which again states that the dispute concerned the final account “inclusive of variations, loss and expense payments, liquidated damages, direct costs as a consequence of delay and extension of time”; paragraph 2.17, which states “Verry is entitled to an extension of time to the 2nd February 2004. Verry is not entitled to an extension of time for their own failures to perform”; and paragraphs 2.32 and 2.33, which make plain the degree of finality that Furlong were seeking. These paragraphs read as follows:

“2.32. Further additional costs have been notified to Furlong since the account statement and Furlong requests that the Adjudicator deals with that within this Adjudication in order to finally conclude the account.

2.33. The amounts are included in the summary of the accounts. The Adjudicator has been given jurisdiction to decide on any such other amount confirming requests that these additional costs are taken into account within the Adjudicator’s decision.”

15. The statutory twenty-eight day period for the adjudication expired on the 5th October 2004. On the 10th September the adjudicator sought and obtained an extension of time to the 12th October 2004. Eventually, by a process of ad hoc extensions that arose inevitably from the morass of material that the adjudicator was obliged to consider, the parties agreed to extend the adjudicator’s time for providing his Decision until the 26th October 2004. Such ad hoc extensions to the period prescribed in the Act are a common feature of adjudications where the subject matter is the complete review of a lengthy contract: see for instance *CIB -v- Birse*[2004] EWHC 2365. In their turn Verry sought and obtained an extension of time to respond to the Referral Notice until the 21st September 2004. Section D of that response was headed: “What is William Verry’s proper entitlement to an extension of time?” and paragraph 62 - 132 set out in detail a claim for an extension of time down to the 27th July 2004.

16. It was not until eight days later, on the 29th September, that HCC wrote to the adjudicator to complain that Section D involved a new extension of time claim. Mr Smith of HCC said:

“The response includes several items that are not part of the dispute and have not previously been seen by Furlong. Your jurisdiction is restricted to the crystallised dispute. Section D paragraph 62 - 132 of the response introduces a new extension of time claim. The headings may be the same but the narrative and dates are new. The crystallised dispute concerns Verry’s letter dated 17th November 2003, Furlong’s letter dated 11th May 2004, Verry’s letter dated 2nd July 2004, Furlong’s notes on extension of time and the Verry letter dated the 24th August 2004.

Verry had no right to seek decisions from you on this Adjudication that had not been referred to Furlong. Verry are required to respond to the crystallised dispute.”

17. In a separate letter on the same date Mr Smith sought an extension to 5th October for Furlong to reply to the Verry response which would then have given Furlong a total period of fourteen days to reply, which was as long as Verry had to respond to the claim itself. Whilst these periods were not unreasonable, given the numerous details within the final account, they (like the extensions sought by the adjudicator himself and referred to in paragraph 15 above) illustrate graphically the difficulties of trying to deal properly with final account disputes of this kind using the adjudication process.

18. Also on the 29th September, the adjudicator, in response to Furlong's letter of complaint, seemed sympathetic:

"The case now put forward in Section D of the response is markedly different from that previously put forward in Verry's letter to Furlong dated 2nd July 2004 and has not been seen by Furlong before the issue of the Notice of Adjudication. Subject to any submission from DCL [Driver Consultant Limited, Verry's advisors] on Verry's behalf, I consider myself bound by the decision of His Honour Judge Richard Seymour QC in Edmund Nuttall Limited -v- R G Carter Limited and that I am therefore debarred from considering Verry's claim as now put forward in the response but can only consider the claim as advanced in Verry's letter dated the 2nd July 2004".

19. On 1st October 2004 DCL, acting on behalf of Verry, dealt at length with these suggestions. Essentially they contended that Nuttall was only relevant to a party who was making a claim and, in so doing, was seeking to raise for the first time in an adjudication a claim which had never been raised before; they argued that where, as here, the referring party was contending that the responding party was only entitled to a specific extension of time, the responding party was entitled to refute that argument by any proper means and if that meant making points which had not been made before then that was entirely legitimate. In making this submission, DCL relied on the decision of His Honour Judge Toulmin QC in AWG Construction Services Limited -v- Rockingham Motors Speedway Limited, which did not adopt the analysis in Nuttall.

20. In his letter of the 4th October 2004, the adjudicator considered the point again and concluded, contrary to his earlier view, that Verry were entitled to rely on the matters set out in Section D of the response. He said, having considered the two authorities to which I have previously referred:

"Both the cases considered, and others, relate to the situation where the referring party is seeking to put forward a case which is arguably different from that which had crystallised at the time of the Notice of Adjudication. In this case however, it is the responding party's case which is being considered. The Notice of Adjudication dated 31st August 2004 refers to Furlong's assessment of extension of time and states that "the Adjudicator will be requested to decide that the extension of time granted by Furlong to the 2nd February 2004 is correct". It is therefore Furlong's decision on the extension of time which is being referred to Adjudication, not Verry's response to it. In the Referral under 'Decision sought' paragraph 3.01 states: "The Adjudicator is requested to decide that the extent of time granted to Verry by Furlong was correct based on the information provided. The date is the 2nd February. Alternatively the Adjudicator is requested to decide the appropriate extension of time". The extension of time to the 2nd February was granted in Furlong's letter dated 11th May 2004 i.e. before Verry's letter dated 2nd July and is therefore based on information available to Furlong at that time. Furlong did not modify their position following Verry's letter and rely on their letter and the Notes attached to their letter dated 13th August in support of their case. I am therefore now of the view that Verry are not confined, in responding to Furlong's referral, to the case they put forward in their letter of the 2nd July but are entitled to put forward a fully argued case in response to the Referral."

21. Mr Smith of HCC was quick to respond to that letter making it plain that he did not agree with the adjudicator's new view. He said that Verry advanced a case for an extension of time to the 24th June in their letter of 2nd July and that in the response document Verry were trying to advance a case for an extension time to the 31st July which was, he said, a different case. He went on to say that:

"If Verry wished to make a new extension of time claim outside of this Adjudication it would be considered by Furlong in the proper way."

22. The adjudicator's change of view came too late to affect Furlong's formal reply to Verry's response. That was served on the 5th October 2004 under cover of a letter which made clear that the new extension of time claim, as it was called, had been ignored. However, in the light of the adjudicator's decision on the point on 4th October (paragraph 20 above) and his further letter of the 6th October 2004, Furlong decided that they had to put in a response to that new extension of time claim. A lengthy document containing 107 paragraphs was served on the 11th October 2004, which purported to reply to Section D of the Verry response document. The reply of the 11th October 2004 did not claim that it had been impossible for Furlong or HCC to respond to the points made in Section D; on the contrary, the reply appeared to deal with each of the points advanced by Verry.

23. As to the status of the Verry response document, and the allegedly new claim that it contained, it seems to me that Mr Smith of HCC rather muddied the waters in his covering letter of the 11th October 2004 when he said:

"We would point out that whilst you believe that Verry are entitled to respond in any way they choose and are not confined to any previous statements or assessments they may have made, we would expect you to take on board that their response should only be considered to the extent which it is a response to the position we asserted and does not represent a new case. Furthermore, we would expect you to weigh the evidence of the day more heavily than the new case they make now".

24. In my judgment, it was always going to be extremely difficult - if not impossible - for the adjudicator to try and follow this suggestion in practice because on any view the dividing lines between what HCC called the 'old' claim and the 'new' claim were extremely blurred. Take for example, an item of delay which was in both claims: if the only difference between the detail of the two claims was the suggestion in the new claim that the delay actually caused by that event was longer than previously indicated, it simply would not have been practicable for the adjudicator to take the longer period into account for one purpose, but not another.

25. Verry responded to this document, as well as other matters, on the 13th October, and Furlong, who were keen to have the last word, replied again on the 18th October. The adjudicator's Decision was provided on the 26th October 2004. Amongst other findings that he made in favour of Verry was his conclusion that Verry were entitled to an extension of time to the 27th July 2004.

26. Furlong had commenced the adjudication but, in the event, they had done badly. Accordingly, they indicated that they did not regard themselves as bound by the adjudicator's Decision. This in turn explains Verry's claim in this action for a declaration that the adjudicator's Decision is binding. As I have indicated, Furlong contend that the Decision was not binding and should not be enforced because the adjudicator did not have the jurisdiction to consider what they call Verry's new claim for an extension of time and/or because Verry's new claim led to unfairness and a substantial risk of injustice.

27. The various arguments that now arise in this case have been made clearly and succinctly today by Mr McMullen, who appeared on behalf of Verry, and Mr Bingham, who appeared on behalf of Furlong. I ought to point out that Counsel have been able to complete their arguments in just over half a day despite the fact that there are a large number of documents and authorities which less skilful advocates might have taken days to deal with, I therefore acknowledge with gratitude my debt to them.

B. JURISDICTION

28. It seems to me that the central issue of jurisdiction incorporates three possible sub-issues. First, was Section D of Verry's response a new claim for an extension of time which had not been made before? Secondly, if it was, were Verry entitled to rely on it in the adjudication? Thirdly, if Verry were not entitled to rely on it in principle, were they able to rely on it in fact because, by their conduct, Furlong effectively gave the Adjudicator the necessary jurisdiction.

B1. Was Section D of Verry's Response a New Claim?

29. Mr Bingham submitted that the claim made in Section D was a new claim by Verry for an extension of time which had not been made pursuant to the Contract machinery of Clause 3B and was very different to the claim of the 2nd July 2004, which he said was the only claim which the adjudicator was entitled to have regard to. On the other hand, Mr McMullan argued that the claim was not a new claim; that the Section D claim was fundamentally the same claim as that made in the letter of the 2nd July 2004; and the letter of the 2nd July 2004 was a skeletal depiction of the claim which was expanded in greater detail in Section D of the response document.

30. In my judgment it would be excessively legalistic to classify Section D of Verry's response as a new claim. It is simply a fuller explanation for the claim originally made on the 2nd July 2004. The fact that a new extension date was sought in Section D merely reflected the fact that work continued on site after the 2nd July 2004 (when the Verry claim was first made) and down to the 27th July 2004.

31. In reaching that conclusion I have had particular regard to Appendix A produced by Mr Smith of HCC. That analysis, in my judgment, makes clear that the actual events relied on by Verry in seeking an extension of time down to the 2nd July 2004 in the letter of the same date were essentially repeated again in Section D of their response. The only real difference was that sometimes different - usually longer - periods of delay were ascribed to those events and, in almost all cases, further supporting information was provided in Section D. Thus, in my view, Section D was not a new claim and could properly be described as a refinement or an enhancement of the claim that had been made at the time that the adjudication started.

32. I should also refer to the evidence of Mr Gamble of Verry on this topic whose statement at paragraphs 4 and 5 said:

"The differences between the July claim and the claim brought in the Adjudication are as a result of:-

4.1

The fact that since the claim for extension time had been submitted on the 2nd July Verry had completed its work on site on the 31st July and was therefore in a position to finalise its claim

4.2

The fact that Verry expanded its narrative to enable the Adjudicator, who unlike Furlong was not familiar with the project, to understand the factual background to various claims of extension of time

4.3

The facts and basis of Verry's claims for an extension of time did not change between the 2nd July 2004 and the response document of the 24th September 2004 and accordingly was not new."

33. On the basis of the information with which I have been provided, I agree with and accept that conclusion. It seems to me therefore that, on this basis alone, this case is far removed from the situation described by His Honour Judge Seymour QC in *Nutall* to which I refer in more detail below. Accordingly, I find that Section D of Verry's response was not a new claim and contained material to which the adjudicator was entitled to have regard in any event. It seems to me therefore that on that ground alone the jurisdiction challenge must fail. However, I go on to consider the second question identified above - namely whether, if it was a new claim, the Adjudicator was entitled to have regard to it - on the assumption that I am wrong on this point and that it is appropriate to classify Section D of Verry's response as a new claim.

B2. If Section D was a New Claim, could the Adjudicator take it into account?

34. Mr Bingham submitted that the adjudicator could not take into account the claim in Section D because it was a new claim which had not previously been made. He said that the claim should have been submitted to Furlong's Mr Dove under the Contract for proper consideration and the adjudicator had no jurisdiction to consider a claim which had not been subject to that agreed process. He submitted that all claims for extensions of time had to be put to Mr Dove and Mr Dove had to reject them before they could then be raised by Verry in an adjudication. Mr McMullan submitted that it would be wrong to find that, in the adjudication, Verry should in some way be restricted to the points in their letter of the 2nd July 2004; he said that there was nothing in the documents, and in particular the Notice of Adjudication and the Referral Notice, that could lead to any such restriction.

35. As a matter of construction of the relevant documents, and as a matter of commercial common sense, I consider that Mr McMullan is right. The overwhelming reason for this conclusion is the one which I have already identified in paragraphs 12-14 above, namely that neither the Notice of Adjudication nor the Referral Notice can be fairly read as restricting the extension of time claim to be considered by the adjudicator to the one set out in brief terms in the letter from Verry to Furlong of the 2nd July 2004. The Notice of Adjudication makes no reference to that letter or claim at all and merely asks the adjudicator to decide that the extension of time granted down to the 2nd February 2004 is correct. That extension of time had of course been granted before the claim of the 2nd July 2004 had even been made. If Furlong had wanted to restrict the scope of the adjudicator's investigation they could have defined the dispute as to whether or not, solely on the basis of the letter of the 2nd July 2004 and the information contained within it, Verry were entitled to an extension of time beyond the 2nd February 2004. Of course, they failed to do so. Even when, in the Referral Notice, they did describe the the issue as being whether the extension of time was correct "based on the information provided", Furlong went on in the alternative to ask the adjudicator "to decide the appropriate extension of time". That was, it seems to me, a completely open-ended and unqualified request which was not limited in any way to the extension of time which had been previously claimed or granted .

36. It is fair, I think, to note that in relation to the Notice of Adjudication and the Referral Notice, there was, as sometimes happens in these circumstances, a certain amount of rewriting of history going on towards the end of the adjudication. I refer by way of example only to Mr Smith's letter of the 18th October 2004. In that letter he said this:

“Notwithstanding Furlong’s Notice of Adjudication asked you to decide whether the extension of time granted to the 2nd February 2004 was [my emphasis again] correct and the Referral repeated this based on the information provided at the time of the crystallised dispute, we have followed your directions of the 5th October 2004 to resolve entitlement on the basis of Verry’s submission on extension of time as if they were the Claimant, which they are not. In so doing that Furlong’s initial position in respect of extension of time was totally put aside by you, your letter dated 4th October 2004 refers”.

It seems to me clear that by changing the “is” to “was” and by referring to “the information provided at the time” – which was not in fact referred to anywhere in the Notice of Adjudication – Mr Smith was becoming aware of the open-ended nature of his original document.

37. Having reached that firm conclusion on the basis of the relevant documents, the remaining question is whether the many authorities on the question of what is and what is not validly part of ‘a dispute’ in adjudication should lead me to a different conclusion to the one that I have outlined above. On analysis, I consider that the cases only serve to confirm the conclusion which I have reached.

38. There are, as has been pointed out, a raft of decisions dealing with the definition of ‘a dispute’ for the purposes of adjudication. A number of the more important decisions have been usefully gathered together by Jackson J in AMECCivil Engineering Ltd –v- The Secretary of State for Transport [2004] EWHC 2339 which I hope will be taken as the starting point when cases on this topic are cited in or to the TCC in future. The relevant authorities to which I have had regard and which he summarised there are Monmouthshire County Council –v- Costelloe and Kemple 5 BLR 83; Tradax International –v- Cerrahogullari [1981] 3 All ER 344; Ellerine Brothers –v- Klinger [1982] 1 WLR 175; Cruden Construction v Commission for New Towns 2 Lloyd’s Law Reports 37; the important Court of Appeal decision in Halki Shipping Corporation –v- Sopex Oils [1988] 1 WLR 726; Fastrack Contractors –v- Morrison Construction Ltd [2000] BLR 168; Sindall v- Soland 80 Con LR 152 ; and Beck Peppiatt Ltd –v- Norwest Holst Construction [2003] BLR316.

39. These authorities having been summarised by Jackson J in AMEC, he then derived from them seven principles to which I was referred by Mr Bingham. It seems to me that these principles are mainly concerned with the issue as to when a failure to respond to a claim or claim document, as opposed to an outright rejection of that claim, can trigger or crystallise a dispute so as to enable the adjudication process to begin. As such these principles themselves are not directly relevant to this case, which is principally concerned with what can and cannot be relied upon by a party when setting out its case in adjudication.

40. The starting point for any consideration of that specific topic is Edmund Nuttall v R.G Carter to which I have already referred. This decision was expressly considered by the adjudicator. There, Nuttall had made an extension of time claim which had been rejected. When they commenced adjudication they did so by reference to a new expert’s report which put forward the extension of time claim in a way that was entirely different to the previous claim. In particular, wholly new events were relied upon in the report as being the cause of the critical delays. The adjudicator decided that Nuttall were entitled to an extension of time on that new basis but Nuttall were not able to enforce the decision. HH Judge Seymour QC found that there could be no crystallised dispute in relation to the claim set out in the report because such a claim had not been provided, let alone considered and disputed by Carter, prior to the adjudication.

41. The Judge said, at paragraph 36:

“However, when a party has had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a dispute between the parties is not only a claim which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side. No doubt for the purposes of a reference to Adjudication under the 1996 Act or equivalent contractual provision, a party can refine its arguments and abandon points not thought to be meritorious without altering fundamentally the nature of the dispute between them. However, what a party cannot do in my judgment is abandon wholesale facts previously relied upon or arguments previously advanced and contend because the claim remains the same as that made previously the dispute is the same.”

42. This has been referred to in some of the later authorities as “the restricted view” of the word ‘dispute’. It has been distinguished and/or not followed in a number of the later cases including the decisions of Her Honour Judge Kirkham in Cowlin Construction –v- C. F.W Architects [2003] BLR 241; of His Honour Judge Wilcox in London and Amsterdam –v- Waterman Partnership [2003] 91BLR; and of His Honour Judge Toulmin QC in AWG Construction Services Ltd –v- Rockingham Motor Speedway Ltd [2004] EWHC 888.

43. In each of these three cases, as well as those referred to in paragraph 38 above, the Courts have stated that the word ‘dispute’ is to be given its ordinary and natural meaning and that it “included any claim which the other party refused to admit or did not pay whether or not there was an answer to the claim in fact in law.”

44. I note that in Cowlin Her Honour Judge Kirkham said:

“In my judgment the approach in Halki is to be preferred [to the restricted approach in Nuttall]. I am guided by the straightforward analysis in that case. In Halki (in the context of the [Arbitration Act 1996](#)) the Court of Appeal reminded us that the Courts have generally construed widely the word ‘dispute’ and they declined in that case to construe the word more narrowly in the context of arbitration.. Whilst I accept that the adjudication process involves short timescales and that there is a risk that the responding party might be ambushed, those are not in my judgment reasons to construe the word dispute more narrowly in the context of adjudication than in other contexts. I bear in mind the practical difficulties faced by an adjudicator whose jurisdiction is challenged on the ground there is no dispute. The Court should not add unnecessarily to those difficulties by giving a narrow meaning to the word dispute which would in turn permit a responding party to introduce uncertainties which might be difficult for an adjudicator to deal with. Otherwise there is the risk that the purpose of the 1997 Act may be defeated.”

I respectfully agree with her analysis.

45. The Courts’ present approach to the scope of the dispute in any given adjudication is probably best summarised by His Honour Judge Toulmin QC in AWG. He analysed the various authorities and it is unnecessary for me to set out in all the relevant paragraphs of his judgment. I do, however, set out his conclusions starting at paragraph 141:

“In my view each case must depend on the circumstances and the context in which the Referral is made. In some cases the issues referred are very specific. In other cases it is clear that the issues are more general and have been so treated by the parties and that there is significantly more room for the case to be developed. The test in each case is first what dispute did the parties agree to refer to the Adjudicator? And, secondly, on what basis? If the basis which is argued in the Adjudication is wholly different to that which a Defendant has had an opportunity to respond in advance of the Adjudication,

this may constitute a different dispute not referred to the Adjudicator or, put another way, in so far as the Adjudicator reaches a decision on the new issues it is not responsive to the issues referred to him.”

At paragraph 144 he said:

“It is important that a Court should approach the question of what is a dispute with robust common sense which takes into account the nature of the dispute and the manner in which it has been presented to the Adjudicator. I bear in mind that having an award enforced against a party is a serious matter for that party and there are circumstances where there is no alternative to saying that the basis on which the dispute was referred to the Adjudicator was essentially different from than upon which the Adjudicator based his decision.”

At paragraph 145 the Judge dealt with his ability or otherwise to reconcile Nuttall with the other cases to which I have referred and at paragraph 149 he concluded that he could not adopt in full the approach taken by His Honour Judge Seymour QC in that case.

At paragraph 146 the Judge said:

“It follows from this that within the limits which I have described an Adjudicator is not confined to considering rigidly only the package of issues, facts and arguments which are referred to him.”

46. In general, the restrictive approach in Nuttall (which was in any event a case with an extreme set of facts) has not been followed; instead the Courts have taken a robust view as to what makes up the real dispute in any given case, having regard to its particular facts. That is the approach I have adopted here. Applying that robust approach to the facts which I have already set out, I find that even if, which I do not accept, Section D could be classified as a new claim for an extension of time, it clearly formed part of the dispute which was referred by Furlong to adjudication. The detailed reasons for this conclusion have, of course, already been set out in paragraphs 35 and 36 above.

47. Of course, in the present case there is an additional reason for my conclusion, namely the very point that swayed the adjudicator in the first place. Verry were responding to this claim and were not themselves the referring party. They did not start the adjudication. They had to defend themselves as best they could against the allegation that their only entitlement to an extension of time was down to the 2nd February 2004 and that liquidated damages should be deducted for the period of delay thereafter. In my judgment, they were not to be taken as having agreed that they could only defend themselves in the adjudication with half a shield, able to rely on some matters of fact but being artificially prevented from referring to others. It seems to me that that would be an absurd result. In my judgment, Verry were entitled to take whatever points they liked to defend themselves against the assertion that their extension entitlement was limited in the way advanced by Furlong and the adjudicator was obliged to consider all the points which they raised.

48. It seems to me, therefore, that this case is a good example of what His Honour Judge Thornton QC was referring to in Fastrack Contractors -v- Morrison when he said:

“The scheme [that is the Adjudication Scheme] gives the Adjudicator two powers: to take initiative in ascertaining the facts in the law... and to resign if the dispute varies significantly from the dispute referred to him... These powers show that it is possible that a dispute that has been validly referred to Adjudication can in some circumstances, as the details unfold during the Adjudication, become enlarged and change its nature and extent. If this happens it is conceivable that at least some of the

matters and issues referred... which are not previously encompassed within a pre-existing dispute could legitimately become incorporated within the dispute that is being referred.”

In similar vein, I believe that what happened here was just the sort of dispute development envisaged by His Honour Judge Lloyd QC in K N S -v- Sindall⁷⁵ BLR 71 when he said that:

“A party to a dispute who identifies the dispute in simple general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which Adjudication is sought”.

49. Both cases are directly in point here. Having made a general and unqualified request to the Adjudicator to decide the question of extension of time, Furlong cannot now complain because, in seeking to defend themselves Verry have raised a variety of matters which (on Furlong’s approach) are new. Furlong sought a resolution of that entitlement to an extension of time and they claimed positively that such an extension of time could not extend beyond the 2nd February 2004. Verry were entitled to defend themselves against that assertion and if that led them to rely upon matters which were not part of a previous formal claim then there was nothing to stop Verry from doing so.

50. Accordingly I conclude that even if Section D did somehow constitute a new claim it was material which the adjudicator was entitled to take into account when deciding the wide ranging dispute referred to him by Furlong. The jurisdiction challenge fails. It is therefore unnecessary for me to decide whether or not Furlong voluntarily accepted his jurisdiction. It was always part of the adjudicator’s jurisdiction to consider all the points put forward by Verry in defence of the assertion that their entitlement was limited to an extension of time to the 2nd February 2004.

C. PROCEDURAL IRREGULARITIES

51. The remaining question is whether, even though the adjudicator was entitled to consider Section D, he dealt with it in some way unfairly.

52. By way of background I should say that in my judgment the adjudicator did all that he could to ensure that both parties had sufficient time to deal with Section D. Section D was served on the 21st September 2004 and it was not until the 11th October 2004 that Furlong responded to it, which was a total of 20 days. In the context of an adjudication which should have taken just 28 days from start to finish that was more than adequate time for Furlong to deal with the detail of the new claim. I have already made the point that the response from Furlong did not suggest that there were any matters with which they had been unable to deal.

53. As to the allegations of procedural irregularity, Mr Bingham has put them with considerable fairness and not a little skill but he recognised that they were not straight forward. The first suggestion was that the Adjudicator did not have enough time to deal with the adjudication because of the introduction of Section D and he should have warned the parties to that effect. In this regard Furlong rely on paragraph 40 of the Decision. I shall set out paragraph 40 in full because it is important to see what the Adjudicator actually said:

“Both parties have made numerous submissions and have advanced a mass of documentary evidence in the form of witness statements, letters, programmes, progress reports, orders and delivery notes for materials and the like in support of their respective cases. Both parties have relied on this mass of evidence in support of their totally opposed assertions as to the reasons for delay in completion of Verry’s work until the 27th July 2004. In the timescale of Adjudication, even with the extension of time granted to me by the parties it has simply not been possible for me to make the full analysis of this

mass of evidence which would be appropriate in litigation or arbitration where the analysis would in any case probably have been carried out by experts for both sides. While I have carried out as much analysis as has been possible my decision is therefore based to a large extent on an objective overall view of events, causes and effects.”

At paragraph 36 of his Statement, Mr Dove translates this paragraph into a statement by the adjudicator that he did not have sufficient time to carry out a proper analysis, and Mr Dove goes on to say that it is clear that failure was because of the introduction of Section D. On the basis of all the evidence I reject that assertion and therefore this part of Furlong’s case.

54. It seems to me that the Adjudicator’s comments at paragraph 40 were general and did not relate specifically to Section D. More importantly, it seems to me that no-one could expect an adjudicator, operating on a tight timetable and obliged to reach a decision on every possible dispute that could arise under a building contract that took a year to perform, could deal with each point with the same care and detail as if the point was being decided in litigation or arbitration. This was an adjudication, which is an entirely different form of dispute resolution. It seems to me that that is all the Adjudicator is saying in this paragraph. I regard it as unexceptionable and a simple reflection of the realities of raising final account claims like these by way of adjudication.

55. Furthermore, in my judgment, it does not lie in the mouth of Furlong to criticise the suitability of the adjudication process for final account claims when they themselves started this adjudication. They clearly thought, for better or for worse, that there was an advantage to be gained in starting an adjudication which encompassed all these individual disputes. They hoped to score an early victory over Verry, despite the fact that the adjudicator would always have been struggling to deal in detail with everything in the limited time he had: they therefore took a risk and in the event it backfired on them. For them now to complain about the result of the process which they put in train in the first place seems to me not only wrong and unfair but misconceived.

56. In my judgment, paragraph 40 of the adjudicator’s Decision is entirely unexceptionable. The comments he made there are a reflection of the summary nature of adjudication generally and the complexity and difficulty of this type of adjudication in particular.

57. Mr Bingham next contended that if an adjudicator runs out of time and cannot produce a fair decision within the statutory time limit he should say so, and not go on to reach an unfair Decision. I accept that proposition, and to that extent, therefore, I would agree not only with Mr Bingham but with the analysis of His Honour Judge Toulmin QC in CIB -v- Birse (above). In both that case and this, despite the mass of material, the adjudicator felt that he was able to come to a proper decision on the matters raised before him. I have seen nothing to suggest that Mr Sims’ decision in this case was, or even might have been, unfair. On the contrary, it seems to me that the adjudicator in this case produced a detailed and painstaking decision which properly reflected all the material with which he had been provided. I reject any suggestion that the Decision, or the way it was arrived at, was or even might have been unfair.

58. Finally, on this question of timing, I am bound to note that the adjudicator expressly warned the parties that he might need longer than the 26th October to produce his Decision. He did that in his letter of the 19th October. In the event he did not need that further time and he produced his Decision by the 26th October. It might be thought that this is the best possible evidence that the adjudicator did not require additional time beyond the 26th October, so there was nothing to warn the parties about in any event.

59. Furlong's final complaint was that the result of the adjudication was unfair because the adjudicator, having effectively encouraged Furlong to seek from Verry a considerable amount of further documentation, then wrote on the 18th October 2004 to hint that if Verry did not produce the documents, that omission would be reflected in the result of the adjudication. Furlong says that, in consequence, they did not pursue their request. They now say that, because this indication was not in the end reflected in the result of the adjudication (because Verry got a complete extension of time), this was palpably unfair and amounted to a procedural irregularity on the part of the adjudicator.

60. Mr Bingham relies by analogy on a decision in respect of Arbitration Vee Networks Ltd -v- Econet Wireless International Ltd [2004] EWHC 2909. There, at paragraph 90, Colman J set out what is required in order to establish serious injustice under Section 68 of the Arbitration Act. He makes it plain that:

"The element of serious injustice in the context of Section 68 does not in such a case depend on the Arbitrator having come to the wrong conclusion as a matter of law or fact, but whether he was caused by adopting inappropriate means to reach one conclusion, whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure it is enough if it is shown that it caused the Arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the Court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.

61. On the basis of the information which I have, it seems to me that an irregularity has simply not been made out on the facts. The relevant part of the adjudicator's letter of the 18th October 2004 said this:

"I therefore ask Furlong and HCC on their behalf, to consider very carefully whether it is really necessary for the establishment of their case, although accurately the refutation of Verry's case, for the volume of material which DCL has indicated involved, to be copied and sent to them and to me, process which itself would take some time and not inconsiderable costs, followed by the process of analysis and comment by HCC for Furlong. It is possible that DCL, for Verry, will then argue that they have a right to respond to Furlong's submissions on this further evidence. They may well argue as DCL have already done in their letter, that delivery tickets etc. are not necessarily conclusive evidence that delays were due to later deliveries, as they may seek to show that deliveries were postponed because of previous delays, making it undesirable for materials to be delivered until they could be used. I understand that this whole process will take at least until the end of this week, and that it will require at least another week for me to finalise my decision."

As a result of that paragraph, Mr Smith of HCC, chose not to pursue further these outstanding delivery tickets etc, a point that was noted in the adjudicator's letter of the 19th October 2004. It appears that, by this time, the adjudicator had reached the conclusion that he had enough information to resolve the matters that were in dispute in the adjudication. For that reason, it does not seem to me that the adjudicator was saying that the failure to provide the extra documents would be reflected in the Decision: he was merely saying that he had sufficient material to reach his Decision without the further material.

62. Therefore, I do not believe that the point raised in respect of the documents and their non-provision gave rise to, or could have given rise to, any irregularity of the sort referred to in Vee. In any event, it seems to me that it is impossible for me to reach the view that these further delivery tickets and the like would have made any difference to the outcome of the adjudication; the clear indication in the adjudicator's letter of the 18th October is that they would not. Accordingly the necessary requirement of demonstrating the real possibility of injustice is also not made out.

63. I should conclude by referring again to the adjudicator's letter of the 18th October. There the adjudicator said:

"My task is certainly to arrive at a decision which, so far as practically possible, is soundly based upon evidence so that the parties may accept it as being a reasonable resolution of the dispute."

On all the evidence I have seen, I have no hesitation in concluding that that is precisely what the adjudicator did. His decision is therefore binding on the parties until it is the subject of a final decision by the Court. In those circumstances I grant the declaration sought by Verry.
