Neutral Citation Number: [2007] EWHC 144 (TCC)

Case No: HT-06-367

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 01/02/2007

Before :

THE HON. MR. JUSTICE RAMSEY

- -

Between :

HG Construction Ltd **Cla**

- and -

Ashwell Homes (East Anglia) Ltd **Defe**

- -

- -

Mr Andrew Bartlett QC (instructed by **Silver Shemmings**) for the **Claimant**

Miss Finola O'Farrell QC and Mr Mathew Holt (instructed by **Christopher Cox**) for the **Defendant**

Hearing date: 29 January 2007

- -

Approved Judgment

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

.....

THE HON. MR. JUSTICE RAMSEY

The Hon. Mr Justice Ramsey:

1.
The Claimant, HG Construction Limited, ("HG") was the Contractor and the Defendant, Ashwell Homes (East Anglia) Limited ("Ashwell") was the Employer on a new housing development at Caldecote, Cambridgeshire. The contract dated 7 July 2004 ("the Contract") was on the JCT Standard Form of Building Contract with Contractor's Design (1998 Edition).

2.
The Contract provided for Sectional Completion and identified 10 Sections of the Works. Various disputes arose between the parties and there have been four adjudications, which I will refer to as Adjudications 1 to 4. These proceedings arise from an application by HG for summary judgment to enforce the decisions in Adjudications 3 and 4, which I will refer to as Decision 3 and Decision 4.

3.
Ashwell has now accepted that Decision 4 is enforceable and that HG is entitled to be paid the sums claimed in respect of that decision. I am therefore only concerned on this application for summary judgment with the issue of the enforceability of Decision 3. In particular the question is whether Decision 3 is binding in the light of the dispute referred to and decided in Decision 1. The main issue relates to the validity and/or enforceability of the provisions in the Contract as to liquidated and ascertained damages ("the LAD provisions"). The sum claimed by HG on the basis of Decision 3 is £184,627 being a refund of the liquidated and ascertained damages ("LADs") deducted by Ashwell.

4.
Mr Andrew Bartlett QC who appears for HG submits that Decision 3, when analysed as a matter of substance, dealt with an issue which was not dealt with in Decision 1 and is therefore binding. Miss Finola O'Farrell and Mr Matthew Holt who appear for Ashwell contend that the validity and enforceability of the LAD provisions was determined in Decision 1 and it is that Decision which dealt with the dispute and is binding rather than Decision 3.

Background

5.
There was a delay in completion of the Works and that raised the potential for Ashwell to deduct LADs from sums otherwise payable to HG.

6.
On 12 July 2005 HG obtained advice from Alway Associates on a variety of issues relating to the Contract including reasons why the LAD provisions might be unenforceable.

7.
After correspondence and a meeting between HG and Ashwell on the subject, on 14 September 2005 Ashwell responded to HG stating:

"You are aware that we are in the process of evaluating the situation regarding liquidated and ascertained damages ("LADs") and their relationship with your recent application for an interim payment.

This matter has already been the subject of extensive correspondence between us. In particular you have informed us (by way of a letter from your consultants Alway Associates dated 12 July 2005), that you consider the mechanism within our contract for the deduction of LADs is unenforceable. We disagree with you on this vital point and we have explained our reasons for doing so by letter dated 30 August 2005.

Despite this you have not indicated your acceptance that we are in principle entitled to deduct LADs. This situation is unsatisfactory.

We therefore invite you, in light of our previous correspondence on this matter, to indicate your agreement to the following propositions:

1. That the provisions within our contract for deducting LADs are valid and enforceable.

2 That you therefore withdraw your erroneous contentions set out in the Alway Associates letter of 12 July 2005

The time pressure on senior management of ourselves and Ashwell is considerable, as it the correlation of their diaries, therefore we must request a response by 5:30 on Friday 16th September 2005 in order that sufficient consideration can be given to our answers. Should you fail to respond by that deadline we will consider that a dispute has arisen between yourselves and Ashwell Homes in relation to this issue."

8.
No response was received and on 20 September 2005, Ashwell gave Notice of Intention to Adjudicate the disputes which it identified as:

"The dispute or difference which we intend to refer is the validity and/or enforceability of the provisions within the Contract for the deduction of liquidated and ascertained damages ("the LAD provisions")."

9.
Ashwell sought a decision to determine the dispute identified in the letter of 14 September 2005. Mr Christopher Hough was appointed as adjudicator.

10.
On 23 September 2005 Ashwell served its Referral.

11.
On 3 October 2005 HG served its Response in which it developed its arguments, as follows:

(1)
At paragraph 4.2.1. HG repeated what it had said in the letter of 12 July 2005 that is:

"The Sections at page1/2 of the Employer's Requirements are not, therefore, clearly and/or adequately defined in terms, of the work required to be undertaken in each Section. In order to establish when the works to a Section are Practically Complete one must be able to determine with certainty what drainage, roads, block paving lighting etc forms part of the relevant plot and/or Section. This however cannot be done.

On this basis, it is submitted that it is not possible with any precision to determine what works are comprised in each section and hence whether those works are Practically Complete. As such the contract mechanisms is fundamentally flawed and fails. Hence the Employer must seek unliquidated damages, details of which it must prove".

(2)
At paragraph 4.2.8. HG then referred to the decision in Taylor Woodrow Holdings Ltd. v. Barnes & Elliott Ltd[2004] EWHC 3319 (TCC) where, upholding the award of an arbitrator, His Honour Judge Wilcox had said:

"In my judgment, the arbitrator's analysis was correct. He concluded that 17.1.4, which governs the computation of the relief from LADs on account of partial possession, was operable only if a valuation could be placed on the sectional works. He concluded, in my judgement rightly, that the contract failed to provide any means of ascertaining what was contained in any section and there was no certainty as to what works comprised each contract sections. It was not possible to value any sectional works and therefore the proportional relief against LADs contemplated were incapable of being calculated."

(3)

At paragraph 4.5.8. HG submitted “as in Taylor Woodrow Holdings Limited and George Wimpey (Southern) Limited v. Barnes & Elliot Limited, the Contract fails to provide any means of ascertaining what is contained in any Section and there is no certainty as to what works comprise each Contract Sections. It is therefore, not possible to value any Sectional works and therefore the proportional relief against LADs contemplated is incapable of being calculated.”

(4)
At paragraph 4.5.9 to 4.5.12. HG referred to a letter of 28 September 2006 from TP Associates Limited (“TPA”), who were named as the Employer’s Agent in the Contract, in which TPA had set out a calculation of LADs due after allowing an adjustment under clause 17.1.4 to take account of partial possession. HG said that Ashwell “has acknowledged that it is not possible to properly value the works within a particular section”. HG referred to the value allocated to sections 1-5 and 7-9 of some £2.4m compared to the contract sum of about £3.5m and said that the balance of some £1.1m “equates to works which [Ashwell] is unable to allocate to any one section”.

(5)
At paragraph 4.5.12 HG concluded: “The question, therefore, arises what drainage, roads etc falls within which Section, and what are their respective values. It is submitted that it is not possible to value any sectional works and, therefore the proportional relief against Liquidated and Ascertained Damages contemplated are incapable of being calculated.”

12.
Ashwell served a Rejoinder on 6 October 2005 and in Response stated at paragraphs 36-38:

“36. .. The reasons why the Taylor Woodrow decision is distinguishable from the present case have already been explained. As a result paras 4.5.4-4.5.8 are irrelevant as the uncertainty identified in Taylor Woodrow can in no way be found in the present case.

37. Notwithstanding that the letter of 28 September 2005 quoted in para 4.5.9 was written after the commencement of the Adjudication, it is in any event wholly irrelevant to the dispute referred as to the validity and enforceability of the liquidated damages in the Contract. The letter of 28 September 2005 is concerned with the calculation of LADs with a view to future deduction or claim for the appropriate sums. Such matters as are set out in paras 4.5.9-4.5.12 have not been referred to the Adjudicator, were in any event not the subject of a pre-existing dispute at the date this Adjudication commenced and should therefore be disregarded as irrelevant. It is specifically denied that Ashwell has admitted that it is not possible to properly value the works within a particular section as alleged in para 4.5.9.

38. Without prejudice to the generality of the foregoing, the Adjudicator may wish to note that the arguments in paras 4.5.9-4.5.12 are essentially the very evidential ones which are eminently capable of resolution (although not in this Adjudication)”

13.
This led to an email from the Adjudicator on 7 October 2005 to which HG responded on the same day, confirming that it had made submissions that certain matters rendered the contract provisions inoperable. These included:

“That whilst the Referring party took partial possession of parts of all the Sections it is not possible to value any Sectional Works and, therefore, the proportional relief against Liquidated and Ascertained Damages contemplated are incapable of being calculated.”

14.
HG added that: “At paragraph 37 the Referring Party asserts that matters raised by the responding party fall outwith the dispute referred. The Responding Party therefore seeks the opportunity to respond to this new assertion.” HG accordingly submitted a Response to Rejoinder in which it said that the letter of 28 September 2005 was relevant to matters which it had set out in paragraphs 7 & 8 of the Response to Rejoinder. In paragraph 7 HG had identified an ambiguity which it stated “renders the liquidated damages a penalty and/or inoperable in that the Employer has taken partial possession of the Section” and in paragraph 8 HG had referred to the provisions of clause 17.1.4 and stated that the values of certain external works which could not reduce the value of sections rendered the provisions a penalty and inoperable.

15.
The Adjudicator, Mr Hough, then issued Decision 1 (dated 1 November 2005) in which he dealt with the argument as follows at paragraphs 7 and 10:

“7. In essence HG submits that it is not possible decide, with any precision, what works are comprised in each of several of the 10 Sections under the Contract. It follows that it is not possible to establish when the works to a Section are Practically Complete. HG submits that the Contract mechanism is flawed fundamentally and the LAD provisions therefore fail.

….

10. I am satisfied that it is possible, as a matter of objective construction of the terms of the Contract, to decide what works are included in each Section. I accept Ashwell’s submission that any dispute as to whether a Section is practically complete will be a matter of construing the Contract terms and then deciding whether, as a matter of evidence, the works included within that Section (on an objective consideration of the terms of the Contract) are Practically Complete. I do not accept that the matter is incapable of precise ascertainment, although the result of that ascertainment may be a matter of disagreement. The fact that there are a number of possible outcomes to such an analysis of the Contract and the subsequent application of the evidence does not mean that the matter cannot be decided with certainty.”

16.
He also dealt with the argument that the LADs were a penalty. He then made a declaration in these terms:

“a. The provisions within the Contract for the deduction of liquidated and ascertained damages (“the LAD provisions”) are valid and enforceable

b. The reasons given by HG via its consultants Always Associates by letter dated 12 July 2005 for believing that the said provisions are unenforceable are incorrect.”

17.
Subsequently on 26 June 2006 Alway Associates gave a notice of adjudication in Adjudication 2, in respect of 5 disputes including:

“i. The Sections of the Works

ii The provisions within the Contract for partial possession

iii The provisions within the Contract for liquidated and ascertained damages”

18.
They sought a decision in these terms:

“That whilst the Employer took partial possession of parts of the sections it is not possible to value the Sectional works and therefore the proportional relief against Liquidated and Ascertained Damages contemplated is incapable of being calculated ”

19.
Mr John Riches was appointed as the Adjudicator. In the Referral HG stated in relation to Decision 1:

“It is clear from the Adjudicator’s Reasons that he only considered the objections to the validity of the LAD provisions set out by Always Associates in its letter 12 July 20005 and which did not include the issue of whether, following Ashwell taking partial possession of parts of the Sections, it was possible to value Sectional Works and if not whether the proportional relief against Liquidated and Ascertained Damages contemplated was incapable of being calculated.”

20.
In the submissions in the Referral HG substantially repeated the submissions that it had set out in the Response to Adjudication 1.

21.
Ashwell in the Response submitted that HG had raised the arguments previously in Adjudication 1 and that the Adjudicator could not therefore decide the same matters and was bound by Decision 1.

22.
The Adjudicator made Decision 2 on 31 August 2006. He made various findings as to the works included within each section but also at paragraph 251 stated: “I Declare that the liquidated and ascertained damages provisions of the contract is inoperable and therefore void for want of certainty.”

23.
Ashwell commenced proceedings in this court under CPR Part 8 seeking declaratory relief in respect of Decision 2. However the parties compromised those proceedings and by a Consent Order dated 6 October 2006 it was declared that Decision 1 was valid and binding but that the parts of Decision 2 dealing with the validity of the LAD provision, including the declaration at paragraph 251, were not binding.

24.
Meanwhile on 11 September 2006 Alway Associates gave a further Notice of Adjudication in Adjudication 3 seeking a decision from the Adjudicator that “Ashwell shall repay HGC forthwith liquidated and ascertained damages in the sum of £184,627.00, or such sum as the Adjudicator shall decide”.

25.
Mr Riches was again appointed as the Adjudicator. In the Referral HG submitted:

“pursuant to Taylor Woodrow Holdings Limited and George Wimpey (Southern) Limited v. Barnes & Elliot Limited, that for the proportioning down of damages in clause 17 to be effective it must be possible from the Contract to value the sectional works.

…

HG assert, however, that following Ashwell taking partial possession of parts of the Sections it is not possible to value the Sectional Works and therefore the proportional relief against Liquidated and Ascertained Damages contemplated is incapable of being calculated.

...

As in Taylor Woodrow it is submitted that it is not possible to value any sectional works and therefore the proportional relief against LADs contemplated is incapable of being calculated.

In summary HG submits that it is not possible to value the Sectional works and therefore the proportional relief against Liquidated and Ascertained Damages contemplated is incapable of being calculated. Accordingly Ashwell is required to repay HG forthwith liquidated and ascertained damages in the sum of £184,627.00 or such other sum as the Adjudicator shall decide."

26.
At the date of the Referral of 19 September 2006, whilst HG was aware of the Part 8 Proceedings, it was not clear what would be the outcome of those proceedings or the effect on Decision 2. HG therefore sought a declaration that "whilst the employer took partial possession of parts of the sections it is not possible to value the Sectional works and therefore the proportional relief against Liquidated and Ascertained Damages contemplated is incapable of being calculated."

27.
Ashwell declined to participate in Adjudication 3. The Adjudicator made Decision 3 dated 19 October 2006. In relation to Issue 1 – "Should the Liquidated and Ascertained Damages be paid to [HG]", the Adjudicator set out his reasons at paragraphs 85 to 96 and concluded that the LAD provisions could not operate.

28.
As a result the Adjudicator decided that HG should be paid the sum of £184,627.00 by way of refund of Liquidated and Ascertained Damages. That is the sum for which HG seeks summary judgment in these proceedings.

The Issue

29.
The central issue in this case is whether HG can rely on the Adjudicator's finding in paragraph 96 of Decision 3 that "there is no basis on which the Liquidated and Ascertained Damages operate and therefore they should be refunded" in the light of Decision 1 where, at the paragraph 5, Mr Hough decided that "The provisions within the contract for the deduction of Liquidated and Ascertained Damages (the LAD provisions) are valid and enforceable."

30.
That issue raises a question about the extent to which an earlier adjudication decision is binding in relation to a later adjudication and the principles to be applied for resolving such matters.

The Law

31.
In this case, the starting point is clause 39A.7.1 of the Contract which provides:

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

32.
As a matter of contract therefore the parties have accepted that they are bound by the decision of Mr Hough and it follows that, to the extent that Mr Riches has purported to decide anything which was decided by Mr Hough, the parties are bound by what Mr Hough decided and cannot rely on Mr Riches decision in that respect.

33.
The position in successive or serial adjudications was recently considered by the Court of Appeal in Quietfield Ltd v. Vascroft Construction Ltd[2006] EWCA Civ 1737 where the court had to decide the extent to which an adjudicator in a later adjudication was precluded from considering a contractor’s claim for extension of time when, in an earlier adjudication he had held that the contractor had failed to establish that they were entitled to an extension of time.

34.
The question was whether having proceeded to the first adjudication relying on matters set out in two letters to support a claim for extension of time, the contractor could rely in a later adjudication on matters contained in a document, which as Jackson J held, was “substantially different from the claims for extension of time which were advanced, considered and rejected in the first adjudication.” Jackson J held that they could and the Court of Appeal dismissed the appeal.

35.
In Quietfield, the parties adopted the provisions for adjudication contained in the Scheme for Construction Contracts (England and Wales) Regulation 1998 (SI 1998 No 649) which at paragraph 23(2) reproduces the substance of s.108(3) of the Housing Contracts Construction and Regeneration Act 1996. It is in similar terms to clause 39A.7.1 of the Contract which applies in this case.

36.
The Scheme also provides at paragraph 9(2) that an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that adjudication. Paragraph 9(4) of the Scheme, dealing with the consequences of such a resignation, proceeds on the basis that the adjudicator is therefore “not competent to decide” the dispute.

37.
In this case the provisions of the Contract comply with the requirements of s.108 of the 1996 Act and therefore the default provisions of the Scheme do not apply. The sole contractual provision is therefore clause 39A.7.1. What then are the relevant principles to be applied in this case and do they differ from a case where the Scheme applies as in Quietfield?

38.
Although there is no provision which expressly deals with the position of an adjudicator in this case, I consider that the effect of clause 39A.7.1 is that:

(1)

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

(2)
The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision by an Adjudicator.

(3)
As a matter of practice, an adjudicator should consider (based either on an objection raised by one of the parties or on his own volition) whether he is being asked to decide a matter on which there is already a binding decision by another Adjudicator. If so he should decline to decide that matter or, if that is the only matter which he is asked to decide, he should resign.

(4)
The extent to which a decision or a dispute is binding will depend on an analysis of

(a)
the terms, scope and extent of the dispute or difference referred to adjudication and

(b)
the terms, scope and extent of the decision made by the adjudicator.

(5)
In considering the terms, scope and extent of the dispute or difference the approach has to be to ask whether the dispute or difference is the same or substantially the same as the relevant dispute or difference.

(6)
In considering the terms, scope and extent of the decision, the approach has to be to ask whether the Adjudicator has decided a dispute or difference which is the same or fundamentally the same as the relevant dispute or difference.

(7)
As accepted by Mr Bartlett, the approach must involve not only the “same” but also “substantially the same” dispute or difference. The reason for this, in my judgement, is that disputes or differences encompass a wide range of factual and legal issues. If there had to be complete identity of factual and legal issues then the ability to “re-adjudicate” what was in substance the same dispute or difference would deprive Clause 39A.7.1 of its intended purpose. As Dyson LJ pointed out in Quietfield at para 44: “The cost of a referral can be substantial. No doubt that is one of the reasons why the statutory scheme protects respondents form successive referrals to adjudication of what is substantially the same dispute.” The expense and trouble of successive adjudications on the same or substantially the same dispute or difference in relation to adjudication which provides a temporarily binding decision is something which is to be discouraged and is the purpose behind the provisions of Clause 39A.7.1

(8)
Whether one dispute is substantially the same as another dispute is a question of fact and degree: see para 46 of Quietfield per Dyson LJ.

39.

In essence, therefore, whether under the standard provisions in Clause 39A or the provisions of the Scheme, I consider that the underlying principles do not differ.

40.
As Dyson pointed out in Quietfield at para. 446:

“There is an analogy here, albeit an imperfect one, with the rules developed by the common law to prevent successive litigation over the same matter: see the discussion on Henderson v. Henderson (1843) 3 Hare 100 abuse of process and cause of action and issue estoppel by Lord Bingham of Cornhill in Johnson v. Gore Wood & Co (a firm)[2002]2 AC 1 30H-31G ”.

41.
In Johnson v. Gore Wood at 31A Lord Bingham of Cornhill said that the concepts of abuse of process, cause of action estoppel and issue estoppel; have much in common:

“The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an abuse if the court is satisfied (the onus being one the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.”

42.
In adjudication, issues of “abuse of process” and the associated public interest considerations are less likely to arise because of the contractual setting for adjudication. However, the standard provisions contained in clause 39A.7.1 of the Contract in this case are aimed at providing a limit to serial adjudication.

43.
I now turn to consider how that limit applies on the facts of this case.

The Dispute referred to adjudication in Adjudication 1

44.
The starting point for the dispute was a concern by HG that Ashwell might assert that HG had failed to complete sections of the Works on time. Under clause 24 of the Contract that would lead to Ashwell being able to deduct LADs and there could be an abatement of those LADs under clause 17 of the Contract if there was partial possession. HG sought advice from Alway Associates who in their letter of 12 July 2005 identified “three obstacles…which will be fatal to the Employers right to seek to levy liquidated damages under the Contract”.

45.
These obstacles fells into two categories

(1)
“Failure to adequately define Sections”. Alway Associates set out the general position that:

“unless there are effective provisions within the contract for:

a) calculating liquidated damages to clearly defined Sections of work and/or reducing it in proportion to the part taken into possession; and/or

b) granting extensions of time for matters that are deemed the responsibility of the Employer

then in either circumstances (or both) a claim for liquidated damages will, prima facie fail."

Applying that to this case Alway Associates concluded:

"The Sections at page1/2 of the Employer's Requirements are not, therefore, clearly and/or adequately defined in terms, of the work required to be undertaken in each Section. In order to establish when the works to a Section are Practically Complete one must be able to determine with certainty what drainage, roads, block paving lighting etc forms part of the relevant plot and/or Section. This however cannot be done.

On this basis, it is submitted that it is not possible with any precision to determine what works are comprised in each section and hence whether those works are Practically Complete. As such the contract mechanisms is fundamentally flawed and fails. Hence the Employer must seek unliquidated damages, details of which it must prove."

It can be seen that they did not, at that stage, raise any concerns with respect to provisions which reduced the liquidated damages in proportion to the part taken into partial possession, which they had raised in their letter when setting out the general position.

Amended clause 17.1.4 of the Contract is the relevant provision in this case and provides that if before Practical Completion of a Section the Employer takes possession of any part or parts of such Section then:

"In lieu of any sum to be paid by the Contractor or withheld or deducted by the Employer under clause 24 in respect of any period during which suck Section may remain incomplete occurring after the relevant date apart from the provisions of clause 17 as the amount included in the Contract Sum for such Section less the amount contained therein in respect of the relevant part to such amount; or the Employer may give notice pursuant to clause 30.3.4 that he will deduct such sum from the monies due to the Contractor."

(2)
The "sum is rendered a penalty" This is in reference to the argument that if LADs are a penalty then they are unenforceable. Alway Associates identified two potential arguments: "10 minor items" and "betterment".

46.
In addition Alway Associates identified a failure to grant extensions of time as being a further argument.

47.
There was further correspondence, a meeting and on 12 August 2005 HG's claim for extension of time was rejected by TPA. On 30 August 2005 TPA wrote to HG confirming Ashwell's intention to claim LADs. It also responded to the matters raised by HG in the letter of 12 July 2005.

48.
The next letter of relevance is TPA's letter of 14 September 2005. As set out above by way of background, that letter referred to HG's contention in the letter of 12 July 2005 that the mechanism in the Contract for deduction of LADs was unenforceable. Given what TPA stated was an unsatisfactory position, TPA sought agreement from HG as to two propositions. The first was a general proposition: "That the provisions within our contract for deducting LADs are valid and enforceable". The second

was “That you therefore withdraw your erroneous contentions set out in the Alway Associates letter of 12 July 2005” and was a more particular proposition which would flow form the first.

49.
The concluding paragraph of TPA’s letter of 14 September 2005 sought a response by 16 September 2005 failing which TPA said that they would consider that a dispute had arisen between HG and Ashwell. There was no response.

50.
In these circumstances, I consider that a dispute had arisen by 20 September 2005 when Ashwell gave Notice of Intention to Refer the two propositions in the letter of 14 September 2005 to adjudication.

51.
In my judgement, the scope of that dispute was not limited to the arguments or obstacles identified by Alway Associates in the letter of 12 July 2005. Ashwell were evidently anxious only to deduct LADs when the dispute had been the subject of an adjudication. In construction contracts it is not unusual for a contractor to seek to defend a claim for LADs by raising contentions that the provisions of the contract are not valid or enforceable or that LADs amount to a penalty. Understandably when such arguments are raised, an employer, such as Ashwell, might seek the protection of an adjudication decision before making the deduction.

52.
If proposition 2 had stood alone then the dispute would have related to the three obstacles raised by Alway Associates in the letter of 12 July 2005. In my judgement, by adding proposition 1, TPA on behalf of Ashwell, were seeking to raise a wider dispute which would deal with any contention that could be raised at that stage that the provisions in the Contract for deducting LADs were invalid or unenforceable.

53.
I consider that Ashwell were therefore correct in their characterisation of the dispute in the Notice of Intention to Refer as: “the validity and/or enforceability of the provisions within the Contract for the deduction of liquidated and ascertained damages (“the LAD provisions”)”.

The Dispute as developed in Adjudication 1

54.
In the Referral, Ashwell referred to and dealt with the arguments raised by HG as set out in the letter of 12 July 2005. I accept that, as Miss O’Farrell submits, it is not surprising that Ashwell only dealt with those arguments as these were the only arguments which HG had raised. There was clearly no obligation on Ashwell to raise and deal with any other arguments.

55.
In the Response, HG dealt with arguments under two headings: “Ambiguity and/or uncertainty with regards to the works comprised in each section” and “Whether the Liquidated [Damages] Provision are a penalty”.

56.
In relation to the first heading, HG developed the submissions in the letter of 12 July 2005 by reference, in particular, to the revision/omission of certain “Bellmouth Works”. At paragraph 4.2.2. HG referred to the decision in Taylor Woodrow Holdings Ltd v. Barnes and Elliott Ltd and developed an

argument based on that decision in paragraphs 4.2.2. to 4.5.8 of the Response. In summary, as set out in the judgment of His Honour Judge Wilcox, the contract in that case failed to provide any means of ascertaining what was contained in any section and there was no certainty as to what works comprised each section. It was not possible therefore to value any works in a section and therefore the potential relief against LADs in clause 17.1.4 of the relevant contract was incapable of being calculated.

57.
At paragraph 4.5.6 of the Response HG then raised clause 17.1.4. and submitted at paragraph 4.5.8 that: “the Contract fails to provide any means of ascertaining what is contained in any Section and there is no certainty as to what works comprise each Contract Sections. It is therefore, not possible to value any Sectional works and therefore the proportional relief against LADs contemplated is incapable of being calculated.”

58.
HG therefore, in terms, raised an argument that the proportional relief contemplated in clause 17.1.4. was incapable of being calculated.

59.
At paragraphs 4.5.9 to 4.5.12. HG referred to the letter sent by TPA dated 28 September 2005 which they characterised as an acknowledgement “it was not possible to properly value the works within a particular section”. They set out the terms of the letter including the calculations from the schedule attached to it. They relied on the calculation as showing that TPA had only been able to allocate some £2.4m of the Contract Sum to particular sections and that some £1.1m of the total contract sum of about £3.5m had been unallocated. HG raised the question of what drainage, roads, etc fell within which section and were their respective values. On that basis HG submitted that it was not possible to value any section or works and therefore the clause 17.1.4. purported relief against LADs was incapable of being calculated.

60.
Ashwell submitted a Rejoinder. In it Ashwell dealt with the Taylor Woodrow decision by distinguishing the contractual provisions and submitting that the provisions in the Contract in this case were not uncertain.

61.
At paragraph 37 of the Rejoinder Ashwell dealt with paragraphs 4.5.9 to 4.5.12. of the Response and the letter of 28 September 2005. It submitted that the letter was irrelevant. It stated that the matters had not been referred to the Adjudicator, were not the subject of a pre-existing dispute and should therefore be disregarded as irrelevant.

62.
HG’s letter to the Adjudicator on 7 October 2005 explained that HG had raised an argument that the contract provisions were inoperable on the basis that the potential relief against LADs under clause 17.1.4. could not be calculated because it was not possible to value any section of works. HG also sought the opportunity to respond to certain matters raised in the Rejoinder, including paragraph 37.

63.
In the Response to Rejoinder, HG contended in relation to paragraph 37 of the Rejoinder, that the submission was relevant as “it showed the Referring Party’s attempt to give proportional relief of damages on taking partial possession of Sections”.

64.
From the above submissions made in Adjudication 1, it can be seen that the main relevant submissions raised by HG in relation to ambiguity and/or uncertainty of the works comprised in the Sections were:

(1)
that the scope of the works contained in the sections was ambiguous and/or uncertain;

(2)
that the value of the works contained in the section were ambiguous and/or uncertain

(3)
that it was not possible to operate the proportional relief against LADs contemplated in clause 17.1.4. when partial possession was taken as part of a section

(4)
that the LADs provisions was invalid and/or unenforceable

65.
The starting point for all those submissions was, in my judgment, the contention that the scope of the works contained in the sections was ambiguous and/or uncertain. I do not consider that those submissions went outside the terms of the dispute which was referred to the Adjudicator in Adjudication 1. Whilst the argument based on Taylor Woodrow and the contention in relation to clause 17.1.4. did raise matters which were outside the precise contentions raised on behalf of HG in the letter of 12 July 2005, it was a contention which HG could raise in respect of the more general proposition 1 and, in any event, I consider that it would be a permissible development of the dispute raised on proposition 2.

66.
On that basis, I now consider the terms of Decision 1 and whether it dealt with the relevant dispute.

The Scope of Decision 1

67.
Decision 1 is brief. It runs to five pages. At paragraph 7 it identified HG's arguments which the Adjudicator, Mr Hough, summarised in the relevant part as follows: "In essence HG submits that it is not possible decide, with any precision, what works are comprised in each of several of the 10 Sections under the Contract. … HG submits that the Contract mechanism is flawed fundamentally and the LAD provisions therefore fail."

68.
At paragraph 10 he summarised his main conclusions in these terms: "I am satisfied that it is possible, as a matter of objective construction of the terms of the Contract, to decide what works are included in each Section. … I do not accept that the matter is incapable of precise ascertainment, although the result of that ascertainment may be a matter of disagreement. The fact that there are a number of possible outcomes to such an analysis of the Contract and the subsequent application of the evidence does not mean that the matter cannot be decided with certainty."

69.

At paragraph 5 Mr Hough set out his decision in these clear terms: “The provisions within the Contract for the deduction of liquidated and ascertained damages (“the LAD provisions) are valid and enforceable” and stated that the reasons given in the letter of 12 July 2005 were incorrect.

70.
In my judgement that decision was sufficient to deal with each of these main relevant submissions identified in para. 64 above because:

(1)
The Adjudicator expressly dealt with the contention that the scope of the works contained in the Sections was ambiguous and/or uncertain. He held that it was possible to decide what works are included in each Section.

(2)
The Adjudicator did not need to deal expressly with the arguments about the value of the sections or the possibility of operating clause 17.1.4. because those arguments were based on the submission that the scope of works being uncertain and fell with the finding on that contention.

(3)
The Adjudicator made a clear decision that the LADs were valid and enforceable.

71.
Mr Bartlett submits that the Adjudicator did not make any decision about how or whether clause 17.1.4. might or might not be operable when there had been partial possessions of Sections.

72.
Mr Bartlett also submits that the Adjudicator must have acceded to Ashwell’s objection in paragraph 37 of the Rejoinder that clause 17 and HG’s argument about allocation of the Contract Sum to Sections was not the subject of a pre-existing dispute and had not been referred to the Adjudicator.

73.
For the reasons set out above, Decision 1 did deal with the argument that clause 17.1.4. was inoperable. That argument was based on the premise that there was uncertainty in the scope and therefore the value of the Sections of the Works.

74.
In relation to paragraph 37 of the Rejoinder and the argument raised by Ashwell in relation to paragraphs 4.5.9 to 4.5.12 of the Response, I consider that there are a number of points. First, the argument relating to clause 17.1.4. raised in paragraphs 4.5.9 to 4.5.12 is similarly an argument relating to the contention that works cannot be allocated between the Sections. The contention is that £1.1m “equates to works which [Ashwell] is unable to allocate to any one Section”. I emphasise the word “works”. The point being made is that the value of any particular Section cannot be valued because the works cannot be allocated.

75.
Secondly, the clause 17.1.4. argument depends on it not being possible to value the sectional works.

76.
Thirdly, paragraph 37 of the Rejoinder raises a point which is well made. Whether the figures which are set out in TPA’s letter of 28 September 2005 are the appropriate values is not the subject of a dispute which has been referred to the Adjudicator. This is made clear in paragraph 38 of the

Rejoinder where it is accepted that the figures in the invoices can be referred to adjudication but not in Adjudication 1.

77.
I do not therefore consider that Paragraphs 4.5.9 to 4.5.12 of the Response adds anything to the argument already set out up to and including paragraph 4.5.8. HG is merely attempting to rely on the letter of 28 September 2005 to show the difficulty in allocating the work to Sections and therefore valuing Sections and is seeking to support the argument made in paragraph 4.5.8 of the Response. Neither do I consider that Ashwell's Rejoinder made anything but a proper objection to prevent the adjudicator from determining whether the values in the letter of 28 September 2005 were the correct values. Rather, I consider that, for the reasons given above, the Adjudicator did determine the issues raised by paragraphs 4.5.9 to 4.5.12 in Decision 1.

78.
As a result, I consider that Decision 1 did decide on the disputes referred for the decision of the Adjudicator in Adjudication 1, as set out in the two propositions and as developed, in particular, in relation to arguments based on the valuation of Sections and proportional reduction under Clause 17.1.4.

Adjudication 2

79.
I can deal with this briefly. The Notice of Adjudication dated 26 June 2006 sought the decision of the Adjudicator on a dispute as to " the provisions within the contract for liquidated and ascertained damages". The issue as set out at paragraph 2(i) of the Notice of Adjudication on the face of it is a repeat of the issue set out at paragraph 4.5.8 of the Response in Adjudication 1. This is confirmed in paragraph 3.5 of the Referral where HG said, incorrectly as I have now found, that Decision 1 "did not include the issue of whether, following Ashwell taking partial possession of parts of the Sections, it was possible to value Sectional Works and if not whether the proportional relief against Liquidated and Ascertained Damages contemplated was incapable of being calculated."

80.
The submission by HG substantially repeated the argument in paragraphs 4.5.8 and 4.5.9 to 4.5.12 of the Response in Adjudication 1.

81.
Ashwell objected on the basis that the matters had already been the subject of Adjudication 1. The Adjudicator, Mr Riches, decided that Mr Hough had not dealt with certain arguments (paras 81 to 114 of Decision 2) and then went on to consider whether the LAD provisions were inoperable and void for want of certainty (paras 160 to 188 and 251). However, the parties have agreed that those parts are not binding upon them by the terms of the Consent Order dated 6 October 2006 in relation to the court proceedings commenced in respect of Decision 2.

82.
In my judgment the only direct relevance of Decision 2 is that there is nothing in that decision which is binding on the parties in relation to the issue of the validity or enforceability of the LAD provisions. Rather, for whatever reason, the parties agreed that the relevant parts of Decision 2 were not binding.

83.

It should, however be noted that in Decision 2 (para 116 to 159) the Adjudicator dealt with the question of the scope of the Works in the Sections and determined what was the scope.

Adjudication 3

84.
Decision 2 was made on 31 August 2006 and on 11 September 2006 HG commenced Adjudication 3 in which it sought repayment of £184,627 which had been deducted as LADs between 10 October 2005 and 12 April 2006.

85.
Because the issue of what works fell within what Section had already been determined in Decision 2, HG now concentrated on the argument under clause 17.1.4. In the Referral at paragraph 14 and on the basis of Taylor Woodrow HG submitted that for the proportioning down of damages in clause 17 to be effective "it must be possible from the Contract to value the sectional works".

86.
At paragraph 18 of the Referral HG submit that, as in Taylor Woodrow, "it is not possible to value any sectional works and therefore the proportional relief against LADs contemplated is incapable of being calculated". At paragraphs 19 to 21 HG refer to Adjudication 2 and cite paragraphs from Decision 2 which were later agreed not to be binding by the Consent Order.

87.
HG then referred to the Part 8 proceedings (which had not by then been compromised) and maintained that the Adjudicator, again Mr Riches, could decide the following issue, which had formed para. 2(i) of the Notice of Adjudication in Adjudication 2: "that whilst the employer took partial possession of parts of the sections it is not possible to value the Sectional works and therefore the proportional relief against Liquidated and Ascertained Damages contemplated is incapable of being calculated."

88.
On the face of it that was the same issue, or substantially the same issue, as was included by HG in the Response in Adjudication 1 at paragraphs 4.5.8 and 4.59 to 4.5.12.

89.
Ashwell declined to take part in Adjudication 3. Mr Riches made Decision 3 dated 19 October 2006 and at paragraph 41 recorded that it was Ashwell's position that he had no threshold jurisdiction on the basis that what was before him had already been decided by Mr. Hough.

90.
Mr Riches considered the question of jurisdiction and decided to continue on the basis that "there is a distinction to be made as to whether or not the clause in the contract pertaining to the liquidated and ascertained damages provisions is binding in principle as opposed to whether it is binding on the application of the facts" (para 49 of Decision 3). However, as can be seen, he did not make a decision on the application of facts but rather decided the matter based on the provisions of the Contract. This is not a case where a new factual position arose giving rise to a new argument.

91.
In proceeding to consider issue 1: "Should the liquidated and ascertained damages be paid to [HG]" the Adjudicator set out at paragraphs 56 and 57 of Decision 3 that: "What [HG] dispute is that the value of work included in the contract sum in respect of any section is capable of being determined

from contract documents…. Equally [HG] say that it is not possible to value the proportional relief when one of the sections is taken into partial possession."

92.
The Adjudicator set out at paragraph 65 that from the contract documents he had determined what the physical extent of the work was in each Section. He then continued with the submissions of HG in respect of the decision in Taylor Woodrow, the Section boundaries and the value of the work included in the Contract Sum in respect of each Section.

93.
The Adjudicator then set out his decision and concluded in paragraph 96 that "there is no basis on which the liquidated damages operate and therefore they should be refunded", leading to the decision that HG should be paid the sum of £184,627.00 by way of refund of liquidated damages.

94.
Mr Bartlett submits that the dispute referred to adjudication in Adjudication 3 differed in substance from what had been decided in Decision 1 and that Mr. Riches decided this different dispute in Decision 3, as he was entitled to.

95.
Miss O'Farrell submits that Mr Hough was asked in broad terms to decide in Decision 1 whether the provisions of the Contract for deducting liquidated and ascertained damages were valid and enforceable and that Mr Hough did so decide and that it was not open for Mr Riches to decide in Adjudication 3, on any grounds, that the same provisions were not valid and enforceable.

96.
As I have said above, the issue which was raised in Adjudication 3 by HG as the basis for recovering the LADs was that already set out in Adjudication 1 at para. 4.5.8 and 4.5.9 to 4.5.12. That argument was supplemented by HG in "Appendix 2 to the Referral" referred to in paragraph 70 of Decision 3. Paragraphs 44 to 48 of that document set out some further matters.

97.
At paragraph 48 of that document HG submit that "of the Contract Sum of £3,523,159.00 only the sum of £2,049,735.28 can be allocated with any degree of certainty to a particular Section. So far as the remainder of any allocation will be wholly arbitrary and artificial. It follows, as above, that it is very probable that there are an infinite number of values that can be ascribed to the 10 sections."

98.
However the fact that only part of the Contract Sum could be allocated was the same submission made in para 4.5.12 of the Response in Adjudication 1, although the allocated values were different. At that stage, as I stated above, the argument on allocation depended on the inability to allocate work. I consider that point is still being made by HG in Adjudication 3.

99.
Even if, however, there was some development of a new point on valuation, independent of work allocation, the underlying argument is the same or substantially the same as that raised in paragraphs 4.5.8 and 4.5.9 to 4.5.12 of the Response to Adjudication 1. It depends on the ability to value the works in each Section.

100.

That point was decided, as I have found, in Decision 1. In any event, I consider that Miss O'Farrell is correct in her submission that, even if this were a new argument challenging the validity or enforceability of LADs, it could not be raised as that dispute had already been raised and decided in Adjudication1.

101.
The decision of the Adjudicator as gleaned from paragraphs 62 to 96 of Decision 3, even read benevolently as Mr Bartlett submits it should be, is determining the same dispute as in Decision 1, that is, that because the scope of work in any section is uncertain, the value is uncertain. This is evident from para. 94 of Decision 3 which immediately precedes his conclusion in para. 96 and where the Adjudicator states and I emphasise: "The contents of any section and therefore their values are not contained in the contract other than by broad definition. There is no mechanism agreed by the parties whereby they could be ascertained."

102.
Even if, as appears at the highest in paras 85 to 89 of Decision 3, there might have been a development in the argument based on the ability to allocate the Contract Sum to the Sections, independently of the allocation of the Works, that dispute and the consequent reliance on clause 17.1.4 would certainly be substantially the same as the dispute referred to and decided in Decision 1. The argument is one of principle: whether it is possible to derive a value for the Sections of the Works from the Contract.

103.
As Mr Bartlett properly accepted in argument, having raised the "penalty" argument based on the grounds put forward, HG could not at a later stage have raised another argument that the LAD provisions were a "penalty". Equally, in my judgment, HG could not seek to establish that the LAD provisions were invalid and/or unenforceable by relying on another argument based on the uncertainty of the provisions of the Contract in relation to the division of the Works between the Sections or the division of the Contract Sum between the Sections, whether that is consequential or independent of the argument about the division of the Works. This is not a case similar to applications for extensions of time where there is a changing factual position and later extensions of time are based on a different set of facts.

104.
I therefore conclude that the dispute referred to adjudication in Adjudication 3 was the same or substantially the same as the dispute referred to adjudication and decided in Decision 1. It follows that the Adjudicator's decision in paragraph 96 of Decision 3 that "there is no basis on which liquidated and ascertained damages operate" is based on the determination of the same or substantially the same dispute raised by HG and decided in Adjudication 1. It is not therefore binding on the parties.

Summary

105.
As a result, the decision in Decision 3 that Ashwell should pay £184,627 to HG by way of refund of liquidated damages, is based on a finding which is contrary to Decision 1. Under the provisions in Clause 39A.7.1 it is Decision 1 and not Decision 3 which is binding on the parties.

106.

Accordingly HG’s application for summary judgment in the sum of £184,627 based on Decision 3 is dismissed.