Neutral Citation Number: [2008] EWHC 2333 (TCC)

Case No: HT-08-215

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17th September 2008

Before:

MR. JUSTICE COULSON

- -

Between:

BENFIELD CONSTRUCTION LIMITED **Cla**

- and -

TRUDSON (HATTON) LIMITED **Defe**

- -

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Ms. Camille Slow (instructed by **Wright Hassall LLP** for the **Claimant**

Mr. Piers Stansfield (instructed by **Else Commercial**) for the **Defendant**

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Judgment

MR. JUSTICE COULSON:

A. INTRODUCTION

1.
This is a contested application to enforce the decision of the adjudicator dated 2nd July 2008, given in the claimant's favour, in the sum of £79,569.79. The defendant maintains that the adjudicator had no jurisdiction to reach this decision because the dispute was the same or substantially the same as an earlier dispute previously referred to and decided by another adjudicator. Accordingly, this is another case illustrating the potential difficulties of what has come to be called serial adjudication.

2.
I set out in **Section B** below a summary of the relevant facts. At **Section C** below, I identify the relevant principles and, at **Section D** below, I analyze whether the adjudicator had the necessary

jurisdiction to reach the decision of 2nd July 2008. I have been greatly assisted in this task by the clarity and economy of counsel's submissions.

B. BACKGROUND FACTS

B.1. The Contract

3.
By a contract dated 21st December 2005, which incorporated the JCT Standard Form of Contract (With Contractor's Design) 1998 edition, the defendant employer engaged the claimant contractor to carry out the design and construction of two houses and external works on land known as Hatton Flight, near Hatton in Warwickshire. The defendant's agent for the purposes of the contract was Osborne Clewett Colledge, ("Osbornes"). The date for completion was 29th September 2006. The rate of liquidated damages was £1,500 per week.

4.
Clause 16.1 of the JCT standard form dealt with practical completion and provided that when works have reached practical completion:

"…the Employer shall give the Contractor a written statement to that effect, which statement shall not be unreasonably delayed or withheld and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such statement."

Pursuant to clause 17.1, the defendant was entitled, prior to practical completion of the works, but with the claimant's contractor's consent, to take possession of any part or parts of the works and, if that happened, clause 17.1.1 provided that practical completion of the relevant part "shall be deemed to have occurred" on the date of partial possession. Clause 24 allowed for the deduction of liquidated damages, and clause 25 allowed the contractor to make a claim for extensions of time on the happening of certain relevant events. Clause 25 permitted the employer to deduct liquidated damages provided that there was a notice of non-completion.

5.
The adjudication provisions of the contract are set out in clause 39A. It is unnecessary for me to recite them all, but it is perhaps important that I set out in full clause 39A.7, which provided:

"7.1. 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.

7.2. The Parties shall without prejudice to their other rights under the Contract comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator [is] given effect.

7.3. If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 39A.7.1"

B.2. History

6.
The works were seriously delayed. Osbornes granted the claimant an extension of time to 25th May 2007 but the works remained incomplete.

7.
On 17th August 2007, a representative of Osbornes and a representative of the claimant contractor signed a proforma document that had been produced for that purpose by the claimant. The document bore its name and then went on to say:

"Handover Form - COMMERCIAL

Project: Hatton Flights

Client: Trudson (Hatton)

I confirm that on the final inspection of this property the works were accepted as complete, subject only to the following outstanding items being dealt with in a reasonable time..."

The document then set out a list of defects. In addition, there was confirmation that sets of keys and operating and maintenance manuals had been provided. Certain other keys were said ‘to follow’.

8.
On 3rd September 2007, Osbornes wrote to the claimant saying that, in view of the existence of a particular defect in the floor screed, it was not possible for them to certify practical completion. In its reply of 5th September, the claimant took issue with this, pointing out that the defect with the screed was not a matter identified in the handover form of 17th August and that, as a result, practical completion was effective from 17th August. The fact and content of the handover form was therefore critical to the claimant’s case from the outset.

9.
It is, I think, common ground that the properties suffered from a variety of defects and required extensive remedial works which were carried out by the claimant over the following months. Those works have been recently completed and Osbornes have certified practical completion as having been achieved on 14th August 2008.

B3. Adjudication 1

10.
On 4th April 2008, the defendant's solicitors served a notice of adjudication. The dispute referred to adjudication was said in the notice to arise out of the defendant's contention that practical completion had not at that stage occurred whilst, as we have seen, the claimant was saying that it had occurred on 17th August 2007. The defendant sought a declaration that practical completion had not occurred at the date of referral, namely 4th April 2008.

11.
In the subsequent referral notice, the defendant again identified the claimant's principal contention that practical completion had occurred on 17th August 2007. It was said that that claim arose "both on the basis that as a matter of fact the works were complete and on the basis of the production of certain documents ...". This point was developed in paragraph 5.5 of the referral notice as follows:

"Benfield rely upon a documentary argument that certain documents, namely Handover Forms, were signed by a representative of Osbornes and, therefore, a Statement of Practical Completion has been issued which is binding on the parties regardless of the factual position on site. It appears to be common ground that the ongoing damp/moisture issues on site must have arisen prior to 17th August 2007. There is no evidence that, for example, this is a latent defect which has subsequently appeared."

12.
In its response, the claimant did indeed allege that practical completion occurred on or about 17th August 2007 and relied expressly upon the handover form: see paragraphs 16.18 to 16.23 of that document. At paragraph 16.20 the claimant alleged that practical completion "was and is deemed for all the purposes of the contract to have taken place on the day named in the written statement [the handover form], 17th August 2007". In addition paragraph 16.21 alleged that the handover form "has deeming effect".

13.
Nowhere in that document (or indeed in any of the documents provided to the adjudicator) did the claimant draw any distinction between clauses 16 and 17 of the contract. But in my judgment, the various passages from the adjudication documents to which I have referred above make plain that the dispute as to practical completion was both a matter of fact and also something that, according to the claimant, was deemed to have happened as a result of the contents of the handover form of 17th August 2007.

14.
At paragraphs 30-34 of his decision of 14th May 2008 the adjudicator, Mr. Don Smith, considered the handover form and concluded that practical completion had not occurred on 17th August 2007, and had still not occurred at the date of the adjudication notice. In reaching that conclusion, he dealt in some detail with the contents of the handover form itself. He expressly rejected the suggestion that the form "can be deemed to be a written statement to the effect that practical completion had taken place". Paragraph 33 of his decision sets out the particular reasons for that conclusion. He made no express reference to clause 17.

B.4. Adjudication 2

15.
Adjudication 2 was also commenced by the defendant's solicitors on 4th April 2008. It was concerned with the liquidated damages due to the defendant if it was right and no extension of team was due, so that practical completion had still not been achieved. It is common ground that the claimant's response in the second adjudication repeated, in the same or substantially the same terms, the points about deemed practical completion that were set out in their response in adjudication 1 (paragraph 12 above). The same adjudicator, Mr. Smith, considered that the defendant was entitled to liquidated damages for the relevant period and awarded them the sum of £75,428.57. It is also common ground that that sum has been paid by the claimant.

B.5. Adjudication 3

16.
By a notice of adjudication dated 28th May 2008 the claimant's claims consultants sought to initiate a third adjudication. Paragraph 7 of the notice said that the defendant had taken partial possession of the project on 17th August 2007. Paragraph 8 went on to say this:

"Accordingly, Benfield contends that notwithstanding the decision made by Mr. Smith (in Adjudication No 1) that Practical Completion had not occurred at the date of his Decision, 14th May 2008, Trudson is not entitled to recover liquidated and ascertained damages from Benfield for the period after 17th August 2007. Benfield further contends that Practical Completion is deemed to have occurred for the purposes of clause 30.4.1.2 of the Contract and that Benfield is entitled to the release of the first half

of retention calculated on the gross value of the work certified by Osbornes in interim payment certificate number 14 dated 5th September 2007."

17.
In consequence of this position, the claimant sought declarations to the effect that the defendant was not entitled to liquidated damages for the period after 17th August 2007. The defendant objected to the notice and participated in the third adjudication without prejudice to its primary contention that the adjudicator in the third adjudication had no jurisdiction to address this issue. There is no suggestion of any subsequent waiver on the part of the defendant.

18.
In a decision dated 2nd July 2008 the adjudicator in the third adjudication, Mr. Robert Sliwinski, rejected the defendant's case and considered that practical completion should be deemed to have taken place on 17th August 2007 and that, as a result, the defendant was not entitled to liquidated damages. That is the decision which the claimant now seeks to enforce and to which the defendant objects on jurisdictional grounds.

19.
I should make plain that Mr. Sliwinski did deal at paragraph 2 of his decision with the jurisdictional point that is at the heart of the issue before me this afternoon. He said this:

"Practical Completion and Partial Possession are two different aspects of the same Contract. It is correct that both matters affect the parties' obligations under the contract and in particular the clause dealing with liquidated damages. I accept that Mr. Smith has decided the position vis-à-vis Practical Completion of the works and that I should not interfere with that Decision, however, it is also obvious that Partial Possession can occur before Practical Completion and Mr. Smith's Decision will not impact upon the case being put forward with regard to Partial Possession. In the event that I find that Partial Possession has been agreed then the natural consequences of that must be allowed to flow. In this respect Mr. Smith's decision as to Liquidated and Ascertained Damages would have to be read in conjunction with any Decision made in this Adjudication where it affects the matter of Liquidated and Ascertained damages."

C. THE RELEVANT PRINCIPLES

C1. The Starting Point

20.
The starting point for any consideration of the relevant principles in a case of this sort is, of course, clause 39.A.7.1 of the contract, set out at paragraph 5 above. In **HG Construction Ltd v. Ashwell Homes (East Anglia) Ltd** [2007] EWHC 144, [2007] BLR 175 Ramsey J described this same provision as "providing a limit to serial adjudications."

21.
Precisely the same effect is achieved by those contracts which incorporate paragraph 9.2 of the Scheme for Construction Contracts. That provides 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 earlier adjudication. As Dyson LJ observed in **Quietfield Ltd v. Vascroft Construction Ltd.** [2007] BLR 67 at paragraph 45 "it must necessarily follow that the parties may not refer a dispute to adjudication in such circumstances."

C2. Earlier Authorities

22.
There are a series of earlier authorities dealing with the possible overlap between an earlier and a later adjudication. Whether or not the later decision was enforced in those cases depended on whether, as a matter of fact and degree, the subsequent dispute was the same or substantially the same as that decided in the earlier adjudication. In the reported cases, many decisions of subsequent adjudicators were indeed enforced by the courts: see, for example, **VHE Construction Plc v. RBSTB Trust Co.** [2000] BLR 187, **Mivan Limited v. Lighting Technology Projects Limited** [2001] ADJCS 04/09 (TCC) and **Skanska Construction UK Ltd v. The ERDC Group Ltd** [2003] SCLR 296. If there is any sort of common thread in those cases it is that the material relied on in the second adjudication was, as a matter of fact, very different to that relied on in the first, giving rise to what was described as 'a separate and distinct factual enquiry' second time round. Other later examples of this trend are the decisions in **Emcor Drake & Skull Limited v. Costain Construction Limited** 97 Con. LR 142 and **David McLean Contractors v. The Albany Building Limited** [2005] EWHC B5 (TCC), a decision of His Honour Judge Gilliland QC.

23.
The only early case which deals with matters of principle is the decision of His Honour Judge Thornton QC in **Sherwood & Casson UK Ltd v Mackenzie Engineering Ltd** [2004] TCLR 418. There the judge considered the approach that a court should adopt when enquiring whether the two disputes were the same or substantially the same. He said that, in conducting that enquiry, the court would give considerable weight to the decision of the adjudicator and would only embark on a jurisdictional enquiry in the first place where there were real grounds for concluding that the adjudicator had erred in deciding that there was no substantial overlap. He went on to say that it would be rare to find circumstances that would necessitate such an enquiry.

24.
Miss Slow argued on behalf of the claimant that this was the correct approach in the present case. Mr. Stansfield noted that, in that case, the learned judge was dealing with the situation where any investigation into overlap would inevitably involve a detailed factual enquiry, whilst the present case was much more straightforward. It seems to me that Mr. Stansfield is certainly right to say that the enquiry necessitated here is far less detailed than that required in **Sherwood & Casson**, but I am inclined to the view that any decision by an adjudicator, including one on jurisdiction, is a matter which ought to be the subject of careful consideration by the court in circumstances where that court is being invited not to enforce the adjudicator's decision.

C.3. Later Authorities

25.
There are two more recent and more important authorities on the topic of serial adjudication, both of which I have already referred to. The first is **Quietfield Ltd v. Vascroft Construction Ltd**.[1] . In the first adjudication in that case, the contractors Vascroft had claimed an extension of time by reference to two specific letters. Their claim failed on the facts. In the third adjudication, the employer, Quietfield, sought liquidated damages on the basis that there were no outstanding extension of time claims, and those that had been made had failed. However, Vascroft defended the claim for liquidated damages with reference to a much greater range of factual material than had been contained in the two claim letters. This new material was collated in a document called Appendix C. The adjudicator in the third adjudication excluded Appendix C because, he said, it went to a matter that had already been decided in the first adjudication. Jackson J concluded that the disputes were different and that the adjudicator in the third adjudication had been wrong not to consider Appendix C.

26.
At paragraph 42 of his judgment in that case, Jackson J identified four principles applicable to serial adjudications. It is unnecessary to set those out in this judgment, not only because those principles were expressly concerned with adjudications concerned with extensions of time, which is not this case, but also because, following the decision at the Court of Appeal in **Quietfield,** the relevant principles have, I think, been restated more generally by Ramsey J in **HG Construction** (see paragraph 34 below).

27.
On appeal the Court of Appeal upheld Jackson J in **Quietfield**. Both May LJ and Dyson LJ confirmed the conclusion that, because the material in Appendix C was substantially different to the material in the two claim letters, the material in Appendix C should have been considered by the third adjudicator.

28.
It should be noted that, although of marginal relevance to the present dispute, Dyson LJ added a qualification to the first two of the principles enunciated by Jackson J and made the point that it was not necessarily the case that every dispute arising from the rejection of an application by the contractor for an extension of time might then subsequently be referred to the adjudication. He said that it would always depend on the terms of the contract and the nature of the dispute being referred.

29.
Dyson LJ also dealt with the provisions of paragraph 9.2 of the scheme to which I have already referred. At paragraph 46 he said:

"This is the mechanism that has been adopted to protect respondents from having to face the expense and trouble of successive adjudications on the same or substantially the same dispute. 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 about **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.”

30.
Although it does not appear that any adjudication authorities were cited to the Court of Appeal on this topic of issue estoppel, it does seem to me that Dyson LJ's remarks were consistent with points made by His Honour Judge Humphrey Lloyd QC in **KNS Industrial Services v. Sindall Ltd** [2000] EWHC 75 (TCC) and Lord MacFadyen in **Construction Group Centre Limited v. The Highland Council** [2002] BLR 476. Whilst, in the latter case, Lord MacFadyen was dealing with a slightly different point (namely a party's failure to take a point in the adjudication and its subsequent attempt to rely on that point to defeat enforcement), he made plain that such a staged approach was not appropriate:

"The fact that the defenders chose not to advance their retention argument before the adjudicator does not, in my view, entitle them to rely on it now for the purpose of depriving the adjudicator's award of the enforceability which the Act and the parties' contract conferred upon it."

31.
The other significant recent case is **HG Construction,** to which I have also referred above. There the first adjudicator decided that, despite the contractor's arguments that the workscope for each section of the contract was uncertain, the liquidated damages provisions in the contract were valid and enforceable. There was then a subsequent adjudication (in fact the third), again instituted by the

contractor, on the basis that liquidated damages had been wrongfully deducted because the employer had taken partial possession. The employer refused to take part in that adjudication on jurisdictional grounds, and the third adjudicator found in favour of the contractor.

32.
Ramsey J decided, after a careful analysis of the nature, scope and extent of the disputes in both adjudications, that the dispute referred in the third adjudication was the same or substantially the same as the dispute previously referred to and decided by the first adjudicator. In those circumstances he said that the third adjudicator's conclusion, to the effect that there was no basis on which the liquidated and ascertained damages could operate, was invalid because it was based on the determination of the same or substantially the same dispute that had been raised and decided first time round. He therefore said that the third adjudicator's decision was not binding on the parties and that it was the first decision which had the temporary finality of a valid adjudication decision.

33.
In his judgment, Ramsey J dealt in detail with **Quietfield**. He distinguished it on the facts, noting that in **HG Construction** there was not a changing or different factual position; it was not a case where later claims for an extension of time had been based on different factual material. On the contrary, in **HG Construction** the underlying factual material in both the first and third adjudication was the same, so that once the first adjudicator had decided that the liquidated damages provisions were valid and enforceable, the subsequent adjudicator could not go behind that decision.

34.
In my view the relevant principles that apply in cases of this sort are those set out in paragraph 38 of the judgment of Ramsey J where he expressly considered the effect of clause 39A.7.1. I summarize those principles as follows:

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

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

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

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

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

35.
Ramsey J also dealt expressly with the situation in which one party could have raised a particular issue in an adjudication but did not do so and the extent to which that point could be run in a subsequent adjudication (paragraphs 29-30 above). In **HG Construction**, on the particular facts of

that case, he concluded that the point could not be taken subsequently, commenting at paragraph 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."

36.
With those principles in mind, I turn to analyze the contention that the adjudicator in the third adjudication had no jurisdiction to reach the decision that he did reach on 2nd July 2008, because the issues concerning practical completion and liquidated damages had already been decided by the first adjudicator.

D. THE JURISDICTION OF THE ADJUDICATOR

D1. Are There Real Grounds For Concluding That The Adjudicator Erred?

37.
Adopting, for present purposes, the approach set out in **Sherwood & Casson** by His Honour Judge Thornton QC, I have to first ask myself whether there are real grounds for concluding that the adjudicator in the third adjudication erred because there was a substantial overlap between that which he was being asked to decide and that which had already been decided by Mr. Smith.

38.
In my judgment, it cannot sensibly be argued that there are no real grounds for concluding that the adjudicator in the third adjudication erred in deciding that there was no such overlap. I arrive at that conclusion in this way. In the first adjudication, it was decided that practical completion had not taken place on 17th August 2007, whilst in the third adjudication, it was decided that practical completion must indeed be deemed to have taken place on that very date. Similarly, in the second adjudication it was decided that the employer was entitled to some £75,000 worth of liquidated damages, whilst in the third adjudication it was decided that the employer was not entitled to any liquidated damages at all. In those circumstances it is difficult to imagine a more obvious case of overlap and, indeed, a starker case of fundamentally contrary decisions.

D.2. Did The Adjudicator Have The Necessary Jurisdiction To Consider And Decide The Dispute In The Third Adjudication?

39.
I am in no doubt that the adjudicator in the third adjudication did not have the necessary jurisdiction to deal with the alleged dispute identified in the notice of arbitration. There are three separate reasons for that conclusion: the similarity between this case and **HG Construction**; the fact that the same or substantially the same disputes were dealt with in adjudications 1 and 2, and adjudication 3; and the question of issue estoppel and the prohibition against serial adjudication. I deal with each in turn below.

(a) HG Construction

40.
I consider that, in all significant ways, this case is indistinguishable from **HG Construction**. There the claimant was bound by a decision against him concerning the enforceability of the liquidated damages provisions, but still sought to avoid liability for liquidated damages by reference to an argument about partial possession. That attempt failed. It seems to me that, in the present case, the claimant is also seeking to rely on partial possession to avoid liability for liquidated damages, notwithstanding Mr Smith's earlier decisions as to practical completion and the claimant's liability for liquidated damages. In those circumstances it seems to me that there is no material difference between **HG Construction** and this case and that the same result must eventuate.

41.
Indeed, it is probably right to say that, on the facts, this case is even stronger than **HG Construction**. There the overlap was slightly less clear-cut. Here, for the brief reasons I have already outlined, the overlap was, or must have been, obvious to all. The results in the first two adjudications would be completely obliterated if the result in the third adjudication was allowed to stand.

42.
I deal in more detail in paragraphs 43-50 below with the precise nature of the disputes in the present case. However, by way of a general point, I accept Mr. Stansfield's argument that one of the deciding factors in **HG Construction** was the width of the dispute which was referred to the adjudicator in the first adjudication, and which it was said could not, therefore, be opened up by the mechanism of the third adjudication. The width of the dispute in the first adjudication in **HG Construction** was dealt with at paragraph 52 of the judgment of Ramsey J. Similarly, in the present case, I accept that, such was the width of the disputes being referred in adjudications 1 and 2 (which I have summarized above), Mr Sliwinski did not have the jurisdiction to re-open any question of practical completion or liquidated damages in the third adjudication.

(b) The Same Or Substantially The Same Dispute

43.
I have concluded that, as a matter of fact and degree, the dispute in the third adjudication was the same or substantially the same as the disputes that had been decided in the first and second adjudications. There are a number of reasons for that conclusion.

44.
First, I find that there were no different material facts presented in the third adjudication which had not already been presented (and indeed considered and dealt with in his decision) by the first adjudicator. Thus, the most common reason why, in the past, courts have often concluded that there was not sufficient overlap, and that the later adjudicator's decision should be enforced, does not arise here.

45.
At the conclusion of his helpful skeleton argument, in a passage to which he drew my express attention at paragraph 63, Mr. Stansfield said this:

"It cannot be said that there was a changing factual situation between Adjudications 1 and 2, and Adjudication 3, all of which took place after the handover from had been signed and which included

consideration of its effect. Far from it: Adjudication 3 was based on precisely the same document, the Handover Form, as had been considered in Adjudications 1 and 2."

It is, I think, impossible to reach any other conclusion. That is, therefore, an important factor in my conclusion that the dispute was the same or substantially the same as that in adjudications 1 and 2.

46.
Secondly, this conclusion is confirmed by a consideration of the detailed issues that were raised in adjudications 1 and 2. In the first adjudication, not only was the claimant saying that practical completion had been achieved on 17th August 2007, it was also alleging that practical completion had to be ‘deemed’ to have been achieved on that date. Whilst, as I have already noted, the claimant did not expressly differentiate between clauses 16 and 17, on the basis of all the material before him, Mr Smith was bound to conclude that the claimant was asserting practical completion both as a matter of fact and as a deemed consequence of the handover form. In my judgment, that is the only fair reading of the referral notices and the responses in adjudications 1 and 2, to which I have already referred.

47.
For that reason, therefore, not only was the question of practical completion in issue in that first adjudication, but so too were the consequences and effect of the handover form dated 17th August. That form formed the centrepiece of the claimant's case relating to practical completion; as a result, there can be no possible ground for saying now that the dispute raised in the third adjudication (which was also based entirely upon the handover form) was not the same or substantially the same as that which had arisen in adjudications 1 and 2.

48.
Thirdly, I consider that it is important to distinguish between the underlying dispute between the parties, on the one hand and, on the other, the issues and legal arguments which the parties choose to raise and deploy when setting out their side of that dispute. On behalf of the claimant, Ms Slow submitted that practical completion and partial possession were two completely different concepts and that the first adjudication was dealing with practical completion whilst the third adjudication dealt with partial possession [2] . She therefore submitted that the third adjudication was addressing entirely different matters to those raised in adjudications 1 and 2. In that regard, she relied on a decision of His Honour Judge Thornton QC in **Skanska Construction v. Anglo Amsterdam Corporation Limited** dated 20th June 2002. That was an arbitration appeal where Skanska where arguing for both practical completion on the facts, and deemed practical completion as a result of partial possession. The learned judge indicated in the introductory sections of his judgment that these were distinct ‘disputes’. He was not, of course, there dealing with an adjudication, where the word ‘dispute’ has a particular resonance. I accept Mr. Stansfield's submission that Judge Thornton meant no more than that these were two different issues that had arisen between the parties.

49.
I consider that it is the failure to distinguish between, on the one hand, the underlying dispute between the parties, and the issues/argument on the other, which lies at the heart of this point and constitutes the fundamental flaw in Mr Sliwinski’s reasoning (set out at paragraph 19 above). I am quite prepared to accept that partial possession and practical completion are different legal concepts and, depending on the facts, they might give rise to different issues, maybe even different disputes, between the contracting parties. However, what matters for present purposes is what the underlying dispute was that existed between the parties at the time of the first and second adjudications. In my judgment, that dispute was whether practical completion under the terms of the building contract

could be said to have occurred on 17th August and, if it had not, whether liquidated damages were due to the defendant employer. Therefore, in this case, the legal concept of partial possession only mattered because it was a way – perhaps the only way - in which the claimant could argue its side of the dispute, namely that practical completion had occurred (or should be deemed to have occurred) on 17th August 2007 and that, therefore, there was no liability to pay liquidated damages.

50.
In this case, partial possession and practical completion did not give rise to different disputes; the former was simply an aspect of - an issue to be determined within - the resolution of the underlying dispute as to practical completion and liquidated damages which was the subject of adjudications 1 and 2. Thus, once practical completion and liquidated damages had been decided by Mr Smith, his decisions could not be opened up, let alone comprehensively demolished, as they were by Mr Sliwinski.

(c) Issue Estoppel And The Prohibition Against Serial Adjudication

51.
There is a third reason why I have concluded that the claimant's application today should fail. It seems to me that the very highest that it can be put by the claimant is that it did not make any express reference to clause 17.1 in either the first or the second adjudication and that, therefore, it should be permitted to raise the point in the third adjudication. I have already set out the reasons why I do not believe that argument to be open to them on the facts, but assuming for a moment I am wrong about that, the question that then arises is whether the reference to Mr Sliwinski was contrary to clause 39.A.7. Did it amount to the serial adjudication of matters that could and should have been raised before?

52.
In my judgment, on this alternative basis, it would not be just, fair or appropriate under the contract to allow the reference to the third adjudication to stand. That is for the reason explained by Dyson LJ in **Vascroft** (paragraph 29 above) and Ramsey J in **HG Construction** (paragraph 35 above). It seems to me that, on any view, if the claimant wished to rely on the partial possession argument under clause 17.1, separately and independently of the central argument that it had already made about the handover form in the first and second adjudications, then it was plainly obliged to raise that matter there. If the claimant failed, on its own case, to emphasize sufficiently the effect of that handover form as a matter of contract construction, then that was entirely a matter for the claimant.

53.
Of course, as Dyson LJ pointed out, issue estoppel might be something of an imperfect analogy because of the particular rules relating to adjudication. However, it seems to me that, in the present case, it is a proper analogy to draw, just as Ramsey J found it to be in **HG Construction**. Moreover, the fact that adjudication only produces a remedy which is temporarily binding, so that the claimant can, if it so chooses, challenge that decision in arbitration or in court, only confirms my view that the court should be vigilant to prevent serial adjudications of matters which could and should have been raised first time round.

54.
Ms Slow made a spirited attempt to persuade me that it had not been necessary for the claimant to raise partial possession in either adjudication 1 or 2. The argument was that, because the partial possession argument under clause 17.1 presupposes that practical completion had not in fact been achieved, and that the dispute in adjudication 1 related to the actual state of the works, it was not

necessary to raise it there. She maintained that, because the liquidated damages dispute in adjudication 2 flowed on from adjudication 1, it was also unnecessary for the claimant to raise it in the second adjudication either.

55.
I consider that submission to be brave, but I do not accept it. It would have this effect. It would mean that a contractor could fight about practical completion and liquidated damages based on one set of legal arguments arising out of agreed facts and then, if it lost on those arguments, could dispute both practical completion and liquidated damages all over again, by reference to another set of legal arguments which arose out of exactly the same facts, and which, for whatever reason, it had not deployed first time round. It seems to me that such a method of proceeding would be an abuse of the process of adjudication. And that is not an idle point: the parties to adjudication do not recover their costs, no matter how successful they might be. Allowing one party to raise one legal issue at a time, in serial adjudications extending over many months or even years, until that party achieved a result that it liked, would place an intolerable burden on the other party. It was not the purpose for which adjudication was designed.

56.
For the avoidance of doubt, it is clear to me that any particular emphasis that the claimant wished to give to clause 17 (and therefore the partial possession argument) should and could have been raised in the first adjudication. Similarly, the same points could as well have been made in the second adjudication. Ms Slow does fairly accept, at least in relation to the second adjudication, that this was a matter which the claimant could have raised at that stage.

D. CONCLUSIONS

57.
Adjudication is supposed to be a quick one-off event; it should not be allowed to become a process by which a series of decisions by different people can be sought every time a new issue or a new way of putting a case occurs to one or other of the contracting parties. Given the clear result of the dispute as to practical completion and liquidated damages following adjudications 1 and 2, the claimant ought not to have commenced the third adjudication. If, as it obviously was, the claimant was unhappy with the results in adjudications 1 and 2, then the claimant should have gone either to an arbitrator or to the court in order to challenge those decisions.

58.
As I pointed out during argument, this was not, as Ms Slow maintained, a case of ‘use it or lose it’, because none of the claimant's fundamental legal rights could be affected in any way by the decisions in adjudications 1 and 2. The claimant had a clear and obvious course open to it: clause 39.A.7 makes plain that the decision of the adjudicator shall be binding unless and until the dispute or difference is finally determined by arbitration or by legal proceedings. That was the course that the claimant should have taken.

59.
By reason of:

a) the similarity of this case to **HG Construction**;

b) the fact that the dispute in the third adjudication was the same or substantially the same as that dealt with in adjudications 1 and 2; and

c) the prohibition against serial adjudication encompassed by clause 39A.7 and the rules relating to issue estoppel;

I conclude that the third adjudicator did not have the jurisdiction to embark upon and decide the issues in the third adjudication and I therefore decline to enforce his award.

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[1] At first instance, the neutral citation number is [2006] EWHC 174 (TCC)

[2] Of course, this was similar to the argument that Mr Sliwinski accepted in the third adjudication: see paragraph 19 above.