Case No: HT-10-424

Neutral Citation Number: [2010] EWHC 3366 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 22nd December 2010

Before :

MR JUSTICE AKENHEAD

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Between :

REDWING CONSTRUCTION LIMITED **Cla**

- and -

CHARLES WISHART **Defe**

- -

- -

Samuel Townend (instructed by **CJ Hough & Co**) for the **Claimant**

Camille Slow (instructed by **Quercus Law**) for the **Defendant**

Hearing date: 2 December 2010

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JUDGMENT

Mr Justice Akenhead:

1.
This adjudication enforcement claim raises two issues of interest, the first being whether the dispute decided in a second adjudication had been effectively decided in an earlier adjudication and secondly relating to whether the second adjudicator's correction or amendment to his decision went beyond the correction of a clerical error.

The History and the Contract

2.
The Claimant, Redwing Construction Ltd ("Redwing") was employed as a building contractor by the Defendant to complete a refurbishment of a domestic property at 3, Lyall Mews, London SW1. The refurbishment related to 4 floors of a mews house. The written contract (the "Contract") was in the standard JCT Prime Cost Building Contract form (2006 Revision 1 with amendments). Clause 8.2 was an adjudication clause by which either party could refer any dispute or difference arising under the Contract to adjudication.

3.

Essentially under this Contract Redwing was entitled by Clause 4.1 to be paid the Prime Cost (defined as "the cost of the Works ascertained in accordance with Schedule 1"), the Contract Fee (defined as "the fee referred to in Article 2, being either the Fixed Sum or Percentage Fee specified in the Contract Particulars") and any direct loss and/or expense ascertained under Clause 4.16. The Prime Cost in Schedule 1 included a large number of cost items such as staff on site, materials, plant and subcontractor costs. The Contract Particulars identified the Contract Fee as £3,500 per week. They also identified that the "Estimated Prime Cost" was £723,334.64, a breakdown of which was given in Appendix C; within that estimate was the sum of £98,000 for the Contract Fee. Possession of the Site was to be on 14 July 2008 with the Date for Completion to be 12 December 2008. The Date for Completion was subject to the usual extension of time provision.

4.
A number of variations were ordered. Redwing did not complete the Works by the original Date for Completion. An extension of time was awarded until 31 January 2009. In late March or early April 2009, Mr Wishart took possession of the ground floor. Practical Completion was achieved on 31 July 2009. Redwing submitted applications for extensions of time up to 1 May 2009. These were disputed.

The First Adjudication

5.
By letter dated 20 July 2009, Redwing gave Mr Wishart Notice of Adjudication. Redwing referred to its applications for extension of time and then stated:

"Under Paragraph 1 (3) of the Scheme we are required to give you the following information:

(a) The dispute involves the extension of time awarded by the Contract Administrator in respect of the delays for which the Employer is liable under the Contract. Whilst we have demonstrated entitlement until 1 May 2009 the Contract Administrator has only awarded an extension of time until 31 January 2009 and has only certified part payment of the Contract Fee against this award…

(b) The dispute has arisen in the period between February and June 2009. We do not consider that the Contract Administrator has evaluated our entitlement correctly…

(c) We are seeking the following decisions and/or declarations and/or directions from the Adjudicator:

(i) the award of an extension of time to 1 May 2009, or such other date (s) as the Adjudicator shall determine; and

(ii) that [Mr Wishart] shall pay [Redwing's] Contract Fee in the sum of £3,500.00 per week and/or loss and expense (or such other sum as the Adjudicator shall determine) for the period of the extension of time determined by the Adjudicator within seven days of the Adjudicator's decision (or such other period of the Adjudicator shall determine) without any withholding, set-off or deduction whatsoever…"

Mr Sutcliffe was appointed as adjudicator ("the First Adjudicator").

6.
The Referral which followed was entitled "Application for Extension of Time and Payment of Contract Fee"; it ran to 36 pages. In the "Summary of dispute", at Paragraph 2.1.2 Redwing stated that it had:

"made applications in respect of payment of the Contract Fee £3,500.00 per week for the period of extension claims…Despite the award of an extension of time of seven weeks to 31st January 2010, the Contract Administrator has only thus far certified payment of Contract Fee for 3 of these 7 weeks."

Much of the Referral is then taken up with the representations as to why Redwing believed that it was entitled to extension of time.

7.
Paragraph 6 which only comprised one page dealt with "Financial Entitlement" and expressly identifies that the financial claim was simply expressed as the number of weeks' extension sought multiplied by the Contract Fee identified in the Contract as £3,500 per week. There was said to be an entitlement to an extension of time of 20 weeks; that multiplied by £3,500 produces a total of £70,000 from which three weeks' worth at £3,500 is deducted because it had been paid. There was no hint or suggestion that Redwing were seeking any adjustment of the rate per week in relation to the Contract Fee. The "Redress" sought was in the same terms as in the Notice of Adjudication.

8.
Mr Wishart's written Response dated 6 August 2009 was essentially a legal one in relation to the alleged financial entitlement (Paragraphs 49 to 55). He argued simply that as a matter of legal interpretation, the Contract Fee was fixed at £77,000 calculated by reference to the original contract period of 22 weeks multiplied by the rate of £3,500; as £10,500 more than this had been paid, he asked for it to be returned or credited to him. He made it clear that if there was entitlement over and above the fixed fee it would be by way of loss and expense contractually recoverable under the contract, but, as no claim had been made for the loss and expense, the adjudicator had no jurisdiction to consider any such entitlement (see Paragraphs 52 and 53).

9.
On the 20 August 2009, the First Adjudicator faxed a note to the parties in the following terms:

"1. I have been reading the conditions of contract concerning the Fixed Fee closely. I note that the percentage threshold (Contract Particulars, 4.3) is 0%. At first sight I took this to mean that there would be no adjustment to the Fixed Fee whatever the rise or fall and I suspect that this is what the parties intended and have operated to date. However, if I am reading the conditions of contract correctly it means that any difference between the estimated prime cost and the actual prime cost will generate a pro rata adjustment to the Fixed Fee.

2. In interpreting the Contract Fee entry in the contract particulars I am reading it in the context of the whole of the conditions.

3. I have some difficulty with the concept that the Fixed Fee would be adjustable twice, once for additional time and once additional cost.

4. Contrary to my direction this morning, may I have a brief submission from each side on:

a. My reading of the conditions of contract and

b. If I am right, was this the intention of the parties?"

10.
This provoked a very firm response from Mr Wishart's solicitors on 21 August 2009 (a Friday):

"Mr Wishart's submissions are as follows:

1. Redwing have not advanced an argument that they are entitled to an adjustment of the Contract Fee by reference to the Scope of Works in any correspondence, in the Notice of Adjudication, in the

Referral or in any subsequent submissions including oral submissions in the meeting on 14th when their claim in respect of the Contract Fee was discussed at length.

2. In the circumstances, consideration of an adjustment to the Contract Fee on this basis does not fall within your jurisdiction in this adjudication and Mr Wishart does not agree to extend your jurisdiction in this respect. The absence of reference to this argument in the Notice of Adjudication places this point clearly outside your jurisdiction.

3. Further and in the alternative, the failure to raise this matter in correspondence prior to the commencement of the adjudication means that no dispute on this issue has crystallised and the matter cannot be the subject of adjudication at this time.

4. Further and in the further alternative, the absence of any submission by Redwing on this point makes it clear that Redwing do not consider that the contract has the effect of entitling them to an adjustment of the Contract Fee in respect of any increase in the Scope of Works. Furthermore, their silence on this point is clear evidence that they accept that neither party intended that the Contract Fee should be adjusted on this basis…"

They went on to make relatively brief points about the merits of the point but repeated their primary submission contained in Mr Wishart's Response.

11.
There was no response by Redwing either to the First Adjudicator's faxed note and no challenge as such to the jurisdictional objections made by Mr Wishart's solicitors.

12.
The First Adjudicator then issued his 12 page decision on the following Monday, 24 August 2009. In essence he decided that Redwing was entitled to an extension of time but only to 6 March 2009 and, with regard to the Contract Fee, Redwing was entitled to payment of the Contract Fee on the basis of the number of weeks to the Date of Completion as extended. Thus the total extended contract period was 34 weeks which produced a total Contract Fee of £119,000, 34 weeks at £3,500. From that figure, £87,500 (representing 25 weeks @ 3,500) was deducted because it had been previously paid. The net figure plus interest was ordered to be paid.

13.
At Paragraph 5.2, the First Adjudicator addressed the question as to how the Contract Fee should be calculated. He sets out in Paragraphs 5.2.1 and 5.2.2 what the Conditions of Contract and the Contract Particulars say and what each party's position was. He then goes on:

"5.2.4 To what does the term "fixed sum" apply? Is it "£3,500.00" or is it "£3,500.00 per week"? In my view the answer must be that it applies to "£3,500.00" and not to "£3,500.00 per week" because the latter is not a sum, it is a rate of payment. It means "a weekly payment of the fixed sum £3,500.00".

5.2.5 The position, then, is that there shall be a weekly payment of a fixed sum but that the period of weeks to which it applies is not specified. To give business efficacy to the contract I find it necessary to imply a term to define the period of weeks. There is no dispute that the period shall commence on the Date of Possession. There are two possibilities, as stated in paragraph 5.2.2. I decide that the end of the period occurs on the Date for Completion, whenever this ultimately proves to be, and that a term may be implied to confirm this. I have come to this decision for the following reasons [there then followed four reasons]

5.2 6 Mr Wishart argued that any payment of additional Fee to Redwing consequent upon delay would be a matter of loss and expense, to be dealt with under clause 4.16…The conditions of contract provide for a clear separation of loss and/or expense claims from other payment claims. Nevertheless, in essence, Mr Wishart's proposition is that the claim under the Contract Fee provisions is actually a claim under the loss and/or expense provisions and therefore cannot be considered in this adjudication because no claim for loss and/or expense was made. This is a Catch 22 argument, which I dismiss…

5.2.8 The conditions of contract at clause 4.3.1 and Schedule 2, part 2 included provision for adjustment of the Contract Fee if the actual prime cost differs from estimated prime cost by more than the stated percentage. The percentage stated in the Contract Particulars is 0%; this means that any difference will trigger a pro rata adjustment to the Fixed Fee. In practice, the parties…have not operated this provision and there is no evidence at all in this adjudication that they intend to do so. It is probable that the 0% entry was a mistake, made in the belief that it meant "not applicable". I find as fact that it was not the intention of the parties that the Fixed Fee may be adjusted twice, once for additional time and once for additional cost. I shall therefore direct payment in respect of the former will preclude payment in respect of the latter."

14.
Following receipt of the decision, Redwing faxed on 24 August 2009 (copied to Mr Wishart's solicitors) a note to the First Adjudicator saying, amongst other things:

"However, we note your decision to preclude any adjustment of the Contract Fee under clause 4.3.1 and Schedule 2, Part 2 and would respectfully point out that this was not a matter that was referred to you. The matter referred to you was for the payment of the Contract Fee for the period of the extension of time and not for the adjustment of the Contract Fee which is a separate matter and has nothing to do with this dispute. The adjustment of the Fixed Fee was not discussed by the parties prior to the completion of the contract by Gardiner & Theobald."

No disagreement with this was recorded by Mr Wishart or his solicitors. However, the First Adjudicator responded on 26 August 2009:

"With regard to the Schedule 2, part 2 adjustment of the Contract Fee:

a. In construing a term of the contract I had to do so in the context of the contract as a whole.

b. I was entitled to take the initiative to determine the facts and the law relevant to the dispute.

c. I was faced with a difficult decision due to the inconsistent drafting of the Contract Particulars, the conduct of the parties during the progress of contract and what has been said or not said in the adjudication. Of the possibilities open to me (Mr Wishart to pay for time and cost, pay for time or cost, pay for neither) I have no doubt that the one I chose was the most fair and equitable.

d. "The task of the adjudicator is to find an interim solution which meets the needs of the case."[Chadwick LJ in Carillion v Devonport RD (2005)]. It is open to either party to have the issue finally determined by a higher tribunal. If this does happen I shall be most interested [to] learn what the Courts or an arbitrator make of it."

The Second Adjudication

15.

Thereafter, a further dispute arose following the assessment by Gardiner & and Theobald, Mr Wishart's Quantity Surveyors, of the Final Account. On 31 August 2010, Redwing's solicitors served a Notice of Adjudication on Mr Wishart's solicitors. The dispute identified was in relation to the Final Account, with Redwing asserting that the total value of the Final Account was £1,071,558.34 (made up of Prime Cost, Contract Fee and loss and expense) and, after allowing for £854,162 paid, claiming the net sum of £217,396.34. Mr Wishart's solicitors' response was to raise a number of jurisdictional objections including the one that is pursued in these proceedings, namely that, in so far as Redwing claimed for an adjusted Contract Fee, it had already been decided in the First Adjudication, reference being made to Paragraph 5 of the First Adjudication decision.

16.
Undeterred, Redwing initiated the adjudication process. Mr Soudager was appointed as the adjudicator ("the Second Adjudicator") on 2 September 2010. The Referral dated 23 August 2010, but served on 7 September 2010, was accompanied by a number of contemporaneous documents and identified that the dispute raised four issues, two of which were as to the actual Prime Cost and the Retention money, and the other two relating to the Contract Fee. The Contract Fee issues related to whether the actual £3,500 weekly "rate" for the Contract Fee could be adjusted to reflect increases in Prime Cost and the second whether the weekly allowance for the Contract Fee should be extended to 31 July 2009, 12 weeks after the extended Date for Completion. It was said that the Prime Cost had increased by 31% and therefore the Contract Fee should be increased by the same percentage. It is clear from the Referral that the percentage increase claimed is related to the increase in the basic Prime Cost.

17.
Mr Wishart's solicitors submitted his Response dated 21 September 2010. Apart from a number of other jurisdictional complaints (no longer pursued), they squarely made the point that the First Adjudicator had, and was to be treated as, having dealt with and decided the issues relating to the Contract Fee. Mr Wishart effectively reserved his position so far as this jurisdictional objection was concerned. Redwing argued that the issues had not effectively been decided by the First Adjudicator.

18.
The Second Adjudicator produced his decision on 26 October 2010. There is no issue that this was within the agreed period of time for its issue. He analysed the Prime Cost issues and, deciding some points in favour of each party, concluded at Paragraph 118 that the "Total Prime Cost" was £802,122.70. He dealt with the Contract Fee between Paragraphs 85 and 110. He rejected the claim for the Contract Fee in any amount beyond the extended Date for Completion (Paragraphs 106-110). However in respect of the adjustment to the weekly rate for the Contract Fee, he found in favour of Redwing:

"101. It is agreed that the Contract Fee in the Contract Particulars is a Fixed Sum of £3,500 per week. Where the Contract Fee is a Fixed Sum, Schedule 2 Part 2: Adjustment of Contract Fee (Fixed Sum only) sets out the mechanism whereby the Contract Fee is adjusted. The Contract Particulars also provide that the percentage threshold in respect of Schedule 2, Part 2 Adjustment of Contract Fee is 0%, that is the adjustment of the Prime Cost by percentage whereby the Contract Fee is adjusted.

102. I therefore find that in accordance with the Contract Conditions including Schedule 2 Part 2 the formula should be used for the adjustment of Fixed Sum Contract Fee with regard to the Final Ascertainment under paragraph 2.1.3.

103 In accordance with my calculation as detailed in the Appendix 1, I decide that the Adjusted Contract Fee (ACF) is £3,857.70 per week.

Contract Fee due from 14 th July 2008 up to 6 th March 2009

104. Mr Wishart accepts the Redwing are entitled to a Contract Fee for this period namely 34 weeks.

105. Having decided that the Adjusted Contract Fee (ACF) is £3857.70 per week, accordingly **I decide that Redwing are entitled to the sum of £131,161.80 in respect of the Contract Fee for this period**."

19.
Appendix 1 to the decision contained an arithmetical breakdown showing how the Second Adjudicator arrived at his "ACF" of £3,857.70. He applies the contractual formula in Schedule 2 Part 2. In simple terms he takes the "Total Prime Cost" of £802,122.70 (which is the net actual Prime Cost without any Contract Fee) and compares it with what he calls the "Estimated Prime Cost", £723,334.64 which is the figure from Appendix C to the Contract. He then says that there is a 10.89% increase in the Prime Cost and therefore the Contract Fee rate of £3,500 should be increased by 10.89%. Unfortunately, it is absolutely clear that he is not comparing like with like because the Estimated Prime Cost figure in Appendix C included the Contract Fee of £98,000 and thus the net and truly estimated Prime Cost was £625,334.64.

20.
The Second Adjudicator brought all these various figures together in a Summary of Account in Paragraph 118 and, taking into account what had been paid, summarises his decision at Paragraph 128 to the effect that Mr Wishart should pay the balance, £79,122.50, plus his fees and expenses in the sum of £9,900.

21.
On 27 October 2010, Redwing's solicitors e-mailed the Second Adjudicator (copied to Mr Wishart's solicitors) pointing out what they called the "arithmetical error" in Appendix 1 to the decision and that this was a slip which "could be amended under the Slip Rule". If the "correct" figure for the estimated prime cost was used, a significantly higher percentage resulted, 28.27% which would increase the Contract Fee of £4,489.45. That would increase the Contact Fee allowance to £152,641.30 and the net sum due to Redwing would then be £100,602. Mr Wishart's solicitors replied by e-mail three hours later saying that the Contract "states that the Estimated Prime Cost is £723,334.64 and the amendment was not a slip which could or should be corrected. Redwing's solicitors replied two hours later by e-mail asserting that it was an arithmetical error which could and should be corrected. Mr Wishart's solictors wrote by e-mail to the Second Adjudicator on 28 October 2010 at 10.03 a.m. making representations as to why no slip type amendment could be made. Redwing's solicitors responded at 12.36.

22.
Essentially, the Second Adjudicator acceded to Redwing's position. He explained in an e-mail on 28 October timed at 19.01 what he was doing and he attached and amended Appendix 1 and consequential amendments to the various parts of the decision itself. He accepted that the Estimated Prime Cost figure should be £625,334.64, which resulted in 28.27% increase over the figure up to the actual Prime Cost which remained the same as £802,120.170. The application of the higher rate of £4,489.45 meant that, given the multiplier of 34 weeks up to the extended Date for Completion, a

total of £152,641.30 was allowable in respect of the Contract Fee. That figure factored into the Summary of Account produced the net amount due of £100,602.

These Proceedings

23.
On 4 November 2010, Redwing issued proceedings in the TCC for the enforcement of the Second Adjudicator's (amended) decision. On 22 November 2010, Mr Wishart paid the sum of £66,960.70 together with interest and the Claim issue fee of £810; he has also paid the Second Adjudicator's fees. Witness statements have been exchanged. In broad terms, the balance relates to the net sum allowed for the adjustment of the Contract Fee.

24.
There are essentially two issues raised by Mr Wishart, the first being whether the First Adjudicator had already decided the issue to which the outstanding balance relates. The second issue is whether the Second Adjudicator was entitled to amend his decision as he did. I will not set out all the legal arguments put forward by Counsel for the parties but will address them in the "Law" and "Discussion" sections of this judgement, below.

The Law

25.
Mr Justice Coulson set out in **Benfield Construction Ltd v Trudson (Hatton) Ltd** [2008] EWHC 2333 (TCC) the principles to be applied in cases where a defendant resists the enforcement of an adjudicator's decision on grounds that the dispute is the same or substantially the same as one which has previously been referred and decided in an earlier adjudication. He reviewed earlier authorities and summarised as follows:

"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 summarise 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 re-adjudicate 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."

The decision of Mr Justice Ramsey referred to was **HG Construction Ltd v Ashwell Homes (East Anglia) Ltd** [2007] BLR 175.

26.
The practical logic and common sense of this approach is that the dispute as decided in the first adjudication is binding upon the parties unless and until it is overturned by the tribunal of final resort (be it court or arbitration). It is simply not open to a party to refer all or part of the same dispute, already decided in one adjudication, to a second later adjudication. Lord Glennie in the Outer House of the Court of Session in Scotland had some useful and interesting observations to make in the case of **Barr Ltd v Klin Investment UK Ltd** [2009] CSOH 104:

"[32] It is not uncommon, as I understand it, for there to be a number of references to adjudication during the lifetime of a contract. In submitting a dispute or difference to adjudication, a party is not required to submit all the disputes or differences which have arisen up to that date. He may pick and choose. He may, for example, refer to adjudication a discrete issue affecting a claim for an extension of time, in the hope that, if he is successful on that discrete issue that success will enable him to claim payment of part or all of what he alleges to be due to him. If he is unsuccessful, his chosen route to unlocking that payment will have failed; but that does not prevent him referring to a second adjudication another discrete issue, possibly affecting the same claim, with a similar hope that success on that issue will unlock payment of some or all of the sums which he claims to be due. It is important to have this in mind when seeking to identify the dispute or difference which the referring party has submitted to adjudication on any particular occasion. The dispute or difference referred is simply that which the referring party chooses to refer, no more and no less. That is quite different from serial adjudication. There is no good reason why the court should seek to discourage attempts by a party to a construction contract from seeking an interim decision in his favour by referring sequentially legal points, or short points of disputed fact on a narrow issue, rather than having to engage in what would, in effect, be a dress rehearsal for the full arbitration.

[34] If the dispute which is referred to adjudication may be as wide or narrow as the referring party chooses, it would be dangerous, so it seems to me, and contrary to the intention underlying the process of adjudication in construction contracts, to give an extended meaning to the expression "substantially the same" in clause 39A.3.2 of the contract. If a party refers to adjudication a narrow point of construction so as to enable him to claim payment turning upon that point without having to go to the trouble and expense of a contested hearing on the whole of the underlying facts, but fails on that point of construction, he cannot in my opinion be barred from thereafter referring to adjudication the disputed factual basis upon which the other party says that he should not be paid. The sum sought to be recovered as a result of the adjudication might be the same in each case, but that would not make the dispute referred to adjudication in the second case either the same or "substantially the same" as that referred to in the first adjudication. Such a construction would make little sense. The expression "substantially the same" is designed, in my view, to catch a case where the actual dispute referred is almost the same as that which had earlier been referred; since disputes or differences may encompass a wide range of factual and legal issues, a bar on re-adjudicating "the same" dispute, i.e. one in which there was a complete identity of factual and legal issues, without including the words "substantially the same" would be ineffective: c.f. HG Construction Ltd. v. Ashwell Homes (East Anglia) Ltd. (unreported, [2007] EWHC 144 (TCC), Ramsey J). That expression is not intended, however, to cover a case where the particular dispute referred to adjudication is another separate and distinct way of seeking to unlock the door to payment of a particular sum."

27.
There is another variant on this where it is clear that the dispute in the earlier adjudication is materially different from the dispute referred in the second adjudication but the reasoning of the adjudicator in his or her decision effectively establishes a proposition which impinges on the dispute in the second adjudication. Applying the principles and approach set out above, the following should apply:

(a) One needs to determine what the dispute referred in the first or earlier arbitration was. That dispute may be wide or narrow.

(b) One also needs to determine whether and to what extent the parties gave the adjudicator in that adjudication jurisdiction to address matters which were not obviously within the ambit of the referred dispute. This could cover a defence which had not been raised before the referral but can legitimately be raised as a defence to the referred claim. The adjudicator will need to rule on that.

(c) One must then examine what the adjudicator has decided, first in relation to the referred dispute and any arguable defence put up and secondly if he has purported to decide something which has not been referred or which has not become within his or her jurisdiction.

(d) Any decision which can be described as deciding the dispute, as referred or as expanded effectively within the adjudication process, is binding and cannot be raised or adjudicated upon again in any later adjudication.

(e) In contrast, any decision or part of a decision which can be described as not deciding the dispute, as referred or as expanded effectively within the adjudication process, is not binding and can be raised or adjudicated upon again in any later adjudication.

Thus, where an adjudicator who, in court terms, offers an obiter opinion on a point or topic which is not part of the dispute for which he does have jurisdiction, that opinion is not jurisdictionally part of his decision.

28.
Moving on to slip rule amendments, the law on this was reviewed in **YCMS Ltd v Grabiner** [2009] EWHC 127 (TCC) in this Court:

“So far as the adjudication "slip rule" is concerned, the following can be said:

“(a) An adjudicator can only revise a decision if it is an implied term of the contract by which adjudication is permitted to take place that permits it. It does not follow that, if it is purely a statutory arbitration under the HGCRA (if there is no contractual adjudication clause), such implication can be said to arise statutorily.

(b) If there is such an implied term, it can and will only relate to "patent errors". A patent error can certainly include the wrong transposition of names or the failing to give credit for sums found to have been paid or simple arithmetical errors.

(c) The slip rule cannot be used to enable an adjudicator who has had second thoughts and intentions to correct an award. Thus for example, if an adjudicator decides that the law is that there is no equitable right of set off but then changes his mind having read some cases feeling that he has got that wrong, such a change would not be permitted because that would be having second thoughts.

(d) The time for revising a decision by way of the slip rule will be what is reasonable in all the circumstances. In the **Bloor** case, the Adjudicator revised his decision within several hours and before the time for issuing a decision had been given. It will be an exceptional and rare case in which the revision can be made more than a few days after the decision. The reason for this is that, unlike a court judgment or an arbitration award, a principal purpose of the 1996 Act is to facilitate cash flow. If an adjudicator was able to revise his decision, say, 21 or 28 days later that would necessarily slow down and interfere with the speedy enforcement of adjudicators' decisions. That would in broad terms be contrary to the policy of the Act."

There is little which can be added to this for the purposes of the current case.

Discussion

29.
I will address first the issue as to whether the First Adjudication decision decided all or part of what had to be decided in the Second Adjudication. The first step is to determine what was the dispute referred to adjudication and to do that one needs to ascertain what dispute had crystallised.

30.
It is accepted that the dispute which had arisen before the First Adjudication involved only two elements, the first being the further extension of time to which Redwing was entitled and the second being a consequential entitlement to the Contract Fee at the rate of £3,500 a week. There is no hint or suggestion that there was any crystallised dispute before the Notice of Adjudication for the First Adjudication relating to any possible adjustment to that rate. That is perhaps not surprising because the work was not yet complete and the Final Account process had not yet started. This was confirmed in Mr Wishart's solicitors' letter of 21 August 2009 to the First Adjudicator:

"Redwing had not advanced an argument that they are entitled to an adjustment of the Contract Fee by reference to the Scope of Works in any correspondence, in the Notice of Adjudication, in the Referral or in any subsequent submissions including oral submissions in the meeting on 14th when their claim in respect of the Contract Fee was discussed at length."

31.
Ms Slow for Mr Wishart advances the argument that the Notice of Adjudication and indeed the Referral seek payment of the "Contract Fee in the sum of £3,500.00 and/or loss and expense (or such other sum as the Adjudicator shall determine)" (emphasis added). It is however clear that Redwing was not seeking and had not sought beforehand any determination that the Contract Fee of £3,500 a week should be adjusted, at all or specifically in relation to the increase (if there had been any at that stage) in the actual Prime Cost over and above the originally estimated Prime Cost. It is clear that the claim was for 20 weeks at the rate of £3,500, with the 20 weeks being the extension of time claimed. Because the crystallised dispute therefore did not as such encompass any claim for an adjustment of the Contract Fee weekly "rate", the claim for "such other sum as the Adjudicator shall determine" could not relate to any claim for an adjustment of that rate.

32.
One then needs to consider whether anything happened whereby the First Adjudicator was given jurisdiction to rule upon any issue concerning adjustment of the Contract Fee rate. It is clear that there was nothing in the written submissions, the arguments or in correspondence that in some way evidences that the parties gave the First Adjudicator jurisdiction over such an issue. Indeed, even when the First Adjudicator raised the possibility of addressing the issue, the only party who

responded, Mr Wishart, through his solicitors, made it clear that he at least believed that the First Adjudicator did not have jurisdiction; that was not challenged by Redwing. Redwing made the same point shortly after the issue of the First Adjudication decision.

33.
I then turned to review whether or not what the Adjudicator said was in some material way a critical part of his decision and the reasoning for it. The primary part of his decision about how the Contract Fee should be calculated is that the Contract Fee involved, firstly "a weekly payment of the fixed sum of £3,500.00" (see Paragraph 5.2.4), and secondly, by way of an implied term that the period to which this weekly payment was to relate was the appropriately extended Date for Completion (see Paragraph 5.2.5). It is unnecessary to determine whether the First Adjudicator was right in determining that it was an implied term by which this payment period was to be determined as opposed to simply a matter of contractual interpretation. When one actually analyses Paragraph 5.2.8 (set out in full above), it is a wholly unnecessary part of the decision and it is not reasoning which underpins or supports his finding about the weekly rate or the period to which it relates. He says that "the parties have not operated this provision [to adjust the Fixed Fee] and there is no evidence at all in this adjudication that they intend to do so"; however since it was not in issue in the adjudication, it is hardly surprising that neither party proffered any evidence about it. He then makes a finding of "fact" that the parties did not intend to adjust the Fixed Fee twice: that was not a legitimate finding to make given that the parties had not produced any evidence one way or the other about their intention. It is an immaterial finding in any event. His direction "that payment in respect of [what he decided was due, namely extended time multiplied by the Contract Fee rate]…will preclude payment in respect of [any adjustment of that Rate]" was again wholly unjustified given that neither party had brought any issue about this before him. He had no jurisdiction to make any of these findings let alone make a direction which neither party was seeking. More importantly, this whole paragraph is simply tangential and, in court terms, obiter to what he was required to and in fact did decide on the disputes actually referred to him.

34.
It follows from the above that the Second Adjudicator did have jurisdiction to rule upon the issue as to whether Redwing was entitled to an adjustment of the Contract Fee rate and that accordingly the Second Adjudication decision is enforceable.

The Revision to the Second Adjudication Decision

35.
It is abundantly clear on any count that the Second Adjudicator made a very obvious error. Once he had decided (as he did) that, if and to the extent that the actual Prime Cost exceeded the original Estimated Prime Cost, the Contract Fee rate fell to be adjusted in the same proportion, it would be obviously wrong to proceed upon the basis that the Estimated Prime Cost was the estimated prime cost plus the Contract Fee. Appendix C to the Contract on its title page is headed "Estimated Prime Cost", it is clear on the face of the document that all bar one of the 28 heads are Prime Cost; the one item which is clearly not Prime Cost is the "Redwing Fee" or, otherwise, the Contract Fee.

36.
The Second Adjudicator simply applied the formula set out in Schedule 2 Part 2:

"ACF = CF x 100 +- (D-T)

100

ACF the adjusted Contract Fee

CF is the Contract Fee stated in the Contract Particulars (as revised, where applicable pursuant to Part 1 of this Schedule

D is the increase or decrease of the total Prime Cost when compared with the estimated Prime Cost stated in the Contract Particulars expressed as a percentage of the estimated amount;

T is 10 (or such other number as is stated in the Contract Particulars)

+- shall be + (plus) if the total Prime Cost exceeds the estimated amount of Prime Cost stated in the Contract Particulars or –(minus) if the total Prime Cost is less than that estimated Prime Cost

'total Prime Cost' is the Prime Cost after any additional allowances and deductions made pursuant to these Conditions"

37.
The essential part of the reasoning in his decision both before and after revision is in Paragraphs 101 and 102 (set out above). There is no suggestion that either party was arguing that once one got into the formula the actual or the estimated Prime Cost should be anything other than the Prime Cost, as opposed to the Prime Cost plus the Fee. Indeed there is no logic in comparing the total, actual and eventual Prime Cost with the estimated Prime Cost plus the original Contract Fee.

38.
I have formed a very clear view that the Second Adjudicator was applying the Slip Rule. There is no argument but that there was here an implied term that the Adjudicator within a reasonable time could revise his decision for patent errors. There is no hint or suggestion that the Second Adjudicator was having second thoughts. All the evidence points to him appreciating that there was a very obvious arithmetical error. He was not correcting his reasoning. He was simply correcting a very obvious error, namely he needed to compare, arithmetically, like for like, namely the total actual Prime Cost with the originally estimated Prime Cost. It is clear that Appendix C to the Contract contains an estimate of the Prime Cost, albeit that there is reference also to the Contract Fee. It is obviously unfortunate for Mr Wishart that the amendment to the decision led to him being liable for an additional sum, but the Second Adjudicator acted in accordance with the implied term.

39.
Finally, it was suggested, albeit without any great force, that the Second Adjudicator did not produce his revision within a reasonable time. The revision came out within two days of the original decision. The parties and the Second Adjudicator exchanged seven e-mails. A reasonable time can allow for some limited opportunity for exchange of views about possible revisions. In all circumstances, this revision to the Second Adjudication decision was reached within a reasonable time.

Decision

40.
It follows from the above that the decision of the Second Adjudicator should be enforced. To the extent that the decision has not been honoured, there should be judgement in favour of the Claimant.