Case No: HT-14-62

Neutral Citation Number: [2014] EWHC 940 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2014

Before :

THE HON MRS JUSTICE CARR DBE

- -

Between :

UNIVERSITY OF BRIGHTON	**Claimant**
- and -	
DOVEHOUSE INTERIORS LIMITED	**Defendant**

- -
- -

Ms Lucy Garrett (instructed by **Berwin Leighton Paisner LLP**) for the **Claimant**
Miss Serena Cheng (instructed by **Thomas Eggar LLP**) for the **Defendant**

Hearing date : 14 March 2014

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Judgment

Mrs Justice Carr :

Introduction

1. This is a claim issued by the claimant university ("the University") under Part 8 of the Civil Procedure Rules for declaratory relief against the defendant contractor ("Dovehouse"). The University challenges the validity of a notice of adjudication served by Dovehouse pursuant to Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme"). It contends that the notice was ineffective to commence proceedings for the purpose of a "conclusive evidence" clause in a construction contract between the parties.

The relevant facts

2. By a contract dated 26th March 2012, executed as a deed and incorporating the terms of the Intermediate Building Contract with Contractor's Design 2005 Edition, Revision 2 (2009), as amended by a Schedule of Further Modifications ("the Contract"), the University engaged Dovehouse to carry out the fit out of University Centre, Priory Square, Hastings for a Contract Sum of £2,553,031.29. By clause 9.2 of the Contract the Scheme was to apply in the event of a dispute or difference arising under the Contract which either party wished to refer to adjudication. The date for completion of the works was stated as 29th July 2012.

3. Practical completion was not certified until 30th October 2012. The parties fell into dispute broadly on the following issues :

    a) Dovehouse's entitlement to extensions of time to the date for completion;
    b) the proper valuation of adjustments to the Contract Sum in respect of instructed variations to the works;
    c) Dovehouse's liability for the University's costs to address incomplete and defective works;
    d) Dovehouse's entitlement to recover loss and expense in respect of delay and/or disruption to the works.

4. On 9th December 2013 the Contract Administrator issued her Final Certificate pursuant to clause 4.14.1 of the Contract ("the Final Certificate"). A gross valuation of the works in the sum of £2,099,629.23 was certified. On 12th December 2013 the University served a Payment Notice on Dovehouse pursuant to clause 4.14.2 of the Contract and/or under paragraph 9 of Part II of the Scheme and section 11A of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("the Payment Notice") ("the Act"). Dovehouse disagreed with the sum stated as due in the Final Certificate and in the Payment Notice. So as to allow time for negotiation and settlement, on 23rd December 2013 the University and Dovehouse agreed in writing to amend clause 1.9.2 of the Contract by replacing the period of 28 days there provided for with a period of 66 days. Accordingly, "*for the purposes of clause 1.9.2 [of the Contract] the Final Certificate shall not be conclusive evidence of the matters set out in clauses 1.9.1 [of the Contract] until Friday 14 February 2014"*. Settlement was not reached in that period.

5. On 13th February 2014 Dovehouse, acting at that stage by Knowles Limited ("Knowles"), served a Notice of Adjudication ("the First Notice"). It is the validity of

that notice which is in dispute. It referred a full final account dispute. It is common ground that the First Notice was received by the University on 13th February 2014.

6. The First Notice was headed "IN THE MATTER OF AN ADJUDICATION CONDUCTED IN ACCORDANCE WITH THE SCHEME…". It was entitled "NOTICE OF ADJUDICATION".

7. At section 1.0 the parties' names and addresses were set out. The First Notice gave the name and address of the University as :

> "*University of Brighton*
> *Estate and Facilities Management*
> *Exion 27*
> *Crowhurst Road*
> *Hollingbury*
> *Brighton*
> *BN1 8AF*" ("the Exion address")

8. The next section (2.0 to 2.4) proceeded under the heading "*Introduction and Nature of Dispute*". The background to and circumstances of the dispute were set out. At paragraph 2.4 it was stated :

> "*2.4 Article 7 has not been deleted and therefore Clause 9.2 of the Conditions applies. The Adjudicator is not named and the nominator of the Adjudicator is not stated. The Referring Party therefore selects from the list included in the Contract the Royal Institution of Chartered Surveyors to nominate an Adjudicator.*"

9. The following section (3.0 to 3.3) set out the nature of redress sought :

> "*3.0 Nature of Redress*
>
> *The Referring Party seeks a decision from the adjudicator that*
>
> *3.1 The Final Certificate is to be corrected to certify that the gross sum of £3,670,692.19 and a net sum after deducting previous payments of £1,702,266.47 plus VAT as applicable and that sum is not to be reduced by the notice to pay less nor for any other reason or in all matters such other sum as the Adjudicator may decide and such sum shall be paid forthwith by the Responding Party to the Referring Party.*
>
> *3.2 The Date for Completion is to be extended to the 30 October 2012 or such other period or date as the Adjudicator may decide.*
>
> *3.3 The Responding Party shall forthwith pay interest to the Referring Party on the sum decided at 3.1 above at such rates and on such sum or sums as the Adjudicator may determine.*

3.3 (sic) The Responding Party shall pay the Adjudicator's fees and expenses."

10. On 14th February 2014 Dovehouse requested the Royal Institution of Chartered Surveyors ("the RICS") to select a person to act as adjudicator. On 19th February 2014 the RICS confirmed nomination of Mr Philip Eyre as the adjudicator ("the First Adjudicator"). On the same day the First Adjudicator confirmed to the parties that he had received notice of his nomination. Under the Scheme he anticipated receipt of the referral of the dispute by 20th February 2014. He received notice of referral with supporting materials by 5.30pm on 20th February 2014.

11. On 21st February 2014 the First Adjudicator resigned pursuant to paragraph 9(1) of the Scheme on the basis that he had no jurisdiction, the Contract requiring nomination by the President or Vice-President of the Chartered Institute of Arbitrators ("the CIArb"), not the RICS. He treated his nomination as a nullity.

12. Dovehouse issued a re-served Notice of Adjudication on 24th February 2014 ("the Second Notice"). It corrected the error in the First Notice by recording that the nominator of the Adjudicator was stated in the Contract to be the President or a Vice-President of the CIArb.

These proceedings

13. By a claim form issued on 25th February 2014 ("the declaration application"), the University applied for a declaration that the Final Certificate has become conclusive evidence of the matters stated in clause 1.9.1 of the Contract, namely that :

    a) necessary effect has been given to all the terms of the Contract that require additions to, adjustments or deductions from the Contract Sum, save in regard to any accidental inclusion or exclusion of any item or any arithmetical error in any computation;

    b) all and only such extensions of time, if any, as are due under clause 2.19 of the Contract have been given; and

    c) that the reimbursement of direct loss and/or expense, if any, to Dovehouse pursuant to clause 4.17 of the Contract is in final settlement of all and any claims which Dovehouse has or may have arising out of the occurrence of any of the Relevant Matters, whether such claim be for breach of contract, duty of care, statutory care or otherwise.

14. The University also sought an injunction prohibiting Dovehouse from taking any further step in the adjudication until determination of that application. On 27th February 2014, and without prejudice to their position on costs, the parties agreed to stay the adjudication proceedings pending the outcome of the declaration application.

The issues and evidence

15. The central issue in the declaration application is whether or not Dovehouse "*commenced*" "*adjudication*" "*proceedings*" within the meaning of clause 1.9.2 of the Contract by 14th February 2014.

16. The University contends that the First Notice was ineffective to commence adjudication proceedings within the meaning of clause 1.9.2. It advances four main grounds :

a) that under the Scheme an adjudication is not commenced until a Referral Notice is served on a properly appointed adjudicator pursuant to paragraph 7(1) of the Scheme;

b) the First Notice was invalid because it did not comply with the requirements of paragraph 1(3) of the Scheme. It did not identify the contractually required address and was not served at the contractually required address;

c) no adjudication proceedings were in fact commenced. Dovehouse sought to appoint the adjudicator via the wrong nominating body. The appointed adjudicator correctly resigned;

d) the defects in the First Notice and the resignation of the First Adjudicator cannot now be cured.

17. Dovehouse contends that the First Notice was effective. Proceedings were commenced upon service of the First Notice and such defect as there may have been on the face of the First Notice were not such as to invalidate it. There was proper service. Despite the resignation of the First Adjudicator, since proceedings were commenced by 14th February 2014, the saving proviso in clause 1.9.2 has been triggered and survives any error of incorrect identification of the nominating body.

18. For the purpose of the hearing the parties adduced evidence as follows :

a) for the University : two statements from the University's solicitor, Mr James Clarke;

b) for Dovehouse : a statement from Mr Rodney Taylor, construction management and costs consultant formerly at Dovehouse, and from Mr Keith Tregunna of Knowles.

Relevant terms of the Contract

19. Clause 1.7 of the Contract provided that :

"***Notices and other communications***

1.7.1 Any notice or other communication between the Parties, or by or to the Architect/Contract Administrator or Quantity Surveyor, that is expressly referred to in the Agreement or these Conditions (including, without limitation, each application, approval, consent, confirmation, counter-notice, decision, instruction or other notification) shall be in writing.

1.7.2 Subject to clause 1.7.4, each such notice or other communication and any documents to be supplied may or (where so required) shall be sent or transmitted by the means (electronic or otherwise) and in such

format as the Parties from time to time agree in writing for the purposes of this Contract.

1.7.3 Subject to clause 1.7.2 and 1.7.4, any notice, communication or document may be given or served by any effective means and shall be duly given or served if delivered by hand or sent by pre-paid post to :

.1 The recipient's address stated in the Contract Particulars, or to such other address as the recipient may from time to time notify to the sender; or

.2 If no such address is then current, the recipient's last known principle business address or (where a body corporate) its registered or principal office.

1.7.4 Any notice expressly required by this Contract to be given in accordance with this clause 1.7.4 shall be delivered by hand or sent by Recorded Signed for or Special Delivery post. Where sent by post in that matter, it shall, subject to proof to the contrary, be deemed to have been received on the second Business Day after the date of posting."

20. Clauses 1.7 and 1.8 of the Contract Particulars stated that :

"***Clause 1.7***

Address for service of notices etc. by the Parties
Employer
University of Brighton
Mithras House
Lewes Road
Brighton
BN2 4AT" ("the Mithras House address")

and

"***Clause 1.8***

Electronic Communications	*All communications are to be in writing unless agreed otherwise*"

21. Clause 1.9 of the Contract provided :

"***Effect of Final Certificate***

1.9.1 Except as provided in clauses 1.9.2 and 1.9.3 (and save in respect of fraud) the Final Certificate shall be conclusive evidence…

.2 that any necessary effect has been given to all the terms of the Contract that require additions to, adjustments of deductions from the

Contract Sum, save in regard to any accidental inclusion or exclusion of any item or any arithmetical error in any computation;

.3 that all and only such extensions of time, if any, as are due under clause 2.19 of the Contract have been given; and

.4 that the reimbursement of direct loss and/or expense, if any, to the Contractor pursuant to clause 4.17 of the Contract is in final settlement of all and any claims which Dovehouse has or may have arising out of the occurrence of any of the Relevant Matters, whether such claim be for breach of contract, duty of care, statutory care or otherwise.

1.9.2 If any adjudication, arbitration or other proceedings are commenced by either Party before or not later than 28 days after the Final Certificate has been issued, the Final Certificate shall be conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate" ("the saving proviso").

22. Clause 4.14 of the Contract provided :

"***Issue of Final Certificate***

....

.2 Not later than 5 days after the issue of the Final Certificate the Party by whom the balance is stated to be payable ("the Paying Party") shall give a notice to the other Party which shall, in respect of the balance stated as due, specify the amount of the payment proposed to be made, to what the amount relates and the basis on which the amount has been calculated.

.3 The final date for payment of the balance shall be 28 days from the date of the issue of the Final Certificate."

23. Clause 9.2 of the Contract provided that :

"*Adjudication*

...

9.2 If a dispute or difference arises under this Contract which either Party wishes to refer to adjudication, the Scheme shall apply, subject to the following :

.1 for the purposes of the Scheme the adjudicator shall be the person (if any) and the nominated body shall be that stated in the Contract Particulars..."

24. Clause 9.2.1 of the Contract Particulars provided :

"*Adjudication – Nominator of Adjudicator shall be the President or a Vice-President of the Chartered Institute of Arbitrators*".

25. Part 1 of the Scheme provides that :

"*Notice of Intention to Seek Adjudication*

1(1) Any party to a construction contract (the "referring party") may give written notice (the "notice of adjudication") at any time of his intention to refer any dispute arising under the contract, to adjudication.

1(2) The notice of adjudication shall be given to every other party to the contract.

1(3) The notice of adjudication shall set out briefly –

(a) the nature and a brief description of the dispute and of the parties involved,

(b) details of where and when the dispute has arisen,

(c) the nature of the redress which is sought, and

(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

2(1) Following the giving of a notice of adjudication…

(b)….if… the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator…

2(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request……

3 The request referred to in paragraphs 2, 5 and 6 shall be accompanied by the notice of referral…

…

5(1) The nominating body referred to in paragraphs 2(1)(b)… must communicate the selection of an adjudicator to the referring party within five days of receiving a request to do so.

(3) The person requested to act as adjudicator in accordance with the provisions of paragraphs (1) or (2) shall indicate

whether or not he is willing to act within two days of receiving the request.

...

7(1) Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing ("the referral notice") to the adjudicator.

9(1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.

...

9(3) Where an adjudicator ceases to act under paragraph 9(1)-

(a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7..."

"**Conclusive evidence**" **clauses**

26. "Conclusive evidence" clauses have a clear commercial purpose. They are intended to provide contractually agreed limits to the scope of disputes and to provide clarity as to the parties' obligations once a project is complete. They allow the parties to dictate if and to what extent a final certificate is and is not to be treated as conclusive as between them.

27. In *Agro Company of Canada Ltd v Richmond Shipping* ("*The Simonburn*") [1973] 1 Lloyd's Rep 392, CA Lord Denning held (in the context of a charter party) at 394 :

> "*The objects of a clause such as this were well stated by Mr Justice Mocatta in The Himmerland... They are (a) to provide some limits to the uncertainties and expense of arbitration and litigation; and (b) to facilitate the obtaining of material evidence. To these I would add (c) to facilitate the settling of accounts for each voyage as and when they fall due.*"

28. In the High Court of Singapore in *Standard Chartered Bank v Neocorp International Limited* [2005] SGHC 43, [2005] 2 SLR 345 (in the context of a guarantee) VK Rajah J said :

> "*17. Conclusive evidence clauses were originally devised and inserted in commercial documents to obviate cumbersome and painstaking inquiries to prove out-standings on running accounts. Having received the judicial imprimatur both in England (Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA [1973] 2 Lloyd's Rep 437) and in Australia (Dobbs v The National Bank of Australasia Limited (1935) 53 CLR 643), the clauses are now used pervasively in all manner*

of documentation by all manner of businesses in common law jurisdictions. ...

18. The real foundation for the legal efficacy of such a clause is contract. It can be cogently argued that if parties expressly agree on the modalities for determining a matter, such an agreement should be upheld in the absence of any relevant public policy considerations. Indeed, this is the very basis on which the court recognises and gives effect to arbitration agreements, conclusive certificates of engineers and architects found in construction contracts and experts' decisions, among others…"

Commencement of adjudication proceedings

29. The logical starting point is the question of whether the commencement of adjudication proceedings for the purpose of clause 1.9.2 of the Contract takes place upon the giving of notice under paragraph 1 of the Scheme, as Dovehouse contends, or paragraph 7 of the Scheme, as the University contends.

30. The ultimate aim in interpreting a commercial contract "*is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant*". The "*reasonable person*" is one who "*has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*" – see Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 14. Where a clause permits of two possible constructions, the court is entitled to prefer the construction that is consistent with business common sense and to reject the other – see Lord Clarke in *Rainy Sky SA v Kookmin Bank* (supra) at paragraphs 20 and 21.

31. Lord Clarke referred in this context expressly to the approach of Lord Reid in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 where he stated at 251 that :

> "*The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear*."

32. Section 108(5) of the Act requires all construction contracts to have an adjudication procedure that complies with s. 108. There is no suggestion here that the Contract did not contain a compliant adjudication procedure. It stated that, in the event that a party wished to refer a dispute to adjudication, the Scheme should apply.

33. Proceedings under the Scheme have been described as "*unusual*", "*distinct from arbitration and sui generis*" – see paragraph 40 of *Lanes Group plc v Galliford Try Infrastructure Ltd t/a Galliford Try Rail* [2012] BLR 121. One does not find the words "*proceedings*" or "*commencement*" in the Scheme. There is thus a lack of correspondence between the wording in clause 1.9.2 and the wording in the Scheme, no doubt the product of the fact that clause 1.9.2 was first drafted before the Scheme

existed and, as drafted originally, referred only to the commencement of arbitration or other proceedings.

34. Thus one has to search more generally to find the correct resting point for the "*commencement of proceedings*" under the Scheme for the purpose of clause 1.9.2. Only two candidates for such a point are advanced, namely a) the point when a notice of adjudication is given under paragraph 1 or b) the point when a referral notice is given to an adjudicator under paragraph 7.

35. The question of when adjudication proceedings are commenced in the context of a conclusive evidence clause was considered expressly in *Tracy Bennett v FMK Construction Ltd* [2005] 101 Con LR 92. The contract in that case was on different standard terms to those of the Contract, namely JCT Standard Form of Building Contract (1998 Edn.) (private without quantities), but the conclusive evidence clause (clause 30.9.2 and 30.9.3) was materially identical to clause 1.9.2 of the Contract. The final certificate was issued on 11th March 2005. A notice of adjudication was served on 6th April 2005. The referral notice was communicated to the adjudicator on 18th April 2005. The possibility arose that the adjudicator's appointment was invalid because the referral notice was not referred to the adjudicator within 7 days of the notice of adjudication. The adjudicator resigned on 22nd April 2005. A notice of intention to refer was re-served and a fresh application made for the appointment of an adjudicator. The same adjudicator was re-appointed on 26th April 2005.

36. It was argued for Mr Bennett that the adjudication proceedings were commenced outside the 28-day period specified in the conclusive evidence clause. HHJ Havery QC rejected this argument. The key factor was the giving of notice of intention to refer and not the appointment of the adjudicator. At paragraph 18 he said :

> "*(18) Mr Mort further submitted that it was the referral notice that completed the commencement of proceedings. If that were right, then cl. 30.9.3 would not be applicable to the first reference, let alone the existing reference. Mr Mort referred me to a passage in* ***Keating on Building Contracts*** *7th Edn., 2001) p. 791, paragraph 18-430 to the effect that proceedings are commenced in adjudication by a written notice to refer to adjudication. He submitted that that passage was wrong. I reject that submission. For the purposes of cl. 30.9.3, which provides a short time period with a strict time limit, failure to comply with which leads to serious consequences analogous to the consequences of limitation provisions, 'commencement' must, in my judgment, refer to service of the notice of intention. Delay in the appointment of an adjudicator could lead to failure on the part of an applicant to serve a referral notice within 28 days after the issue of the final certificate through no fault on his part. It would take clear words to that effect to lead to such a conclusion. Clause 30.9.3 refers also to the commencement of arbitration proceedings. For the purposes of limitation, arbitration proceedings before a sole arbitrator are commenced by the giving of a notice to concur in the appointment of an arbitrator (see Mustill and Boyd* ***Commercial Arbitration*** *(2nd Edn. 1989) p. 169). In my judgment, it is clearly contemplated by cl.30.9.3 that*

arbitration can be commenced before the appointment of the arbitrator; and the same, mutatis mutandis, applies in relation to the appointment of an adjudicator."

37. Not only was this approach one adopted by *Keating on Building Contracts* in its 7th edition before the judgment in *Tracy Bennett v FMK Construction Ltd* (supra), but it is one that remains adopted in its 9th edition (at paragraph 20-037). It is also an approach consistent with the *Construction Adjudication and Payments Handbook* (2013) (at paragraph 4.09) and *Coulson on Construction Adjudication* (2nd Edn.) (at paragraph 2.113).

38. Ms Garrett for the University submits that the facts of this case are different to those arising in *Tracy Bennett v FMK Construction Ltd* (supra) and, if necessary, that that case was in any event wrongly decided. She submits that the comments of HHJ Havery QC were made on the false premise that the contractual provision for application to the nominator with the object of securing the appointment of, and the referral of the dispute to the adjudicator within 7 days of the notice of intention to refer was directory only, and not mandatory. The provisions of the Scheme are more than merely directory (even if a breach does not necessarily render a step invalid) – see *Linnett v Halliwells LLP* [2009] EWHC 319 (TCC) at paragraphs 92 to 106; *KNN Coburn LLP v GD City Holdings Ltd* [2013] EWHC 2879 (TCC); *Willmott Dixon Housing Ltd (formerly Inspace Partnerships Ltd) v Newlon Housing Trust* [2013] BLR 325.

39. Ms Garrett goes on to submit that the analogy with arbitration drawn by HHJ Havery QC also gave rise to a false premise. The Arbitration Act 1996, by s. 14(3), defines what is necessary to commence arbitration proceedings (in the absence of agreement otherwise between the parties) in a broad way. Arbitration proceedings are commenced "*when one party or parties give notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter*". As long as the relevant document is in writing and the intention is clear, there are no other necessary formalities. But where the parties, as here, have agreed expressly to incorporate a particular procedure, it is not surprising that a different result should obtain.

40. I turn against this background to consider the facts of this case. I identify two general introductory considerations :

    a) the purpose of clause 1.9.2 was to enable the parties to define for themselves the extent to which, if at all, a final certificate should be evidentially conclusive;

    b) on any view, a notice of adjudication under the Scheme is a critical document which defines the scope of the matters to which the adjudication proceedings relate (see paragraph 17 of the judgment of Coulson J in *Letchworth Roofing Company v Sterling Building Company* [2009] EWHC 1119). *Coulson on Construction Adjudication* (2nd Edn.) states as follows :

"*3.15 It is impossible to over-emphasise the importance of the notice of adjudication. It is the cornerstone of both the adjudicator's jurisdiction and the scope and limit of the referring party's claim in the adjudication.*

Although the significance of the notice of adjudication is dealt with in greater detail at paragraphs 7.47-7.60 below, it is important to note at this stage that the notice must identify carefully the dispute and the nature of the redress sought. Numerous problems in adjudication and adjudication enforcement have arisen out of the referring party's failure to provide an adequate notice of adjudication, and his subsequent attempts to make good that omission in the referral notice (Part 1, paragraph 7) and other documents served in the adjudication. The courts have made it plain that this is not a legitimate approach… .

7.57 The importance of ensuring that the notice of adjudication properly describes the relevant dispute is even more pronounced if the dispute relates to the contents of a final certificate. Many of the JCT Standard Forms of Building Contract contain detailed provisions relating to the issue of a final certificate, which, unless challenged within a set period, becomes conclusive evidence on a variety of potentially significant matters. If a final certificate is challenged, then the challenger is required to issue a notice of adjudication within a specified period (not usually longer than 28 days), and it therefore becomes critically important for the challenger to ensure that every element of his challenge to the final certificate is enshrined in the notice of adjudication; otherwise, if a point of challenge is omitted from the notice, the final certificate will become conclusive evidence in respect of that omitted matter. In such circumstances, there is a potential benefit to be gained by the party who is content with the final certificate in taking technical points about the notice of adjudication and/or the conduct of the adjudication to which it gives rise because, if such arguments are successful and, say, the decision is a nullity, the final certificate will not have been challenged in time.

…

7.58 Accordingly, subject to the points noted above, the general rule is that it is the notice of adjudication that defines the limits of the adjudicator's jurisdiction, so later documents, and in particular the more detailed referral notice, cannot extend the adjudicator's jurisdiction beyond that which is set out in the notice of adjudication … ."

41. As for the wording of clause 1.9.2 and the Scheme :

a) clause 1.9.2 provides that if any adjudication proceedings are commenced within time, the Final Certificate shall be conclusive evidence "*save only in respect of the matters to which those proceedings relate*";

b) there can be no doubt that the matters to which the adjudication proceedings relate are those matters identified in the notice of adjudication. The document that identifies and governs the scope of the proceedings, namely the notice of adjudication (and not the referral notice), may be said to resonate directly with the document envisaged as engaging the saving proviso in clause 1.9.2 ;

c) paragraph 1(1) of the Scheme does refer to the giving of notice of "*intention to refer*" a dispute. However, the giving of notice under paragraph 1(1) of the Scheme is defined as the giving of "*notice of adjudication*". That may be relevant to the question of interpretation, in

other words relevant to what the parties can objectively be said to have intended. It suggests that the notice is to be treated as something more than mere notice of intention;

d) there is no doubt that proceedings are commenced in the courts without a judge being appointed, just as arbitration proceedings may be commenced without an arbitrator being appointed;

e) additionally, the requirements of paragraph 1 (3) are very similar to the requirements for a claim form as contained in CPR 16.2 and CPR16PD.2. The notice is required to set out the nature and a brief description of the dispute and of the parties involved. It is required to set out details of where and when the dispute has arisen. It is required to set out the nature of the redress sought. These requirements go well beyond what would be required merely to give notice of an intention to refer;

f) the First Notice demonstrates those requirements. It did not just give notice of an intention to refer the dispute; it expressly sought relief, including interest and costs. Its heading in standard form (of "*IN THE MATTER OF AN ADJUDICATION*") indicates the existence of actual, not just intended, proceedings;

g) the structure of the Scheme itself suggests that the nothing in the body of the Scheme militates against the notice of adjudication amounting to commencement of proceedings;

h) on the contrary, it is difficult to see why otherwise there would be a need for the provision of a detailed notice of adjudication the type required by paragraph 1(3) of the Scheme. The Scheme could simply have opened with the referral process, but it does not;

i) additionally, it is significant that in the event of resignation of an adjudicator under paragraph 9 it is a fresh notice of adjudication that must be served if the referring party wants to continue, not just a fresh referral notice.

42. I am not persuaded that paragraph 19 of the Scheme militates in favour of the construction advanced by the University. Paragraph 19 requires an adjudicator to reach his decision not later than 28 days after the date of the referral notice under paragraph 7 of the Scheme (or extended periods by agreement again fixed by reference to the referral notice). This simply gives the adjudicator a clean and certain period for completion of his task uncomplicated by previous timings and dates arising out of events in which he was not involved. Nor do I accept that the period between the notice of adjudication and referral is intended objectively only to allow problems in the appointment process to be addressed and not to start proceedings. The requirements for a notice of adjudication go well beyond what would be necessary for such purpose. And, as already indicated, it performs a far more important function than this.

43. For these reasons, looking at the wording of the clause and the Scheme together as a whole without more, the more natural construction of clause 1.9.2 is that proceedings

are commenced when a notice of adjudication is given under paragraph 1 of the Scheme.

44. This is a result consistent with the fact that, as the University has rightly emphasised, the arrangement between the parties is a contractual one. The engagement of the Scheme arises through the Contract. Proceedings for the purpose of the Contract need engage only the parties to the Contract. No outside jurisdiction or tribunal is necessary for the adjudication proceedings to exist, just as in the arbitral context.

45. It is also a result which accords with commercial common sense. It is right to say that that paragraphs 2 to 7 of the Scheme are mandatory and directed at a strict timetable. To this extent, the context is distinguishable from that assumed by HHJ Havery QC in *Tracy Bennett v FMK Construction Ltd* (supra). But it remains the case that events outside the control of the referring party could, on the University's case, lead to the loss of the benefit of the saving provision in clause 1.9.2. Thus by way of example only :

a) the nominating body referred to in paragraph 2(1) b) has up to 5 days from the date of receiving a request to communicate its selection of an adjudicator to the referring party (paragraph 5);

b) the selected adjudicator has up to 2 days of receiving a request to indicate whether he is willing to act (paragraph 2(2));

c) where a selected adjudicator declines to act or does not respond (which could accordingly happen up to 7 days from the notice of adjudication), then under paragraph 6 the referring party may request the nominating body to select another adjudicator who then has another 2 days to indicate whether to accept the nomination (paragraph 6).

46. A further potential complication arises out of paragraph 7 of the Scheme. That paragraph requires the referring party to refer the dispute in writing to the adjudicator not later than 7 days from the date of the notice of the adjudication "*where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6*". Logically, paragraph 7 must be intended to apply where an adjudicator has been appointed, not merely selected. The referring party has control over the giving of notice of adjudication, but not over the selection or appointment of the adjudicator. It is possible, by reference to paragraphs 2, 5, and 6 of the Scheme as set out above, for circumstances to arise where, without any breach of the Scheme, no adjudicator has in fact been appointed within the time frame for referral to the adjudicator under paragraph 7. On the University's case, the referring party would be at risk, through no fault of its own and indeed no breach of the Scheme by any party involved, of losing it protection under clause 1.9.2.

47. As Miss Cheng put it for Dovehouse, a referral notice may thus be invalid for being served outside the period of 7 days from date of the notice of adjudication in circumstances where the referring party has taken every step required of it and the Scheme has been operated as intended. These considerations lend yet further support for the construction that proceedings are commenced, not be referral under paragraph 7, but by notice of adjudication under paragraph 1.

48. The chronology of the present case is itself illuminating. Notification of selection and then appointment of the First Adjudicator was not given to the referring party until after 4pm on 19th February 2014. First, this was at the very limit of the 5-day time limit provided for in paragraph 5 of the Scheme, the request having been made to the nominating body on 14th February 2014. It left Dovehouse with only one day to refer the dispute to the First Adjudicator under paragraph 7 of the Scheme. The practical effect of the construction of the University would also be startling. Absent any agreement for extension, the opportunity for reflection for the parties following the issue of a Final Certificate would be reduced dramatically. Time for a potential referring party to consider its position would be reduced from 28 days to say 14 days. This is not a commercially sensible or practicable scenario.

49. In summary, where the consequences for a referring party in missing the deadline imposed in clause 1.9.2 may (indeed are likely to) be severe, the parties can be taken to have intended and wanted certainty and control over the date of commencement of proceedings. Construing the Scheme in the manner contended for by the University does not achieve that control or certainty and does not accord with commercial common sense. This is not to re-write the Contract but to apply a purposive commercial construction to it.

50. Dovehouse's position is supported further by a consideration of the requirements for commencement of arbitration proceedings. Under the Contract Article 8 and clauses 9.3 to 9.8 of the Contract (dealing with arbitration) were not to apply. There was no agreement as to when arbitral proceedings were to be regarded as commenced for the purpose of the Arbitration Act 1996 or for the purposes of the Limitation Act 1980 (as amended). Thus the position was at large under s. 14(3) of the Arbitration Act 1996, as set out above and only a notice to concur was required for the commencement of arbitration proceedings.

51. Moreover, it would be odd for there to be materially different procedural requirements (and a different timetable) for the commencement of adjudication proceedings on the one hand and arbitration proceedings on the other for the purpose of clause 1.9.2. On the University's case, a much more cumbersome and uncertain procedure would be required for a party wishing to engage the saving proviso in clause 1.9.2 through the commencement of adjudication proceedings. A party wishing to engage the saving proviso in clause 1.9.2 through the commencement of arbitration proceedings could wait safely until the very end of the 28 day period from issue of the Final Certificate before simply issuing a notice to concur. A party wishing to engage the saving proviso through the commencement of adjudication proceedings would, on the University's case, have to issue a notice of adjudication weeks beforehand in order to have any chance of certainty.

52. For all these reasons, I reject the University's submission that adjudication proceedings for the purpose of clause 1.9.2 of the Contract are commenced only by a referral notice under paragraph 7. Rather they are commenced by the issue of an adjudication notice under paragraph 1 of the Scheme.

Invalidity of the First Notice : breach of paragraph 1(3)(d) of the Scheme

53. The University contends that the First Notice was invalid to commence proceedings in any event because it did not set out the contractually specified address for the giving of notices, contrary to paragraph 1(3)(d) of the Scheme.

54. As set out above, paragraph 1(3)(d) required the notice of adjudication to set out briefly :

> "*... the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).*"

55. The First Notice set out the correct name of the University and a correct address of the University. The address set out, namely the Exion address, was that used extensively under the Contract including :

a) in the schedule of works accompanying the tender documents in the Preliminaries;

b) as the address for the University's representative in the minutes for project meetings;

c) as the University's address on all Valuation Certificates;

d) as the University's address in the certificate of practical completion;

e) as the address for the University's representative on Payment Notices.

56. But the First Notice did not set out the address for the University set out in clause 1.7 of the Contract Particulars, namely the Mithras House address.

57. The University contends that all the requirements of paragraph 1(3)(d) are mandatory, fundamental and not merely procedural. Any breach leads to a lack of jurisdiction. Reliance is placed on the decision of Ramsey J in *Linnett v Halliwells LLP* [2009] EWHC 319 (TCC) at paragraph 17 to the effect that a sufficient breach will render a step in the adjudication invalid. At paragraph 96 Ramsey J said :

> "*....Generally, apart from exceptional cases such as Cubitt [Building Interiors Ltd v Fleetglade Ltd [2007] 110 Con LR 36] this will mean that the court will treat service of the referral within that period as being mandatory so that the failure by the referring party to serve it in that period will be regarded as making the referral a nullity as not being what the parties intended. In such cases the adjudicator will have no jurisdiction derived from that referral.*"

58. The University seeks support from *Page and ors v Hewetts Solicitors* [2012] EWCA Civ 805 and the subsequent first instance decision at [2013] EWHC 2845 (Ch). The Court of Appeal there considered the question of when proceedings were "brought" for the purpose of the Limitation Act 1980 (as amended). The claimants' solicitors had sent the claim form to court via DX but the court had no record of receipt. At paragraph 38 Lewison LJ held that in order to establish that proceedings had been brought within time the claimants needed to establish that the claim form was delivered in due time to the court office, accompanied by a request to issue and the appropriate fee. He referred (at paragraph 36) to an "*underlying theme…that a would-be litigant is not responsible for any shortcomings of the Court*."

59. At the following first instance hearing on preliminary issues Hildyard J held that the claimants had not proved on a balance of probabilities that the claim form had duly arrived at the court office. In relation to a second set of claim form documents, as to which there was no doubt about receipt by the court, it was held that they were too were not sufficient for the purpose of bringing proceeding because the accompanying fee was £400 too low. Hildyard J said this :

> "*56. ... I have considered whether it is so de minimis that the Court should not take it into account, or make some exception or allowance.*
>
> *57. However, as I read Lewison LJ's judgment in the Court of Appeal, the rationale of treating the receipt by the court of the required documents as sufficient and transferring to the court the risk of loss or delay thereafter…is that it is unfair to visit such risk on the claimant after he has done all that he reasonably could do to bring the matter before the court for its process to follow. Lewison LJ expressly described what had to be established by the claimants : that the claim was a) to be delivered in due time to the court office, accompanied by b) a request to issue and c) the appropriate fee. In my judgment, the failure to offer the appropriate fee meant that the claimants had not done all that was required of them; and they had left it too late to correct the error, which was a risk they unilaterally took.*"

60. Dovehouse denies that there was any failure to comply with paragraph 1(3)(d) of the Scheme and contends that it was clear beyond doubt who the responding party was intended to be.

61. As to whether or not there was a breach, the only possible breach could be the omission of an additional reference to the Mithras House address. Dovehouse was clearly entitled under paragraph 1(3)(d) of the Scheme to refer to more than one address and, under the Contract, entitled to serve notices at other addresses (see clause 1.7.2 of the Contract).

62. In my judgment, the natural meaning of the requirement in paragraph 1(3)(d) to include addresses which the parties had specified for the giving of notices "*where appropriate*" is that such an address had to be included where, as here, the parties had made such a specification. As was pointed out for the University, it would be surprising if a subjective element (requiring factual investigation) were to be introduced in this context. I therefore reject the submission for Dovehouse that it was not "appropriate" within the meaning of section 1(3)(d) to set out the Mithras House address by reference to the facts of the case.

63. But I am not persuaded on the facts of the case that the failure to set out the Mithras House address was such as to render invalid the First Notice as commencing proceedings for the purpose of clause 1.9.2.

64. The authorities make it clear that not every breach of a requirement of the Scheme is such as to render a notice invalid. Thus, by way of example, in *Linnett v Halliwells*

(supra) a failure to serve the accompanying documents on the adjudicator within the specified 7 day period in breach of clause 41A.4 of the contract was held not to be a sufficient breach to mean that the referral was invalid or to make the adjudication or the decision a nullity.

65. Ramsey J referred to the judgment of Coulson J in *Cubitt Building Interiors Ltd v Fleetglade Ltd* [2007] 110 Con LR 36. There, having considered his earlier decision in *Hart Investments Ltd v Fidler* [2006] 109 Con LR 67, Coulson J stated that clause 41A "*had to be operated in a sensible and commercial way*". Service on day 8 did not mean that there had been a failure to comply : "*although clause 41A sets out a mandatory timetable, it is a timetable that needs to be operated in a sensible and businesslike way.*" Ramsey J agreed (at paragraph 96). He went on at paragraph 97 to say :

> "*.... operating clause 41A and its mandatory timetable in a sensible and businesslike way means that where there has been a failure to comply with the detailed and procedural aspects of cl. 41A, the : courts should be slow to find that a failure to comply with a detailed procedural aspect of contractual provision renders the relevant part of the process a nullity so as to deprive the adjudicator of jurisdiction. Objectively that cannot have been the intention of the parties or of the provisions of the Scheme. This is consistent with the position that I held applied under the Scheme in OSC Building Services Ltd v Interior Dimension Contracts Ltd [2009] EWHC 248 (TCC).*"

66. As identified in *Griffin and another (t/a K & D Contractors) v Midas Homes Ltd* [2000] 78 Con LR 152 (at 153) the purposes of a notice of adjudication under paragraph 1(3) of the Scheme are :

> "*…first, to inform the other party of what the dispute is; secondly, to inform those who my be responsible for making the appointment of an adjudicator, so that the correct adjudicator can be selected; and finally, of course, to define the dispute of which party is informed, to specify the redress sought, and the party exercising the statutory right and the party against whom a decision may be made so that the adjudicator knows the ambit of his jurisdiction.*"

67. There is no doubt that the omission of an additional address for the University in no way affected the fact that the First Notice achieved its purpose of informing the University of the dispute being raised against it by Dovehouse. The parties cannot be taken to have intended that where the relevant purpose of paragraph 1(3)(d), namely to identify who was intended to be the responding party, was satisfied beyond any reasonable doubt, a technical failure to identify an additional address for that party would have the effect of invalidating the notice of adjudication. This was not a fundamental non-compliance.

68. The decisions in *Page v Hewetts* (supra) were in a different context dealing with the rational of treating proceedings as having been brought for the purpose of the Limitation Act 1980 (as amended) even if they had not been commenced. And in any

event a failure to provide the correct level of fee for issue was substantive – in that the form could not be issued without more. Here the omission of a second address did not lead to non-issue. The notice of adjudication was given to the University and there was no doubt as to who was the responding party.

Invalidity of the First Notice : breach of clause 1.7.3 of the Contract

69. The University next contends that the First Notice is invalid for the purpose of commencing proceedings because it was not served at the address that the University had specified contractually for the giving of notices as set out in clause 1.7.3 of the Contract.

70. It is common ground that the First Notice was not served by 14th February 2014 at the Mithras House address, but rather was served at the Exion address.

71. In my judgment it cannot be said that proceedings were not commenced for the purpose of clause 1.9.2 because the First Notice was not served on the Mithras House address.

72. First, I am not persuaded that a notice of adjudication under paragraph 1 of the Scheme is a notice "expressly referred to in the Agreement…or Conditions." as envisaged in clause 1.7.1 of the Contract, and so am not persuaded that any requirements in clause 1.7.3 apply. "Agreement" is defined as "*the Articles of Agreement to which these Conditions are annexed, consisting of the Recitals, the Articles and the Contract Particulars*". Clause 9.2 of the Contract provides that the Scheme shall apply if adjudication proceedings are desired by any party. It did not refer expressly to a notice of adjudication under Part 1 of the Scheme. It seems to me that the Scheme provides a self-contained procedural code. Under paragraph 1(2) notice has to be given to every other party to the contract, but there is no specific requirement for a particular method or place of service.

73. If I am wrong about that, and clause 1.7.3 applies to service of the notice of adjudication, then I do not accept that there was any breach, for the simple reason that clause 1.7.3 does not impose a mandatory requirement to serve the First Notice at the Mithras House address. The presence of the word "and" in the middle of the opening lines is significant. The preceding clause entitles a notice to be given or served by any effective means. The following clause provides a deeming provision whereby service would be deemed to have been duly given if delivered by hand or sent by pre-paid post to the addresses identified in clauses 1.7.3.1 and 1.7.3.2. But clause 1.7.3 does not prevent effective service being made at a different address. If a different address is used, then effective service has to be proved. There is no suggestion that the University did not receive the First Notice at the Exion address.

74. If I am wrong about that, I would in any event hold that a breach of clause 1.7.3 would not invalidate the First Notice for the purpose of triggering the saving proviso in clause 1.9.2. Notice of Adjudication was given substantively and effectively to the University at the Exion address. Its substantive purpose of commencing proceedings was achieved.

What is the effect of nomination of an incorrect nominating body? Can there be a cure?

75. Finally, the University advances an overarching point. It contends that no proceedings were commenced by the First Notice for the purpose of clause 1.9.2 of the Contract because the wrong nominating body was identified. Thus the First Adjudicator's resignation necessitated service of a "fresh notice" by 14th February 2014, and there was no such service. The First Notice cannot be relied on in relation to any other Referral Notice, because no Referral Notice was (or can now be) served within 7 days of that Notice.

76. As to identification of the adjudicator nominating body, it is common ground that the First Notice incorrectly stated that "*the Adjudicator is not named and the nominator of the Adjudicator is not stated the Referring Party therefore selects from the list included in the Contract the Royal Institution of Chartered Surveyors to nominate the Adjudicator*". It is therefore also common ground that the First Adjudicator, nominated by the RICS, was correct to resign. The position is different from that in *Tracy Bennett v FMK Construction Ltd* (supra), where the first referral was rendered abortive through no action or omission of the referring party (see paragraph 17 of the judgment).

77. However, once it is understood, as I have held, that proceedings for the purpose of clause 1.9.2 are commenced by notice of adjudication, the suggestion that somehow proceedings are not commenced because of incorrect identification of the nominating body in the notice of adjudication falls away. Dovehouse was not obliged to identify the nominating body in the First Notice at all. The First Notice could have been completely silent on the point.

78. What was required was the giving of a notice to the University that complied substantively with paragraph 1(3) of the Scheme. The University was driven in this regard to submit in reply that the commencement of proceedings for the purpose of clause 1.9.2 should be construed so as to mean the doing of everything in the power of the referring party to reach a full and final adjudication. This is an unwarranted extension of the phrase "*commencement of proceedings*" which, for the reasons set out above, requires no more than the giving of a valid notice under paragraph 1(3) of the Scheme.

79. There is therefore no proper analogy with, for example, a failure to provide the proper fee for issue of a claim form as was the case in *Page and ors v Hewetts Solicitors* (supra). Without the proper claim form fee the proceedings there could not be commenced. Here the proceedings could be commenced without proper identification of the nominating body. There was no equally fundamental failure. It is also to be noted that in *Page and ors v Hewetts Solicitors* (supra) that the Court of Appeal did not hold that a claim form had to be served validly in order for proceedings to be commenced for limitation purposes.

80. In circumstances where there was no requirement to identify the agreed nominating body in the First Notice, the incorrect identification of that body did not render the First Notice as a whole invalid.

81. On this basis, proceedings were commenced for the purpose of clause 1.9.2 by the notice of adjudication, despite the incorrect identification of the nominating body.

82. As to the effect of the invalid referral and the First Adjudicator's resignation, the University again relies on *Linnett v Halliwells LLP* (supra) and *Page and ors v*

Hewetts Solicitors (supra) which I have already addressed above. Its central argument is that where there is an invalid referral through the fault of the referring party the position cannot be cured. Thus the saving proviso falls away. Where a party wishes to rely on adjudication proceedings for the purpose of clause 1.9.2 it is incumbent on that party to ensure that all matters within its control and power are implemented correctly. It is the referring party that assumes the risk of any problems arising in relation to the effective appointment of an adjudicator.

83. In my judgment the invalidity of the referral and the resignation of the First Adjudicator did not negate the sufficiency of the notice of adjudication for the purpose of commencing proceedings as set out in clause 1.9.2.

84. First, the saving proviso in clause 1.9.2 was not triggered by reference to any outcome, or indeed any step beyond the commencement of proceedings. It did not require a referral, a hearing or a decision in order for the proviso be triggered. On the face of the clause the parties agreed that all that was required to engage the saving proviso was the commencement of proceedings. The parties could have required more, but they chose not to.

85. Secondly, it is important to distinguish between the question of the validity of an adjudication notice and the validity of a referral notice. An invalid referral may mean that the nominated adjudicator has no valid jurisdiction – see the judgment of Edwards-Stuart J in *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC) at paragraphs 58, 60 and 61). But that does not mean that the notice of adjudication was invalid for the purpose of commencing proceedings for the purpose of clause 1.9.2.

86. I accept Dovehouse's submission that the saving provision in clause 1.9.2 was triggered by the commencement of adjudication proceedings. Once triggered, on the facts of this case, the saving proviso remains in operation during the currency of any subsequent adjudication proceedings.

87. This conclusion is not inconsistent with the view expressed in *Tracy Bennett v FMK Construction Ltd* (supra) at paragraph 15. There the court accepted that if a referring party abandons adjudication proceedings by simply not pursuing them, the saving proviso would fall away. Subject to *Lanes Group plc v Galliford Try Infrastructure Ltd* (supra) as discussed further below, that view could be seen as consistent with an objective view of the parties' intention at the time of the contract. Otherwise a party could simply abuse the ability to commence proceedings under the Scheme by serving a notice of intention to proceed and removing the conclusive effect of the Final Certificate without any intention to resolve the dispute under the Scheme. Parties would not objectively be taken to have intended in such circumstances the saving proviso to have remained effective.

88. On the facts here there is no consider a question of abandonment "*by [Dovehouse] simply not pursuing [the adjudication proceedings]*" as envisaged in *Tracy Bennett FMK Construction Ltd* (supra). Dovehouse has always had every intention of pursuing the adjudication proceedings. It issued them within time, albeit containing an error in relation to the nominating body. As soon as the error was identified and the First Adjudicator resigned (in the afternoon of Friday 21st February 2014), Dovehouse amended the First Notice with the Second Notice on the next working day, Monday 24th February 2014. The adjudication proceedings have only not proceeded because

of the stay agreed by the parties pending the outcome of this claim. Thus the situation is materially different to one of abandonment.

89. As for the University's submission that the nature of the cause for the resignation should lead to different results, clause 9 itself does not distinguish between different types of resignation, that is to say resignation because of error on the referring party or resignation for some other reason for which the referring party is entirely blameless.

90. Clause 9 addresses the position where an adjudicator resigns for any reason. Upon a resignation of an adjudicator (at any time and for any reason) clause 9(3) requires service of a fresh notice of adjudication. There is no time limit for the issue of that fresh notice. By definition the resignation could happen at any time many months after the issue of the Final Certificate. I do not accept the submission for the University that the result is to remove all time limits under the Scheme in some impermissible way. The Scheme as a whole permits of uncontrollable delay.

91. Paragraph 17 of *Tracy Bennett v FMK Construction Ltd* (supra) might be thought to support the distinction relied on by the University. There HHJ Havery QC concluded that the words "*those proceedings*" in relation to adjudication in the salvo to clause 30.9.3 of the contract were wide enough to include new adjudication proceedings brought in relation to the same dispute as was the subject of earlier adjudication proceedings "*brought by the same party which have been rendered abortive through no action or omission of the referring party*". And if the issue of the new notice of intention was not necessary, the new notice could be treated as surplusage. It was also suggested that *Coulson on Construction Adjudication* (2nd Edn.) (at paragraphs 7.56 to 7.58) is inconsistent with the conclusion in paragraph 86 above. Paragraph 7.57 states:

> "*....It can be worthwhile for a challenger in such circumstances to issue both a notice of adjudication and a claim form (or arbitration notice) at the same time, to ensure that an error by the adjudicator during the reference does not create an insurmountable procedural difficulty.*"

92. In neither authority or text were the present facts under scrutiny. And guidance as to possible protective practical steps cannot provide a substantive answer to the points of law presently arising. The matter must be viewed as a matter of principle. It would be odd if the position as a matter of principle required parties wishing to engage the saving proviso in clause 1.9.2 to issue multiple (and costly) proceedings in different jurisdictions.

93. In any event, to the extent that any material inconsistencies exist, there is recent appellate guidance to be found in *Lanes Group v Galliford Try* (supra). There the main contractor ("Galliford"), having commenced adjudication proceedings, then terminated them by simply not serving its statement of case on the adjudicator. It took the view at the time (wrongly so it turned out) that the selected arbitrator could not properly act. It then, after a period of time, served a new notice and sought a fresh appointment on the same dispute. It effectively "*started again*", adjudicating the same dispute before a different adjudicator.

94. At paragraphs 36 to 39 Jackson LJ said :

"*36. .... The argument ... is that ... clause 18B of the sub-contract conditions permit a party to refer a dispute to adjudication on one occasion only. If the party seeking adjudication….does not follow through the reference, that is the end of the matter. The right to adjudication of the dispute notified in the adjudication is lost forever. Therefore, argues Mr Wilmot-Smith, Galliford having allowed the adjudication before Mr Klein to lapse could not commence a fresh adjudication in respect of the same subject-matter.*

37. The court was initially attracted by Mr Wilmot-Smith's submission. The proposition that a claimant can allow an adjudication to lapse because it disapproves of the appointed adjudicator and then start a fresh adjudication before a different adjudicator is not an appealing one… Mr Marrin has persuaded me, however, that there are formidable difficulties in the case which Lane advances. First it does sometimes happen that adjudication is not pursued further after the preliminary steps have been taken. There is no authority to suggest that as a consequence the claimant loses its right to adjudicate that dispute for all time.

38. Secondly, both the Blue Form sub-contract, the ICE Adjudication Procedure and the Scheme recognise a right to restart an adjudication in a variety of circumstances…. It is possible to think of many situations, not all of which are provided for by express terms, in which the adjudication procedure would be thwarted if there were no right to re-start an abortive adjudication. For example, suppose there is a postal delay which prevents the referral documents being served within two days as required by paragraph 4.1 of the ICE Adjudication Procedure. It cannot be right that the claimant's entitlement to adjudicate the dispute is irretrievably lost.

39. Mr Wilmot-Smith seeks to overcome these difficulties by arguing that the claimant only loses the right to adjudicate if he deliberately and without good reason fails to serve referral documents by the due date. In my view, however, it is quite impossible to imply a term of this nature either into the present contract or into the 1996 Act and the Scheme. Furthermore, if such an elaborate provision were to be implied, an expensive factual investigation would be required in some cases in order to determine whether the claimant had or had not lost the right to adjudicate."

95. The University says that the Court of Appeal was not there dealing with a conclusive evidence clause. But the approach in principle is in my judgment still applicable, not

least since the Court of Appeal was expressly considering the Scheme and the effect of the lapse of adjudication under the Scheme.

96. As set out above, the Court of Appeal eschewed the notion that where adjudication is not pursued (for whatever reason) the right to adjudication is lost forever. It drew no distinction between circumstances where adjudication was thwarted by error on the part of the referring party or for some other reason. It expressly rejected the invitation to alter the result by reference to the cause of the adjudication proceedings not continuing to their end.

97. Objectively construed, the parties would have intended the saving proviso in clause 1.9.2 to be and remain engaged in circumstances where a notice of adjudication that was valid under paragraph 1 of the Scheme inadvertently identified the wrong nominating body for referral purposes. The error would not lead to the loss of the entitlement to the saving proviso in clause 1.9.2 of the Contract. This is what the reasonable person as envisaged *Rainy Sky SA v Kookmin Bank* (supra) would have understood the parties to have intended.

98. In short, an invalid referral does not render invalid a notice of adjudication for the purpose of commencing adjudication proceedings within the meaning of clause 1.9.2.

Conclusion

99. For these reasons I dismiss the claim. I invite the parties to agree an order and costs so far as possible, including the costs of the University's application for an injunction.

100. Finally, I record my gratitude to both counsel for their able assistance in this matter.