Neutral Citation Number: [2019] EWHC 495 (TCC)

Case No: HT-2018-000203

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

The Rolls Building, 7 Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 08/03/2019

**Before**:

**MR JUSTICE STUART-SMITH**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Hitachi Zosen Inova AG** | **Claimant** |
| **- and -** | |
| **John Sisk & Son Limited** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Steven Walker QC** (instructed by **Vinson & Elkins RLLP**) for the **Claimant**
**Nicholas Collings** (instructed by **Eversheds Sutherland (International) LLP**) for the **Defendant**

Hearing date: 30th January 2019

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

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

.....

MR JUSTICE STUART-SMITH

## MR JUSTICE STUART-SMITH :

### Introduction

1. The central issue for determination is whether the adjudicator in the eighth adjudication arising out of the contract between the parties has jurisdiction to decide what sums are properly payable for additional works that were carried out by the Defendant ["Sisk"]. The Claimant ["Hitachi"] says that the adjudicator has no jurisdiction because the same or substantially the same question has already been decided by an earlier adjudication, which was the second.

2. The essential facts are within a fairly narrow compass and are not materially in dispute. Similarly, the legal principles involved are essentially well established. Despite that, this application generated over 2750 pages of documents and a bundle of 12 authorities. The great majority of this excessive documentation was not referred to in the hearing and will not be referred to in this judgment.

### Factual Background

3. Hitachi was employed to specify, design, engineer, construct, commission and test a multi-fuel power plant on the site of the existing coal-fired power station at Ferrybridge in Yorkshire. It engaged Sisk to provide design and construction services for the project by a contract dated 29 March 2012 ("the Contract") for a consideration in excess of £44 million, or such other sums as might become payable under the Contract. For some reason which is not explained, the parties habitually called additional works under the Contract "Events". This case directly concerns Event 1176.

4. The potentially relevant contractual provisions are set out in Annex A. They impose obligations on both Sisk and Hitachi in relation to payment for variations and claims for interim payment, and adjudications. In summary:

    i) Pursuant to Clause 14.2, where Sisk receives an instruction or direction from Hitachi to vary the works and the instruction does not set out the value or the basis for calculating the value of the instruction then (a) Sisk is obliged to comply with Clause 30 and (b) Hitachi is required to determine the adjustment to the Contract Price "acting reasonably in the circumstances at the time". Where the instruction sets out the value or means of calculating the value of any adjustment to the Contract Price, Hitachi shall issue a Variation Order that clearly identifies the amount payable or the means by which the amount payable shall be calculated. Hitachi shall also issue a Variation Order in all other cases where Hitachi, acting reasonably, is satisfied that Sisk has properly demonstrated an entitlement to be paid pursuant to Clause 30;

    ii) Where Hitachi's instruction does set not out the value or the basis for valuing a related adjustment to the Contract Price, Clause 30.1 provides that Sisk shall be entitled to all reasonable and unavoidable additional direct Cost and Expense incurred by Sisk. The level of entitlement shall be based upon the actual Cost and Expense "substantiated by contemporary records and audits of [Sisk's] books of account" or, in Hitachi's absolute discretion, any suitable relevant rates or prices used by Sisk for agreeing the Contract Price;

iii) Clause 30.4 imposes tight time-limits upon Sisk for giving notice to Hitachi of its intention to make a claim (5 days) and the provision of detailed evidence (a further 15 days) to enable Hitachi to evaluate the validity and value of the claim. Hitachi has the right to request further substantiation to be provided within a stipulated time if the evidence submitted by Sisk does not, in Hitachi's opinion, enable Hitachi adequately to ascertain the validity and value of the claim. Sisk is not entitled to any additional Cost and Expense pursuant to Clause 30 if it fails to comply with such a request from Hitachi. This is emphasised by Clause 30.6;

iv) Pursuant to Clause 37.2(c) the Purchaser's Representative may adjust any previous over or under payment in a Payment Notice subsequently issued. There is no contractual qualification or limitation of the circumstances which may lead the Purchaser's Representative to make such adjustments.

v) Clause 51 provides for reference to adjudication and the incorporation of the TECSA Rules. Rule 16 of the TECSA Rules gives the adjudicator the like power to open up and review any certificates or other things issued or made pursuant to the Contract as would an arbitrator appointed pursuant to the Contract and/or a Court.

vi) Pursuant to Clause 51.7 the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings or by agreement; but, pursuant to Clause 52.2, if an adjudicator's decision is not referred to the Court within 10 Business Days then it becomes final and binding on the parties.

*The Second Adjudication*

5. On 16 October 2015 Sisk issued its Application for Payment of Events No. 6 ["Application No. 6"]. Application No. 6 followed a familiar pattern: it identified the cumulative value of the Events to date (£8,340,152.92) and the amount previously paid (£3,806,230.00) and claimed the difference between those two figures (£4,533,922.92) plus VAT. The schedule accompanying the application included an entry for Event 1176, described as "Acceleration Works to the Boiler Hall construction as agreed … during the meetings of 29th August, 18th September and 1st October 2014". The amount brought into the schedule was £1,092,497.45. The works were said to be 100% complete and the comment was added "As per Sisk's Substantiated Pack – Letter 2957".

6. On 9 November 2015 Hitachi submitted a Payment Notice with respect to Application No. 6. It rejected the claim for any payment for Event 1176 and asserted as an overall position that Sisk had been overpaid £2,720,683.52. Given this dispute, Sisk referred some of the items included in Application No. 6 to adjudication. The items included Event 1176, which was recorded by Schedule 4 to the Notice as being "not accepted". By its notice of intention to refer the dispute to adjudication, Sisk claimed:

> "4.1.1 A declaration as to the correct valuation of each of the items in dispute that have been referred to the adjudicator in this adjudication ..

> 4.1.2 An order that [Hitachi] shall pay to Sisk the sum of £3,947,187.42 plus VAT or such other sum as the adjudicator may decide (plus VAT);
>
> …"

7. Sisk's referral notice set out its explanation and intended substantiation of the sum claimed for Event 1176, to which Hitachi replied by its Response to the Referral Notice. Sisk served a Reply to that Response; Hitachi responded again with a Rejoinder; and, finally, Sisk served a Surrejoinder. Each of these documents advanced submissions and evidence about Event 1176. There can be no doubt that Sisk was asking the adjudicator to evaluate Event 1176 in the sum claimed or such other sum as he found to be proved and that Hitachi was trying to persuade the adjudicator that the sums claimed were not proved to the necessary contractual standard.

8. The adjudicator, Mr Pontin, issued his decision on 14 April 2016 and issued a correction on 18 April 2016. The terms of his decision are critical to the issues that now fall for resolution and I therefore set out the relevant passages in full:

   i) Having summarised the submissions and timetable he said at [11]:

   > "Accordingly this decision does not rehearse each and every issue raised by the Parties but it does address the Dispute referred, namely whether the items are Variations or matters for deduction, whether a time bar or other agreement applies and what the proper valuation is and sum due for the purposes of Application 6."

   ii) At [38]-[45] he considered the basis for valuation under Clause 30.1 and continued at [46]:

   > "Both Sisk and [Hitachi] at times seek to rely on unsupported costs in their respective valuations. Absent common ground in the parties' approach to valuation, I have applied contract rates and allowances where I am directed to them and am satisfied that they are sufficiently evidenced, alternatively Costs and Expense where sufficiently evidenced. If I have insufficient evidence to conclude a valuation I have had regard to any admissions made by either party and applied those to my valuation. In very many cases however the detail provided both in Application 6 and Payment Notice 6 falls short of that required by clause 30.1 and in such situations I have been unable to conclude a valuation for the purposes of Interim Application/Payment Notice 6. This is not to say that no value is due on a subsequent application, but rather, that none could be ascertained as due for this Application 6/Payment Notice 6."

   iii) At [83], under the heading "Valuation" he wrote:

> "My valuation is set out in summary terms in Appendix 1 to this decision for the Variations that Sisk identify …. . The appendices are copies of the schedules provided in Referral Section E with additional columns added for my Valuation and comments."

iv) At [89] under the heading "Directions", he wrote (as amended on 18 April 2016):

> "I therefore Decide, Declare and Direct:
>
> (a) The correct valuation of each of the items in dispute that have been referred to me in this adjudication, being the items in the schedule at Appendix 4 to the Notice of Adjudication is as set out in Appendices 1 and 2 to this Decision, namely [£37,003.59] for Variations ….;
>
> (b) [Hitachi] shall pay to Sisk the sum of [£332,222.27] plus such VAT as is due at law;
>
> …"

v) As indicated in the main text of the decision, Appendix 1 replicated Sisk's claim as set out in its referral for Events, with the sum allowed by the adjudicator and what was described as the "Adjudicator's Decision" in two columns at the right hand side of the Appendix. The sum allowed for Event 1176 was £0.00. The Adjudicator's decision first addressed whether Sisk was instructed to accelerate its works as claimed. The adjudicator concluded that it was and "that this is a variation that requires valuation." He continued:

> "Sisk provide some cost details but with limited exceptions they comprise unreferenced abstracts of daily and weekly resources or extracts from sub-contract accounts without the necessary context to satisfy the requirements of Clause 30.1.
>
> I do not have sufficient details to value the works and hence for the purposes of Payment Notice 6 my value is £nil."

vi) There were other Events (e.g. 1332, 1357, 1372) where the substance of the adjudicator's decision was that Sisk had not satisfied the contractual requirements of proof under Clause 30.1 and therefore no sum would be or was awarded. The wording used by the adjudicator to express this conclusion was not the same in all cases, but in each case the substance of his decision was clear. In at least one case (Event 700) the adjudicator used a rather different formulation, saying that the event was "not before [him] but for the purposes of this Payment Notice 6 the value for Event 700 is nil." ;

vii) One other Event which has figured in submissions was Event 378, which was a claim for the costs of erecting safety barriers and retaining walls in the sum of £110,150.76. The adjudicator's decision was that these works constituted a variation under the contract but that "The cost details provided by Sisk do not

> comply with the requirements of Clause 30.1 and thus I cannot determine the correct valuation for Payment Notice 6". He awarded £0.00.

9. The parties have referred to other occurrences before the eighth adjudication, to which I can refer relatively briefly.

*The Mediation*

10. On 10 April 2017 the parties agreed to mediate about what was described as Sisk's Mediation Final Account. The mediation was an attempt to settle all outstanding disputes between the parties. Various Events were included in the scope of the mediation, including Event 1176, which was now claimed in the sum of £1,343,838.88. Hitachi's response in the mediation was that the claim was not properly substantiated so as to satisfy the requirements of Clause 30.1. In the event the mediation did not achieve settlement.

*The Sixth Adjudication*

11. On 21 July 2017 Sisk made a further application for payment of direct costs from various events, including Event 378. Hitachi responded with a Payment Notice on 14 August 2017 by which it contested Sisk's general approach to claims for variations pursuant to Clause 37.2. Among other grounds for contesting Sisk's entitlement to be paid for Event 378, Hitachi said that "there is still no explanation from [Sisk] as to the radical changes in cost since the Second Adjudication" and noted what it called "the blatant attempt to expand the scope of the Adjudicator's decision to seek to include a variety of costs that are totally unrelated to the scope of this Event."

12. In its Referral Notice in the sixth adjudication, Sisk referred back to the adjudicator's decision on Event 378 in the second adjudication and asserted that the substantiation it now put forward was sufficient. By its Response to the Referral Notice, Hitachi submitted that the valuation of Event 378 was now res judicata and that the decision in the second adjudication on Event 378 was now final and binding because it had not been referred to the Court within 10 days. In the course of its Response Hitachi also submitted (at [4.3]) that the adjudicator in the second adjudication:

> "(a) decided liability for Event No. 378 – stating that "the additional Permanent car park was instructed on or about 8 October 2012" and this was "a Variation"; and
>
> (b) did not decide quantum – stating that the "cost details provided by Sisk do not comply with the requirements of clause 30.1 and thus I cannot determine the correct valuation for Payment Notice.""

13. Hitachi submitted that "the decision *on liability* is now final and binding". [Emphasis added]. By contrast, it accepted that it was open to the adjudicator in the sixth adjudication to consider representations from the parties "for the purpose of addressing *the undecided issue of quantum*:" see [5.4] [Emphasis also added]. In the same vein, Hitachi submitted at [5.6] that "in the Second Adjudication, there were at least 8 different instances where liability was decided but quantum was not." It is common ground that this would have been a reference to the Events where a £nil

valuation was included in the adjudicator's schedule for want of sufficient evidence to satisfy the requirements of Clause 30.1: it would therefore have included Event 1176.

14. Mr Pontin was the adjudicator in the sixth adjudication. In his decision, he accepted the distinction between his having determined the issue of liability in the second adjudication but not the issue of quantum. He therefore concluded that it was open to him to proceed to value the Event 378 works, and he did so.

*The Eighth Adjudication*

15. Sisk made a further attempt to recover monies for Event 1176, commencing with an application for payment in the revised sum of £999,595.59 submitted to Hitachi on 3 November 2017. It relied upon evidence that included much of what had been submitted in Adjudication 2 but also went well beyond it. Hitachi rejected the claim on 30 November 2017 asserting that it had no contractual merit. Hitachi referred to the adjudicator's decision in the second adjudication, observed that it was "quite some time since that decision" and asserted that the cost details now provided by Sisk did not comply with the requirements of Clause 30.1. Hitachi provided a Payment Notice, also dated 30 November 2017.

16. On 20 June 2018 Sisk gave notice of its intention to refer the dispute to adjudication. The notice rehearsed the previous history in relation to Event 1176, including relevant parts of the decision in the second adjudication. It referred to the terms of Clause 52 and to the fact that the second decision was not referred to the Court within 10 days (or at all) and that "as such it is final and binding on the parties." At [9.2] it stated the disputed amount to be £994,572.19 and claimed redress in the following terms:

> "Sisk requests that the Adjudicator should make the following declarations:
>
> 10.1.1 Declare that a Variation Order should have been issued by [Hitachi] in relation to the Instruction and the Event 1176 works as a result of [the binding decision in the second adjudication] that the Instruction was a variation to the Contract or that a Variation Order should other wise be issued as decided by the Adjudicator in respect of the Event 1176 Works;"
>
> 10.1.2 Order that [Hitachi] shall pay to Sisk the sum of £994, 572.19 plus VAT, or such other sum as the Adjudicator shall determine plus VAT in respect of Sisk's entitlement in relation to the Instruction within 7 days of the date of the Adjudicator's Decision.
>
> …"

17. By a letter dated 22 June 2018, Hitachi's solicitors asserted that the adjudicator in the second adjudication "was asked to decide the value of Event 1176 and he did so"; and that "the claim [now being made] is the same or substantially the same as that advanced in the second Adjudication, namely a claim for additional payment in respect of Event 1176." Hitachi thereby raised the jurisdiction issue that now falls for decision.

18. Sisk issued its Referral Notice on 27 June 2018 requesting the declarations set out above. The adjudicator was again Mr Pontin. Preliminary submissions on jurisdiction were submitted to him. On 3 July 2018 he concluded that he had jurisdiction in the following terms:

> "… In the Second Adjudication I decided that Event 1176 was a Variation that required valuation. Thus I cannot adjudicate now on whether Event 1176 was or was not a Variation as that has been decided.
>
> In addition I decided that for the purposes of Application 6 that Sisk had not complied with the provisions of clause 30.1 and stated that "I do not have sufficient details to value the works and hence for the purposes of Payment Notice 6 my value is £nil." The fact that "£nil" was entered onto my spreadsheet does not alter the meaning of the words used in the body of my Decision. I could not conclude a value for Event 1176 in that Notice and as a fact I did not decide a value for event 1176."

19. It is not necessary to refer very extensively to Sisk's referral notice in the eighth adjudication. The following is sufficient:

i) At the hearing of the present issue Mr Walker QC for Hitachi confirmed that the terms of [2.30] were not in dispute. [2.30] says:

> "Mr Pontin's decision in respect of Event 1176 is therefore clear:
>
> 2.30.1 The instruction of 29 August 2014 … is a variation in accordance with the Contract and the works that resulted as a consequence of the Instruction (the Event 1176 Works) require valuation;
>
> 2.30.2 Given the instruction was a variation, [Hitachi] is obliged to issue a Variation Order in accordance with the provisions of the Contract.
>
> 2.30.3 The substantiation provided with Sisk's Referral to adjudication in the Second Adjudication was insufficient to satisfy the requirements of clause 30.1 of the Contract and as a result, at the point of giving his decision, Mr Pontin could not ascertain the value of the variation."

ii) In Section 2 of the Referral Notice Sisk explained that the 3 November 2017 Application provided a level of substantiation that goes far beyond what had been provided before and explained the approach that has now been adopted, notwithstanding that there are similarities between constituent figures that go to make up the amount now claimed and the constituent figures that went to make up the equivalent amounts claimed in the Second Adjudication. Hitachi's solicitor has demonstrated that some of the evidence is common to

the two adjudications and that some of the new evidence would have been available to Sisk at the time of the second adjudication.

20. Hitachi provided its Response on 18 July 2018. There was then a Reply on 1 August 2018, a Rejoinder on 8 August 2018 and a Surrejoinder on 15 August 2018.

21. The adjudicator gave his decision on 31 August 2018. He set out his conclusions and directions under the heading "Decision" at [244] ff. In relation to the treatment of Event 1176 in the prior adjudication he wrote:

> "249. My decision was that the Event 1176 Works I [sic] constituted a Variation that require a valuation, that is, I decided the liability issue as between the parties.
>
> 250. I cannot and do not reconsider that decision here, but I accept that in reaching a decision as to the valuation of the Event 1176 Works, such decision having not been made in the Second Adjudication, I do need to consider whether the requirements of the Contract have been met as regards that valuation."

22. The adjudicator considered the substantiation that was now put forward by Sisk and concluded that Sisk had substantiated a claim for £825,703.17 in accordance with the requirements of the Contract. At [302] he wrote:

> "Having decided in the Second Adjudication that Event 1176 is a Variation that requires valuation and decided here that the valuation is £825,703.17 plus interest, it follows that a Variation Order should be issued to that effect. In any event a Variation Order for the Event 1176 works should have been issued following my Second Adjudication given that I had there decided on liability and the basis of payment."

23. Under the heading "Directions" he wrote at [311]:

> "I therefore Decide, Declare and Direct
>
> (a) A variation Order should have been issued by [Hitachi] in relation to the Instruction and the Event 1176 Works as a result of my binding Decision that the Instruction was a variation to the Contract and in any event a Variation Order should be issued now in respect of the Event 1176 Works;
>
> (b) [Hitachi] shall pay to Sisk within 7 days of the date of this Decision the sum of £825,703.17 plus such VAT as is due at law in respect of Sisk's entitlement in relation to the Instruction.
>
> (c) [Hitachi] shall pay to Sisk within 7 days of the date of this Decision £34,035.33 in relation to interest up to the date of the

> Referral and continuing until the date of this Decision at a daily rate of £192.29
>
> …"

**Did the adjudicator have jurisdiction?**

*Applicable principles*

24. It is common ground that, as a general statement of principle, an adjudicator does not have jurisdiction to decide a dispute that is the same or substantially the same as a dispute that has already been decided in a prior adjudication: see paragraph 9(2) of the Scheme.

25. In *Quietfield Ltd v Vascroft Construction Ltd* [2007] BLR 67 the contractor applied for extensions of time relying upon substantiation provided by two letters. When no extensions of time were granted by the architect the contractor gave notice of adjudication relying upon the grounds set out in the two letters. The adjudicator decided that the contractor had failed to discharge the burden of proof so as to substantiate any extension for time beyond the original completion date. Subsequently the employer started another adjudication, claiming liquidated damages for 588 days of delay. The contractor responded by providing detailed substantiation of its claim for extension of time in a document known as "Appendix C". As a preliminary issue the employer resisted the admission of Appendix C on the basis that the matters to which it related had already been decided in the first adjudication. The adjudicator ruled in the employer's favour on the preliminary issue and on the issue of liquidated damages. When the employer applied for summary judgment to enforce the adjudication decision, the Judge (Jackson J) refused to enforce it on the grounds that the extension dispute raised by Appendix C in the later adjudication was not the same or substantially the same as the dispute that had already been decided in earlier one. The substance of his decision on the facts emerges from the following passage:

> "Appendix C is a far cry from the two application letters dated 2 September 2004 and 22 April 2005. It is perhaps regrettable that Appendix C was not advanced in the first adjudication. Appendix C identifies a number of causes of delay which do not feature in the two application letters. Further, Appendix C appears to be a structured and logical document, which sets out to demonstrate what the critical path was and how individual events did or did not impact upon the final date for completion. Whether, at the end of the day, the submissions in Appendix C will prevail, I do not know. This will be a matter for the adjudicator or, possibly, the arbitrator to decide. I am, however, quite satisfied that Vascroft's alleged entitlement to an extension of time as set out in Appendix C is substantially different from the claims for extension of time which were advanced, considered and rejected in the first adjudication."

26. The Court of Appeal upheld the Judge's decision. At [31]-[33] May LJ emphasised the paramount importance of the *decision* of the first adjudicator:

> "31. Section 108(3) of the 1996 Act and para 23 of the Scheme provide for the temporary binding finality of an adjudicator's *decision*. More than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided. Indeed para 9(2) of the Scheme obliges an adjudicator to resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a *decision* has been taken in that adjudication.
>
> 32. So the question in each case is, what did the first adjudicator decide? The first source of the answer to that question will be the actual decision of the first adjudicator. In the present appeal, Mr Holt did not even take us to the first adjudicator's decision, although he was invited more than once by the court to do so. He was conscious, no doubt, that it would show, as it does, that the decision was limited to the grounds for extension of time in the two letters.
>
> 33. The scope of an adjudicator's decision will, of course, normally be defined by the scope of the dispute that was referred for adjudication. This is the plain expectation to be derived from section 108 of the 1996 Act and paras 9(2) and 23 of the Scheme. That is also the plain expectation of para 9(4) of the Scheme, which refers to a dispute which varies significantly from the dispute referred to the adjudicator in the referral notice and which for that reason he is not competent to decide. There may of course be some flexibility, in that the scope of a dispute referred for adjudication might by agreement be varied in the course of the adjudication."

27. Dyson LJ at [44] drew a distinction between (a) the continuing dialogue that may occur between contractor and architect about whether and, if so, to what extent claims for extensions are justified and (b) the different considerations raised by referrals to adjudication, which may be costly, observing that "no doubt that is one of the reasons why the statutory scheme protects respondents from successive referrals to adjudication of what is substantially the same dispute." At [47] he continued:

> "47. Whether dispute A is substantially the same as dispute B is a question of fact and degree. If the contractor identifies the same Relevant Event in successive applications for extensions of time, but gives different particulars of its expected effects, the differences may or may not be sufficient to lead to the conclusion that the two disputes are not substantially the same. All the more so if the particulars of expected effects are the same, but the evidence by which the contractor seeks to prove them is different.
>
> 48. Where the only difference between disputes arising from the rejection of two successive applications for an extension of time is that the later application makes good shortcomings of

> the earlier application, an adjudicator will usually have little difficulty in deciding that the two disputes are substantially the same.
>
> 49. In the present case, I am in no doubt that the judge reached the right conclusion. The first disputed claim which was the subject of the first adjudication was different from the second disputed claim. The written notices which formed the basis of the second claim identified Relevant Events which were substantially more extensive than those which formed the basis of the first claim. The particulars of expected effects were very different too. There will be some borderline cases where it is a matter of judgment whether the two claims are substantially the same and where there may be room for more than one view. In my view this is not a borderline case."

28. In the present case, Hitachi relies particularly on [48]. It is however, to be noted that Dyson LJ there lays down no hard and fast rule. It is also to be noted that he went on at [49] to identify the differences which he said meant that *Quietfield* was not a borderline case, implying that there could have been greater overlap between the substantiation provided in the earlier and later adjudications before the later disputed claim would be the same or substantially the same as the former.

29. In *Carillion Construction Ltd v Smith* [2011] EWHC 2910 (TCC) at [56], Akenhead J provided general guidance on "the factors that, amongst others, can be deployed in considering whether the same or substantially the same dispute has been referred to or resolved in an earlier adjudication." He tended to concentrate upon the ambit and scope of the disputed claims that had been *referred* to the first adjudication rather than to what the first adjudication *decided*: see [55(a) and (8)] in particular. For that reason, I respectfully take the view that the guidance he gave cannot be regarded as comprehensive and, if taken on its own, is capable of leading to error.

30. May LJ's emphasis in *Quietfield* on what the first adjudicator actually *decided* was continued by the decision of the Court of Appeal in *Harding v Paice* [2015] EWCA Civ 1231 [2016] 1 WLR 4068. At [57] Jackson LJ (with whom the other members of the Court agreed) said:

> "57. It is quite clear from the authorities that one does not look at the dispute or disputes referred to the first adjudicator in isolation. One must also look at what the first adjudicator actually decided. Ultimately it is what the first adjudicator decided, which determines how much or how little remains available for consideration by the second adjudicator."

31. Subsequent Court of Appeal authority has adopted and endorsed the approach of the Court of Appeal in *Harding v Paice*. Although the adjudicator's view of whether one dispute is the same or substantially the same as one that has already been decided may be influential, it cannot bind the Court if the Court is asked to determine the issue: see *Brown v Complete Buildings* [2016] EWCA Civ 1 [2016] BLR 98 at [23]-[24]. Equally, although the authorities have referred on occasion to analogies between the extended doctrine of issue estoppel derived from *Henderson v Henderson* (1843) 3

Hare 100 and the need to guard against repetitive adjudications of the same issue, the applicable principles are not the same and may be liable to confuse if attempts are made to elide principles that are relevant to the conduct of final litigation with those that apply to the particular mechanisms of adjudication. This is not least because adjudication is, by its very nature, an interim procedure for the protecting and promoting of cashflow in the construction industry rather than a system of litigation that is designed to ensure finality from the outset. In my judgment, that provides a cogent reason why the enquiry in the context of adjudications should focus intently upon what the first adjudicator *decided*.

32. Nothing in the contractual provisions has been identified that touches upon whether or when successive references to adjudication should be regarded as references of the same or substantially the same dispute. The relevance of Clause 52.2 is that, where an "adjudicator's decision" has not been referred to the Courts within 10 business days, it provides another reason why that decision may not be referred to adjudication for a second time: the original decision is final and binding. Clause 52.2 clearly prohibits the resubmission to adjudication of the same dispute as has been decided by an earlier adjudication decision and not challenged through the Courts. It does not use the language of "substantially the same"; but its effect will be that, to the extent that a dispute has been referred to and decided by an earlier adjudication decision (and not challenged through the Courts within time), it may not be referred again for decision in a subsequent adjudication because the first decision is agreed to be final and binding.

*Application of principles to the present case*

33. Applying these principles to the present case, there are two questions to be answered. First, what did the adjudicator in the second adjudication decide about Event 1176? And, second, is the dispute that was referred to the adjudicator in the eighth adjudication the same or substantially the same as the dispute decided by the adjudicator in the second adjudication about Event 1176?

34. In answering both these questions there is ample scope for misleading paraphrase and tendentious interpretation. In my judgment, the answer to both questions is to be found in the precise terms of adjudication referrals decisions themselves.

*What did the adjudicator in the second adjudication decide about Event 1176?*

35. The referred dispute in the second adjudication included Sisk's request for "a declaration as to the correct valuation of each of the items in dispute that have been referred to the adjudicator in this adjudication"; and one of the items in dispute was Event 1176. There can be no doubt that Sisk was asking the adjudicator to evaluate Event 1176 in the sum claimed or such other sum as he found to be proved and that Hitachi was asking him to find that the sums claimed were not proved to the necessary contractual standard: see [6] and [7] above.

36. The relevant passages of the adjudicator's decision are set out at [8] above. I accept that, taken in isolation, the passages at [83] and [89] of the decision speak of "my Valuation" and "the correct valuation of each of the items" in unqualified terms which, if taken in isolation, might suggest that the adjudicator had reached a conclusion on what was the correct value to be attributed to each Event for all

purposes of the contract between the parties. However, those passages cannot be taken in isolation and must be taken in the overall context of the decision. Once that is done, the position becomes clear:

i) At [11] of the decision the adjudicator refined and qualified what he had decided by saying that the decision addressed "whether the items are Variations or matters for deduction, … and what the proper valuation is and sum due *for the purposes of Application 6*";

ii) At [46] he identified that in many cases the substantiating detail provided fell short of that required by clause 30.1 and said that "in such circumstances *I have been unable to conclude a valuation for the purposes of Interim Application/Payment Notice 6*. This is not to say that no value is due on a subsequent application, but rather, that *none could be ascertained as due for this Application 6/Payment Notice 6*." This clarifies that in many cases his decision was that there was a want of substantiating detail and that in such cases he had not concluded a valuation for the purposes of Interim Application/Payment Notice 6. In other words, he was not purporting to provide a valuation or any decision save that there was an absence of substantiating detail within the materials submitted to him. He expressly took a limited approach to the question referred to him: he did not purport to decide whether there was or was not any value in the Events where there was inadequate substantiation. He expressly left that question open and to be decided (if appropriate) at a later date on a subsequent application, which is an indication of his view of the limitations on what he was deciding but is not determinative of any issue that now falls to be decided;

iii) In Appendix 1 under "Adjudicator's Decision" for Event 1176 he decided that Event 1176 was a variation that required valuation; but he put it in the category of cases where the evidence provided was insufficient to satisfy the requirements of Clause 30.1 for substantiating value. He then said expressly that he had insufficient details to value the works and "hence for the purposes of Payment Notice 6 my value is £nil."

37. The combined effect of these passages makes clear that the adjudicator expressly declined to take a view or make a decision about the proper value that could or should be attributed to Event 1176. His "value" of "£nil" was not a valuation of the variation as such; the figure "£nil" was merely the consequence of the lack of substantiation before him and was not intended to express any view about or to decide whether Sisk had incurred Cost and Expense for which they should be reimbursed in due course.

38. My answer to the first question (which could be expressed differently but with the same essential meaning) is that the adjudicator in the second adjudication:

i) Decided that Event 1176 was a variation that required valuation;

ii) For want of evidence decided that no sum was payable to Sisk pursuant to Payment Application 6 for Event 1176; but

iii) Did not decide the valuation of Event 1176 for any other purposes than in the context of the claim pursuant to Payment Application 6.

*Is the dispute that was referred to the adjudicator in the eighth adjudication the same or substantially the same as the dispute decided by the adjudicator in the second adjudication about Event 1176?*

39. Hitachi submits that, in deciding the sum to which he considered Sisk to be entitled to payment in respect of Event 1176 and directing payment of that sum the adjudicator in the eighth adjudication decided the same claim that he had considered and decided in the second adjudication (in the sum of £nil).

40. I disagree. The referred dispute in the eighth adjudication was the valuation of Event 1176. That was precisely what the adjudicator declined to decide in the second adjudication, for want of substantiating evidence at that time. The dispute referred in the eighth adjudication was therefore not the same as the dispute decided in the second adjudication.

41. In my judgment the dispute referred in the eighth adjudication was also not "substantially the same" as the dispute decided in the second. It is important to bear in mind that the comparison to be made is between what was *referred* in the eighth adjudication and what was *decided* in the second. Once it is recognised that there was no valuation decision at all in the second adjudication, it becomes clear that, in the matter of the value to be attributed to and recovered for Event 1176, there is no overlap at all. It is only if one compares what was *referred* in each adjudication that a misleading and irrelevant similarity between the two referred disputes appears. I recognise and take into account the dicta of Dyson LJ in *Quietfield* and Akenhead J in *Carillion*, but neither laid down a hard-edged rule that disputes should be regarded as being the same or substantially the same if there was an overlap of evidence. To the contrary, in *Quietfield* (as in this case) the remedy originally sought (there an extension of time) was the same and there was an overlap of evidence when compared with the substance of the dispute that was referred in the later adjudication.

42. It is worth considering the consequences of the parties' respective contentions. In advance of the hearing, Hitachi's written position was that Sisk could not get any valuation (or payment) for Event 1176 until it made its application for final payment under the contract. During the hearing Mr Walker QC submitted that, on the facts of this case, Sisk are in fact shut out permanently from recovering any payment for Event 1176 despite the decision of the adjudicator in the second adjudication that Event 1176 should properly be regarded as a variation which fell to be valued. The first of these submissions is draconian; the second is, to my mind, so extreme as immediately to cast doubt on its validity. Common to both submissions is the assertion that the second adjudication decided the value of Event 1176 (which I have held that it did not do) and that the non-referral to the Courts within 10 business days made that valuation final and binding. If one assumes for the purposes of argument that the adjudicator's decision on value in the second adjudication was correct, it begs the question what could Sisk have then referred to the Court for decision? When asked, Mr Walker QC had no answer to that question. The consequence would therefore be that where Sisk failed in an application for payment for want of evidence, it would automatically be prevented from obtaining payment for work it had properly done pursuant to an instruction which qualified as a Variation under the contract either for ever or until its application for final payment. This seems to me to be a contractual trip-wire that requires clear contractual language: and there is none. Furthermore, it sits uneasily with Clause 37.2(c), which permits the Purchaser's

Representative to adjust any previous over or under payment in a Payment Notice subsequently issued. The other consequence, if Hitachi's submissions were correct, would be that the smaller the margin by which Sisk failed to prove an item in an early adjudication, the more powerful would be the argument that it was precluded from bringing back that item for payment in a later Payment Application and adjudication. So, a major item of cash-flow could be lost for want of an evidential horseshoe nail. This seems quite contrary to the well-known policy considerations lying behind arrangements for interim payments and interim adjudications, which is to secure cash-flow relatively quickly and cheaply but with the possibility of correcting adjustments later if necessary.

43. These arguments do not all go one way. I recognise the theoretical possibility of what Hitachi called "serial" adjudications being used as an instrument of oppression; but that is not the case here. What has happened is that Sisk misjudged the evidence that was necessary to substantiate a valuation for Event 1176 in the second adjudication. It then went away and did considerable additional work before coming back a significant time later with evidence that was held in the eighth adjudication to be sufficient to substantiate a large claim. I see nothing oppressive about this approach in the context of a major construction contract. If a party were to act oppressively in the adjudication process, it would find the Court unwilling to lend its assistance in a claim for enforcement; but, I repeat, that is not the position here.

44. I should make clear that these considerations of the potential consequences of each side's submissions do not determine my decision that the adjudicator in the eighth adjudication has jurisdiction, which is made on the basis of what was decided in the second and what was referred in the eighth as explained above.

45. For these reasons, I hold that Mr Pontin had jurisdiction in the eighth adjudication to evaluate Event 1176 as he did.

*Estoppel*

46. Against the possibility of failing in its main arguments, Sisk advanced submissions in favour of the existence of an estoppel that would prevent Hitachi from asserting that Sisk was precluded from pursuing its claims in the eighth adjudication. Because of my primary finding, it is not necessary to examine the estoppel arguments in detail, and I do not do so. I will merely say that, had it mattered, I would have held that no estoppel or other bar had been demonstrated on the basis of the parties conduct since the second adjudication. In particular, the fact that points were not taken in the sixth adjudication or the mediation could not amount to a representation or sharing of a common assumption such as could give rise to an estoppel on normal principles.

**Conclusion**

47. Hitachi's arguments fail. The orders made by the adjudicator in the eighth adjudication fall to be enforced. The parties are to submit an agreed order prior to hand-down, failing which I will hear submissions on any consequential issues and the form of the order on that occasion.

## Annexe A: Contract Provisions

14 VARIATIONS

14.1 The Contractor shall not alter, add to or omit any part of or item of the Works, except as directed in Writing by the Purchaser, but the Purchaser shall have further power from time to time up to taking over by the Employer under the Main Contract of any part of the Plant including the Works hereunder, by notice in Writing to direct the Contractor to alter, add to or reduce or omit in any manner any part of or item of the Works, …, and the Contractor shall as expediently as is possible and subject to the provisions of this Clause 14, comply with the same and be bound by these Conditions, so far as applicable as though such alterations, additions or omissions were stated in the Contract.

14.2 In any case in which the Contractor has received an instruction or direction from the Purchaser under this Clause, and save to the extent that any such instruction or direction sets out the value of or the basis for calculating the value of a related adjustment to the Contract Price, …, or an event or circumstance contemplated by Sub-clause 301.1 below arises, the Contractor shall strictly adhere to the requirements set out in this Clause and Clause 30 below. Where not agreed by the parties, the provisions of Clause 30 below shall strictly apply and any such adjustment to the Contract Price set out in the instruction or direction shall be determined by the Purchaser, acting reasonably in the circumstances at the time, and shall include a fair and reasonable element for profit save where any such direction results from a claim of Cost and Expense. When the Purchaser has set out in the said instruction or direction the value of means of calculating the value of any adjustment to the Contract Price and in all other cases where the Purchaser, acting reasonably, is satisfied that the Contractor has properly demonstrated an entitlement pursuant to Clause 30 below, the Purchaser shall issue a variation order ("**Variation Order")** to the Contractor pursuant to his clause. Without prejudice to the provisions of Sub-Clause 14.3 below, each Variation Order shall clearly identify the amount payable (or as the case may be, the means by which that amount is to be calculated) and the date, event or milestone upon which the Contractor is entitled to make an application for payment pursuant to Clause 37 below and if applicable the relevant extension of time or other alteration to any date in the Approved Programme. …

…

30. ADDITIONAL COST AND EXPENSE AND DELAYS INCURRED BY THE CONTRACTOR

30.1 Subject always to the provisions of this Clause 30, all reasonable and unavoidable additional direct Cost and Expense incurred by the Contractor which is not in consequence of some default or omission on the part of the Contractor, or which is not a Cost and Expense for which the Contractor is responsible under the Contract, or as the case may be, all reasonable savings of cost, Expense and time made by the Contractor and in each case by reason of;

(a) the delay, acceleration (save where the Contractor is suffering culpable delay), suspension, addition to or omission of any of the Works or any part thereof by the instruction or direction of the Purchaser, or

(b) the specific alteration of the order of the Works by the instruction or direction of the Purchaser which is not as a result of the Contractor suffering culpable delay, or

(c) any instruction or direction issued by the Purchaser to the Contractor pursuant to Sub-Clause 14.1 above to the extent not covered under paragraphs (a) and (b) above, or…

shall be the subject of a Variation Order pursuant to and subject to compliance by the Contractor with the provisions of Clause 14 above. For the avoidance of doubt the provisions of Clause 30 shall not apply to any instruction or direction issue by the Purchaser pursuant to Clause 14 above to the extent that any such instruction or direction sets out the agreed value of or the agreed basis for calculating the value of a related adjustment to the Contract Price. The level of entitlement to payment in a Variation Order for reasonable and unavoidable additional Cost and Expense incurred by the Contractor as a direct result of the circumstances set out in paragraphs (a) to (h) above shall be based on the actual Cost and Expense incurred by the Contractor substantiated by contemporary records and audits of the Contractor's books of account pursuant to Clause 30A below, or in the Purchaser's absolute discretion, any suitable relevant rates or prices used by the Contractor for agreeing the Contract Price. However, where an item in any schedule of unit rates as may be set out in Schedule 7 (Payment of the Contract Price) is deemed by the Purchaser in his absolute discretion to be directly applicable that item shall be used. Notwithstanding the foregoing the Contract Price shall be deemed to have included all Cost and Expense an allowance for risk on the part of the Contractor associated with the Contract and in particular with the flexible approach to the detailed execution by the Contractor of the Works with the Programme and as referred to in Clauses 10.4 and 19.3 above. The entitlement or otherwise of the Contractor to relief hereunder shall be subject to and interpreted in accordance with this provision.

30.2 The Contractor shall mitigate any additional Cost and Expense incurred by him pursuant to Clause 30.1 above and the extent to which he has done so, including but not limited to compliance with Clauses 10.4 and 10.5 above, shall be taken into account in assessing the amount to be determined by the Purchaser under the applicable Variation Order as an adjustment to the Contract Price.

…

30.4 No Claim for additional Cost and Expense and/or relief and/or delay shall be made under this Clause unless the Contractor has, within five (5) Days after either the commencement of the event first giving rise to the claim or after the date the Contractor acting as a prudent contractor should first have known of the commencement of the said event, whichever be the later, given notice in writing to the Purchaser of his intention to make a claim and which notice shall with reference to Clause 30.1 above specify the ground upon which the Contractor considers it has an entitlement to claim together with such details thereof as it is reasonable in the circumstances for the Contractor to be able to furnish with the said notice. That notice shall be supported within a further fifteen (15) Days after the expiry of the said five (5) Days by such reasonable detailed evidence as will enable the Purchaser to adequately ascertain the validity and value of the said claim. Such evidence shall include but not be limited to full, reasonable detailed and supported contemporary records of relevant activities, together with such additional records as the Purchaser's Representative may reasonably direct, and all such Contractor's and Sub-Contractor's

records shall be open to inspection by the Purchaser's Representative, Costs and Expense and time programmes. The Purchaser shall have the right to request further substantiations if the evidence as aforesaid does not, in the Purchaser's opinion, meet the aforementioned requirements and to stipulate the time by which such further substantiation shall be submitted by the Contractor. When the nature of the said event is continuous the Contractor shall provide to the Purchaser on a monthly basis, or such intervals as the Purchaser may stipulate, updates of the required detailed evidence. The Contractor shall not be entitled to any additional Cost and Expense pursuant to this Clause unless he shall have complied strictly with the requirements of this Clause and, in default of strict compliance, the Contractor shall be deemed to have waived all rights, claims and damages under this Clause 30 or to which he might otherwise have become entitled pursuant to the Contract whether as a result of any breach of contract by the Purchaser or otherwise. …

…

30.6 The following shall not give rise to any entitlement to relief under this Clause 30 ...
(e) The Contractor's failure to give notice, and follow this with the adequate supporting evidence and records, within the time constraints and to the level of detail so described in Sub-Clause 30.4 above.

30.7 Without prejudice to the generality of the provisions of this Clause, any amendment to the Contract Price and/or the Programme pursuant to Clause 14 above and this Clause 30 shall conclusively constitute the sole and entire remedy and entitlement to additional payment and/or time in respect of the event to which it relates and shall conclusively be deemed to cover all consequences arising out of or in relation to the said event as defined in Sub-Clause 30.1 above, whether caused by a breach of contract on the part of the Purchaser or otherwise.

37. TERMS OF PAYMENT & CONDITIONS PRECEDENT TO PAYMENT

37.1 (a) The Purchaser shall pay the Contract Price to the Contractor in the manner and at the times set forth in Schedule 7 (Payment of Contract Price).

37.2 (a)…
…
(b) Within five (5) Days after the payment due date in respect of an Interim Payment Application the Purchaser's Representative shall issue a notice (the "**Payment Notice**") in which he shall state the amount due from the Purchaser to the Contractor at the payment due date in respect of the Interim Payment Application and the basis on which that sum has been calculated, taking into account:

(i) any deductions pursuant to the provisions of the Contract whereby the Purchaser is entitled to exercise any right under this Contract of withholding and/or deduction from monies due or to become due to the Contractor against any amount due under the Payment Notice;
(ii) any amount to the subject of a previous Payment Notice; and
(iii) any amount which exceeds the corresponding cumulative amount specified in the Milestone Payment Schedule.

(c) The Purchaser's Representative may adjust any previous over or under payment in a Payment Notice subsequently issued.
…

(f) Claims in respect of Variations shall be made by way of Interim Payment Applications to the Purchaser's Representative if and when such applications arise or as otherwise agreed between the Parties and shall not form part of the Contractor's Interim Payment Application in respect of Milestones. … .

37.4 (a) The Contractor shall make the Final Payment Application to the Purchaser's Representative for the final payment no earlier than thirty (30) Days after reaching the last Milestone according to Milestone Payment Schedule or at such later date as may be agreed by the parties, both acting reasonably.
(b) The Final Payment Application shall be accompanied by a final account prepared by the Contractor in relation to the Works. The final account shall give full details of previous payments in relation to the Works under the Contract and other sums as additions as well as deductions made by the Purchaser's Representative together with a detailed analysis of all claims to which the Contractor considers himself entitled under the Contract.

37.5 The Final Payment Notice shall be issued by the Purchaser's Representatives within five (5) Days after the payment due date in respect of the Final Payment Application and shall state the information referred to in Sub-Clause 37.2(b) above. The total amount payable to the Contractor under the Contract in respect of the Works having any addition to or deduction from the Contract Price provided for in these Conditions and claims in respect thereof made by the Contractor, the total amounts already paid, and the balance payable by either party.

37.6 (a) The payment due date in respect of the Final Payment Application shall be ninety (90) Days after the date of receipt by the Purchaser's Representative of the Final Payment Application which the Contractor was entitled to make and which complies with all the requirements of Sub-Clause 37.4 above. For the purposes of this Sub-Clause, time shall not start to run until the Contractor has provided to the Purchaser's Representative all information in amplification of the final account that the Purchaser's Representative may reasonably require….

51. ADJUDICATION

51.1 Notwithstanding any provision in this Contract for a dispute to be referred to the courts in accordance with Clause 51, either party shall have the right to refer any dispute or difference … as to a matter under or in connection with the Contract to adjudication … . The ensuing adjudication shall be conducted in accordance with the edition of the 'Adjudication Rules' (the 'Rules') published by the Technology and Construction Court Solicitors Association current at the time of service of the Notice of Adjudication. …

…

51.7 The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings or by agreement.

52. REFERENCE TO THE COURTS

52.1 … The parties agree that the court may open up, review and revise any option, decision (including any decision made by Adjudication), certificate, Payment Notice, account, requirement or notice given pursuant to this Contract and determine all matters in dispute which shall be submitted to in the same manner as if no such opinion, decision, certificate, Payment Notice, account, requirement or notice had been given.

52.2 In any case where such a dispute is referred to adjudication under Clause 51 above either Party shall be at liberty to refer to the adjudicator's decision to the Courts under this Clause 52 within ten (10) Business Days after the date of the Adjudicator's decision and in the absence of such a reference to the Courts within the said period of ten (10) Business Days the Adjudicator's decision shall be final and binding on the Parties. ...