



## Adjudication not abandoned for the purpose of a conclusive evidence clause

In *Battersea Project Phase 2 Development Co Ltd v QFS Scaffolding Ltd* [2024], the Technology and Construction Court (TCC) looked again at the interplay between an adjudication notice and a “conclusive evidence” provision relating to a final payment notice (FPN) issued under a JCT contract.

### Background

Battersea Project Phase 2 Development Company Ltd (“**Battersea**”) engaged Q.F.S. Scaffolding Limited (“**QFS**”) under a JCT Design and Build Subcontract Agreement 2011 edition with bespoke amendments for the sum of £6,157,764 for an asbestos scaffolding package (“the **Sub-Contract**”) connected with the development of the former Battersea Power Station (“the **Project**”).

The relevant clauses of the Sub-Contract were as follows:

- Clause 1.8.1 provided that a FPN was conclusive of the various matters listed in that clause, unless clause 1.8.2 was engaged.
- Clause 1.8.2 provided that if adjudication, arbitration, or other proceedings were commenced within the time periods noted in the clause, the FPN would not be conclusive pending the conclusion of those proceedings; and upon such conclusion, the effect of the FPN would be subject to the terms of any decision, award or judgement in or settlement of such proceedings.
- Annex 8 provided that the referring party should refer the dispute to the adjudicator within seven days of the notice of adjudication.

On 21 October 2022, Mace (Battersea’s agents/construction managers) provided Battersea’s statement of the Final Sub-Contract Sum, said to be

£30,607,869 plus VAT (“the **Statement**”). On 21 November 2022, QFS gave notice that it disputed the content of the Statement in its entirety.

Following this, QFS commenced three adjudications against Battersea within a short space of time (Adjudication nos. 8 – 10 under the Sub-Contract), all of which were dealt with by experienced construction adjudicator, Matt Molloy (“the **Adjudicator**”).

### Adjudication 11

On 19 December 2022, QFS issued a further notice of adjudication to determine the true value of the final Sub-Contract Sum (“**Adjudication 11**”). QFS had calculated the Final Sub-Contract Sum to be £71,587,425 plus VAT.

QFS’ referral was due within 7 days (noting that there were some public holidays intervening) (“the **Referral**”). Battersea objected to the proposed appointment of the Adjudicator on the grounds that Adjudication 11 would breach natural justice given the other on-going adjudications. To alleviate Battersea’s concerns, QFS offered to not serve the Referral before Friday 13 January 2023. Battersea subsequently accepted this offer.

On 22 December 2022, Mace issued a FPN to QFS in the sum of £37,250,260.80 including VAT.

On 11 January 2023, QFS wrote to the Adjudicator and Battersea stating that it did not intend to serve the Referral on Friday 13 January 2023 and anticipating that it may be “*the week after next*” before it did so. The last working day which would have amounted to “*the week after next*”, would have been 27 January 2023. No Referral was served by that date. Instead, on 31 January 2023, QFS wrote again, stating that it may be another two weeks or so before submission of the Referral.

On the same day, Battersea objected to this on the basis the agreement for the Referral to be served no

### HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB  
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk



earlier than 13 January 2023 was a suspensory waiver. In light of this, Battersea gave notice that its waiver would end on 3 February 2023. QFS failed to serve the Referral by 3 February 2023.

Following this, the parties had several without prejudice exchanges to try to settle the account. Throughout the exchanges QFS made it clear that they intended to pursue Adjudication 11 unless a settlement could be reached.

In May 2023, when QFS came to pursue the subject matter of Adjudication 11, it served a new notice of adjudication. It was common ground that this was in materially identical terms to the previous notice dated 19 December 2022. In other words, it advanced the same dispute as that contained in the original Adjudication 11 notice. Those adjudication proceedings were eventually concluded by the Adjudicator's decision made in September 2023 ("the **Decision**"). The Decision awarded QFS £3,177,462.85 ex VAT.

Battersea objected and subsequently sought a declaration by way of a Part 8 claim that the FPN was conclusive evidence of the sums due. It contended that no effective adjudication could be pursued once 13 January 2023 or, in the alternative, 3 February 2023 had passed given no unforeseeable reason for those dates being missed had been relied on by QFS. Thus, Battersea argued that QFS had abandoned Adjudication 11.

For its part, QFS brought a Part 7 claim to enforce the Decision. The parties agreed that the two actions should be heard together.

## Held

The judge, Mr Alexander Nissen KC, held that Battersea's declaratory relief application failed and awarded summary judgment to QFS in the sum of £3,177,463 plus VAT.

## The Adjudication 11 Referral

The judge held that in order to render Adjudication 11 effective, QFS should have issued its Referral on 13 January 2023 or, as a result of a forbearance or waiver, by 3 February 2023 at the latest. Therefore, the Notice was bound to fail because QFS had not served its Referral by the agreed date.

## The proper construction of clause 1.8.2

The court found that on a proper construction of clause 1.8.2, "*conclusion*" meant either a decision, award or judgment or a settlement. Therefore, a "*conclusion*" did not include the ending of an adjudication which had become a nullity.

Moreover, the expression "*such proceedings*" was found to be broad enough to encompass adjudication proceedings relating to the same dispute as the subject matter of the initial notice.

The court therefore decided that the adjudication proceedings commenced on 19 December 2022 were only concluded when the Adjudicator reached his Decision in September 2023 – unless, before then, QFS had already abandoned the proceedings.

## Abandonment

The judge found that on a proper construction of clause 1.8.2, if adjudication proceedings have been timeously commenced, but have subsequently been abandoned, the saving provision in clause 1.8.2 falls away and clause 1.8.1 becomes effective.

Here, the judge determined that although QFS erroneously thought it did not need to serve the referral in February 2023, its position throughout the subsequent without prejudice exchanges was clear that it was trying to settle Adjudication 11. It was not because it intended to abandon the adjudication proceedings.

## HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB  
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk



**HAWKSWELL  
KILVINGTON**

Specialist Construction Solicitors

# Construction Law Update

The Decision was therefore enforceable, and the Part 8 Claim was dismissed and summary judgment given in the Part 7 proceedings.

## Analysis

The “conclusive evidence” provisions of clause 1.8 of the JCT contract can be tricky to negotiate, even in their unamended form. This case confirms what is meant by “conclusion” of proceedings, finding that “conclusion” does not include an adjudication that has become a nullity. If proceedings are commenced in timely fashion, the conclusive evidence clause will bite only where it can be shown that a party has subsequently abandoned those proceedings before their conclusion.

*This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.*

© Hawkswell Kilvington Limited 2024

## HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB  
Tel: 0113 543 6700 | Fax: 0113 543 6720 | [enquiries@hklegal.co.uk](mailto:enquiries@hklegal.co.uk) | [www.hklegal.co.uk](http://www.hklegal.co.uk)