



# Essential Living (Greenwich) Ltd v Elements (Europe) Ltd [2022] EWHC 1400 (TCC) (08 June 2022) (bailii.org)

**This article was the basis of a talk given by Franco Mastrandrea to the Society of Construction Arbitrators on 21 July 2022.**

This was a Part 8 Claim (i.e. a claim over an issue which does not involve a substantial dispute of fact) by Essential Living **for declaratory relief** arising out of an adjudication decision that I made on 22 July 2019 ("the Adjudication Decision").

The issue for determination by the court was whether, and if so, to what extent, the Adjudication Decision was binding on the parties for the purpose of the ongoing final account process under the contract and any further adjudication, pending final resolution of the matters determined in the adjudication by legal proceedings or settlement.

The Adjudication Decision arose out of an amended JCT Construction Management Trade Contract 2011 ("the Trade Contract") under which Elements (Europe) Limited as contractor agreed to carry out the design, supply, manufacture and installation of modular/volumetric units for a mixed use development for Essential Living (Greenwich) Limited as Employer. The original Trade Contract Sum was £25,751,956 excluding VAT, and the original Completion Date was set at 11 December 2017.

The Trade Contract provided for periodic interim payments and for (interim) adjustments to the Completion Date. It also provided for calculation of the Final Trade Contract Sum and for a final assessment of the Completion date.

**In my decision I summarised the dispute before me as being over the "latest interim" valuation of completed works, and liability for contra charges and liquidated damages.**

In summary, the Employer, who referred the adjudication, contended that it was due a payment from the Contractor of £11,126,306.13, by reference to the Construction Manager's Interim Payment Certificate dated 15 March 2019, whereas the Contractor contended that it was due an interim payment from the Employer of £6,367,673.23. So in all, some £17.5m was in contention.



The decision that I made ran to 107 pages and determined that:

- a) The sum due to the Contractor for the original scope of works performed to date was £24,673,360.34;
- b) The sum due to the Contractor for variations was £2,346,650.46. This involved considering each of the variations in turn, considering the rival contentions, and providing a fairly full narrated rationale against each for reaching the conclusion/valuation that I did;
- c) The amount to which the Employer was entitled for remedying defects in Elements' works was £1,423,096.00, as against a claimed sum of £11,700,873. Again, this involved considering each of the items in turn, considering the rival contentions, and providing a fairly full narrated rationale against each for reaching the conclusion/valuation that I did;
- d) The amount to which the Employer was entitled for liquidated damages. Naturally, this turned on responsibility as between the parties for delays. I found that liability was the capped sum of £1,287,598.00 (which would have been reached after 26 weeks of culpable delay on the part of the Contractor – my finding was that the Contractor was liable for 36.93 weeks' delay). Again, this involved considering each of the delay items in turn, considering the rival contentions, and providing a fairly full narrated rationale against each for reaching the conclusion/time determination that I did;
- e) The amount to which the Employer was entitled under clause 8.7A (being an agreed sum by way of repayment of the financing costs incurred by the Employer in relation to the performance security escrow account) was £300,000.00;

Taking all this into account, I ordered that the Contractor should pay to the Employer the sum of £1,842,360.64. So, although the Employer “won”, as against the sum that it was looking for the win was significantly short. I therefore ordered that payment of my charges be split equally between the parties.

It seems that thereafter, Elements submitted to InnC, the Construction Manager, then on the demise of InnC to Essential Living, its documents for the purpose of calculation of the Final Trade Contract Sum. On 10 February 2021, a Mr David Somerset of Somerset Consult was appointed as the Construction Manager. It seems that Mr Somerset never determined the Final Trade Contract Sum. This hiatus appears in turn to have led to the litigation.

The Employer's stance in the litigation was that, in respect of any matters assessed and decided by the adjudicator, the Adjudication Decision was binding for the purposes of calculating the Final Trade Contract Sum, fixing the completion period under the contract, and any subsequent adjudication.

The Contractor opposed, on the ground that the adjudication related to an interim application for payment, shortly before the occurrence of practical completion; the Adjudication Decision did not impact on the final account process or the contractual review of the period for completion following practical completion (on 31 May 2019).

**Mrs Justice O'Farrell decided that:**

- Although an adjudication decision is binding temporarily on the parties, so that they must comply with and give effect to it (Paragraph 23(2) of the Scheme), in the absence of any agreement to the contrary, it does not affect the underlying rights and obligations of the parties under their contract or displace the agreed contractual procedures for determining those rights and obligations;
- The consequence of the binding effect of an adjudication decision on a dispute or difference is that a subsequent adjudicator has no jurisdiction to determine matters which are the same or substantially the same;
- **the parties were bound** by the Adjudication Decision on **any dispute or difference determined in that Decision** until it was finally determined by the court or by subsequent settlement;
- **the parties could not seek a further decision by an adjudicator** on a dispute or difference if that dispute or difference had already been the subject of the Adjudication Decision;



- it was a **matter of fact and degree**, requiring **careful analysis of the evidence and argument on each disputed item**, as to whether the Adjudication Decision was binding on any other discrete issue referred to and determined by the adjudicator, unless and until the Adjudication Decision was overturned, modified or altered by the court;
- it was a **matter of fact and degree** as to whether any matters which the Contractor might seek to refer to a subsequent adjudication were **the same, or substantially the same, as the matters determined by the Adjudication Decision**; absent any Notice of Adjudication before the court, it was not possible for this issue to be determined;
- the Adjudication Decision **was binding** in respect of variations considered and assessed by the adjudicator, unless and until the Adjudication Decision was overturned, modified or altered by the court, or **unless either party identified a fresh basis of claim that permitted such variation claim to be opened up and reviewed under the terms of the Contract**.
- the Adjudication Decision was **not binding** on the parties for the purpose of **the Construction Manager's final determination** of the Completion Period under clause 2.27.5, from which would flow any liability on the part of Elements for liquidated damages and finance charges;
- the Adjudication Decision was **not binding** on the parties for the purpose of determining the **Final Trade Contract Sum**.

## Take aways

Whether what the adjudicator decides has application beyond the immediate decision depends to a substantial degree on what the governing contract says. Thus, there may as in this case be final review provisions for extensions of time and the Final Trade Contract Sum, which may in turn affect liquidated damages prolongation and disruption claims.

It seems then that as adjudicator you should be clear what the dispute is and what it is that you are deciding.

**It may be that matters such as the following, if decided, will be binding in a subsequent adjudication:**

The meaning of a particular contract term e.g. whether particular heads of financial recovery were recoverable as “direct loss and or damage”.

The application of a contract term; e.g. whether a prospective or retrospective delay analysis methodology should be applied.

Whether further performance under the contract had been validly terminated.

Can findings of fact be binding? By way of example, I had in another matter in which I had rendered two decisions, decided that the Contractor in that case would have been able to assemble the appropriate resources and skills to carry out further works, had it been appointed to those further works (and to which in breach of contract, it was not appointed). That case, *Mallino Development Ltd v Essex Demolition Contractors Ltd* [2022] EWHC 1418 (TCC) (10 June 2022) (baillii.org), as outlined in this article - [Mallino: using the courts to attempt a break out from an adverse adjudication decision?](#) - was decided in the TCC two days after *Essential*. Might it be suggested that had that issue arisen in a subsequent adjudication that finding would, according to *Essential*, have been a matter decided as a discrete issue in the earlier adjudication? Whether that runs the risk of colliding with another principle - that factual findings and conclusion in one set of proceedings will not be treated as evidence of those facts in another set of proceedings<sup>1</sup> (which may itself not be entirely secure, whether at common law<sup>2</sup> or as a result of the Civil

<sup>1</sup> *Hollington v. F. Hewthorn & Co. Ltd* [1943] KB 587, CA.

Cf. *Hui Chi-Ming v. R.* [1992] 1 AC 34

<sup>2</sup> See, for example, *Lord Hoffmann in Arthur JS Hall & Co. v. Simons and Barratt et al* [2002] 1 AC 615, [2000] 3 WLR 543, [2000] 3 All ER 673, [2000] BLR 407, HL.



Evidence Act, 1968<sup>3</sup>) is not entirely clear – albeit that that principle appears anyway to apply only between different parties.

Having said that, the learned judge in *Mallino* arrived at the same conclusion as I had but by a different route, namely that as Mallino had not formally challenged the Essex Demolition pleading which invoked my finding in the adjudication that it would have been able to carry out that further works, the finding in the adjudication had become an **agreed** fact.

### Reasoning

The original adjudicator's reasoning may in any event be of interest or assistance not only to the parties but also to the person charged with any final reviews, any subsequent adjudicator resolving final review disputes, and/or the tribunal charged with finally determining the disputes between the parties.

### Quaere?

Will there be a move to amend contract terms so that all aspects of valuation are the subject of final review?

Can you/should you as adjudicator in a subsequent adjudication in exercising your rights to investigate the facts and the law (Scheme, para 13) seek the earlier adjudicator's decision if not proffered by the parties as a potential aid to your own decision making?

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<sup>3</sup> See, for example, *Crypto Open Patent Alliance v Wright* [2021] EWHC 3440 (Ch).



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