CONCLUSIVE EVIDENCE CLAUSES: COURT COMES TO CONCLUSIVE CONCLUSIONS

By Lucy Garrett KC

The issue of conclusive evidence clauses came before the TCC again in February this year, in *Battersea Project Phase 2 Development Company Ltd v QFS Scaffolding Ltd* [2024] EWHC 591 (TCC). This is almost exactly a decade after the decision in *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC). I represented the losing side in both cases, so consider myself well qualified to discuss the points arising.

There were three points in issue in *QFS*:

1. The nature and terms of an agreement reached as to the timing of service of the Referral.

2. The proper construction of the relevant clause.

3. Whether QFS Scaffolding Ltd ("QFS") had abandoned the proceedings so that it could no longer rely on the clause.

I start by describing the facts.

The facts in *QFS*

By late 2022 there had been 10 adjudications between QFS and *Battersea Power Phase 2 Development* Company ("BPS") arising out of the scaffolding subcontract on Battersea Power Station. Adjudications 8, 9 and 10 were ongoing. Notice of Adjudication No. 11 was issued by QFS on 19 December 2022. The dispute referred was the calculation of the Final Sub-Contract Sum, a statement of which had been provided on 21 October 2022. BPS objected to the appointment of Mr Molloy in Adjudication No. 11 on the same day (on the basis that he was already dealing with three adjudications and could not within the rules of natural justice be expected to deal with a fourth). In response that afternoon, QFS proposed a timetable (copied to the adjudicator), the key parts of which were:

"QFS offers the following to seek to alleviate his concerns:

1. QFS will not serve its Referral in Adjudication 11 before Friday 13 January 2023.

...

5. If for some unforeseen or unforeseeable reason QFS is delayed in serving its Referral in Adjudication 11 until after Friday 13 January 2023 then the parties both consent to extend the period within which the Adjudicator shall reach his decision by the same number of days that the service of the Referral is delayed. This consent shall not need further ratification by either party."

This was accepted by BPS on the same day and Mr Molloy proceeded to accept the appointment in Adjudication 11.
BPS issued its Final Payment Notice on 22 December 2022.

QFS subsequently sent emails to the Adjudicator, copied to BPS, on 11 January 2023 and 31 January 2023, in each case postponing service of the Referral. BPS did not respond to the email on 11 January 2023. QFS's email on 31 January stated, *"I shall be writing to you at some point soon in relation to Adjudication 11 timetable but advise that QFS expect it to be another two weeks or so before submission."* BPS objected to this on the same day. It said that it had waived its right to receive the Referral within seven days of the Notice and to raise a jurisdictional challenge provided that the Referral was served no earlier than 13 January 2023. It said the waiver was suspensory and, given that a further two weeks or so was being asked for, this was unacceptable. It gave notice that its waiver would end on 3 February 2023.

QFS objected to BPS's approach, stating that there had been a binding contractual agreement to extend time for the Referral on an open-ended basis, with no long stop, from which BPS could not be resile. As the Judge said at [30], "*That same day, Mr Molloy expressed the view that the agreement to delay service of the Referral was probably effective but said he would not be entirely comfortable with proceeding with the adjudication absent either express confirmation that no point would be taken about the delayed service of the Referral or re-service of the Notice of Adjudication. As Ms Garrett noted, at this point Mr Molloy was unaware that the Final Payment Notice had been issued, because QFS had not told him. Accordingly, his suggestions as to the appropriate course must be understood in that light.*"

QFS did not serve its Referral on 3 February 2023. In fact, it re-referred the dispute by its Notice dated 10 May 2023 and Referral served on 17 May 2023, over 3 months later. Mr Molloy reached his decision in that referral in September 2023.

The first issue between the parties was the nature and terms of the agreement made on 19 December 2022.

Issue 1: Nature and terms of agreement

QFS had argued before the Court that the only relevant term of the agreement was paragraph 1 – the open-ended agreement – and BPS's acceptance of this amounted to a contractually binding agreement. BPS contended that the email had to be read as a whole, so that paragraph 5 qualified paragraph 1 (imposing a fetter on QFS's ability to extend time for an "unforeseen or unforeseeable reason") and that the agreement was not capable of amounting to a binding contract, because there was no intention to create legal relations.

The Judge found at [31] that *"there was an agreed variation to the requirement in [the dispute resolution procedure] whereby, instead of the Referral being served within seven days of the Notice, it would be served on 13 January 2023 or such later date as may be appropriate in the event of an unforeseen or unforeseeable event"* and that this was a binding contractual agreement.

QFS did not suggest whether at the time or at the hearing any unforeseen or unforeseeable event had occurred. Therefore, the Judge held that QFS was in breach of that agreement when it did not serve a Referral on 13 January 2023. BPS's silence could not amount to a further agreement to extend time. He also held at [41] that the three additional days BPS gave for service of the Referral was reasonable. This was particularly so because (a) QFS did not contend at the time that it was not and (b) QFS had provided sworn witness statements in the subsequent Referral which stated that the Referral had in fact been ready to serve on 26 January 2023.

The Judge said at [42], *"QFS did not serve a Referral on 3 February 2023. On this basis, absent any further agreement or waiver (neither of which is suggested), the prosecution of an effective adjudication based on the Notice of Adjudication dated 19 December 2022 was bound to fail because QFS had not served its Referral by the agreed date."*

The next issue was what that factual situation meant in the context of the proper construction of the clause.

Issue 2: Construction of the clause

The Judge gave a useful summary of the applicable legal principles at [43] to [46]. In particular, it was common ground that as a conclusive evidence clause is a form of exclusion of what would otherwise be a party's right to adduce evidence, the *Gilbert Ash*[1] principle (as reiterated in *Triple Point*[2]) applied: namely that in construing a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.

The contract in *QFS*

In *QFS*, the contract was in the form of the JCT Design and Building Sub-Contract (2011 Edition). It was extensively amended but the relevant clause was not and so is in the wording of the standard form as follows:

"Effect of Final Payment Notice

1.8.1 Except as provided in clause 1.8.2 and 1.8.3 (and save in respect of fraud), the Final Payment Notice under clause 4.12.2 shall have effect in any proceedings under or arising out of or in connection with this Sub-Contract (whether by adjudication, arbitration or legal proceedings) as:

1 Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd [1974] AC 690.

2 Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29 at [108] and [109].

[conclusive evidence that various adjustments have been made]

*1.8.2 If **adjudication**, arbitration or other proceedings **are commenced**:-*

.1 by either Party prior to or within 10 days after the date of receipt of the Final Payment Notice;...

...

the Final Payment Notice shall not have the effects specified in clause 1.8.1 in relation to the subject matter of those proceedings pending their conclusion. Upon such conclusion, the effect of the Final Payment Notice shall be subject to the terms of any decision, award or judgment in or settlement of such proceedings." [emphasis added]

The parties' submissions

It was common ground that an adjudication had been validly "commenced" within the meaning of the clause. The dispute was as to whether the proceedings had concluded and if so, what the effect of that was. The parties' positions were summarised by the Judge:

"48. BPS contends that, in the circumstances, the proceedings validly commenced by the Notice of Adjudication dated 19 December 2022 reached a conclusion. No effective adjudication could be pursued once 13 January 2023, alternatively 3 February 2023, had passed given that no unforeseen or unforeseeable reasons for that date being missed have been relied on. Therefore, those proceedings were a nullity. On a proper construction of clause 1.8.2, a "conclusion" was a wide concept that did not require either a decision, award or judgment or a settlement. An adjudication could foreseeably come to a conclusion without either of those things having occurred. So, in circumstances where the proceedings had become a nullity, there had been a conclusion of them. They had come to an end. If there was a conclusion resulting from either a decision, award or judgment or a settlement then the Final Payment Notice would take effect subject thereto but, if there was a conclusion which did not result from either of those things, no change to the Final Payment Notice was required. In that respect, BPS emphasised the word "any" in the penultimate line, because, it said, it recognised that there may not be a decision, award etc. despite the fact that the proceedings have concluded. Taking these two points together, the proceedings had concluded, but the Final Payment Notice remained unchanged as there was no decision or settlement which impacted upon it.

49. QFS submits that clause 1.8.2 does not require a decision, award or judgment in or settlement in order for the first part of the saving provision to be effective. However, QFS contends that proceedings only reach a conclusion once and if there has been either a decision, award or judgment or a settlement. When that occurs, the Final Payment Notice takes effect subject to those matters. In this context the word "any" in clause 1.8.2 simply means any of a decision, award (of any type) or judgment or a settlement. QFS submits that, in the circumstances of this case, the adjudication proceedings were concluded by the decision of Mr Molloy in September 2023"

The Judge held at [52] that the *QFS* clause had two phases. *"Pending the conclusion of the proceedings, which is the first phase, the Final Payment Notice does not have any of the effects specified in clause 1.8.1 "in relation to the subject matter of those proceedings". Then, upon the conclusion of the proceedings, which starts the second phase, the Final Payment Notice is subject to the terms of any decision, award, judgment or settlement."* As the Judge said, this is not a distinction which had been made in the clauses discussed in previous cases.

Decision in *Dovehouse*

QFS submitted that the *QFS* clause was on all fours with the clause in *Dovehouse* and that decision should therefore be applied. In *Dovehouse*, the Court considered a similar, but (as was accepted in *QFS*) not in fact identical, clause as follows:

"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

[that various adjustments have been made]

*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."*** [emphasis added]

On the facts in *Dovehouse*, a notice of adjudication had been issued but the wrong nominating body identified, so that the first nominated adjudicator resigned and the claiming party had to re-issue a new notice and thus start new adjudication proceedings.

Carr J (as she then was) held that the giving of a notice of adjudication was sufficient to commence proceedings within the meaning of the clause and that the invalidity of the referral and the resignation

of the adjudicator did not negate the sufficiency of the Notice for the purpose of commencing proceedings. She considered the effect of the Court of Appeal's decision in *Lanes Group*[3] at [93] to [96] and commented:

"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 in Rainy Sky... would have understood the parties to have intended."

Decision on construction in *QFS*

The Judge in *QFS* referred to this discussion and adopted it at [60]. He went on to reject BPS's submissions. He said at [63] to [72]:

1. An adjudication which became a nullity had not reached a "conclusion" within the meaning of the clause. The clause envisaged a decision or settlement as the relevant conclusion.

2. BPS's case meant there was potential for a harsh outcome (for example where an adjudication became a nullity because the adjudicator acted in breach of natural justice). He rejected that this is what the parties would have intended as sensible businessmen.

3. As in *Dovehouse*, he agreed that there should be no distinction drawn between, "circumstances where the failure in the adjudication process was the result of error by the referring party and it having resulted for some other reason."

4. It therefore did not matter that a second Notice had had to be issued.

5. On the facts, "the proceedings" had concluded with the decision of Mr Molloy in September 2023. *"The reference to adjudication proceedings is generic. In my view, the expression "such proceedings" is broad enough to encompass adjudication proceedings relating to the same dispute as was the subject of the initial notice raised within time in respect of the Final Payment Notice. There is no necessity for the adjudication decision in question to be responsive to the specific Notice of Adjudication by which the adjudication proceedings were commenced. Consistent with the approach in the cases to which I have referred, including Bennett at [17] and Dovehouse at [97], what matters (in line with the expectation of sensible businessmen) is that the decision is responsive to the subject matter of the dispute raised within time in respect of the Final Payment Notice. Overall, I consider that to be a sensible, business-like construction of "such proceedings".*

6. It also did not matter whether the same adjudicator was appointed.

It will be seen that, exactly as in *Dovehouse*, the Court was not interested in technical points and (consistently with the *Gilbert Ash* principle) took pains to construe the clause widely where necessary in order to achieve a practical, commercial, solution which meant that where a party had substantively started an adjudication, it would not be caught by the conclusive evidence clause. The Judge concluded at [75]: *"Standing back, I consider this outcome strikes the right balance between, on the one hand, recognising the benefits of a conclusive evidence provision (see Marc Gilbard at [9]) and, on the other hand, allowing a true value of the works to be undertaken and paid for on the other. BPS had known that the Final Sub-Contract Sum was in dispute even before the Final Payment Notice was issued. In accordance with clause 1.8.2, QFS had challenged the Final Payment Notice within time. From that moment, BPS will have understood that it could not, by that short cut, obviate the need for the parties to investigate the true value of the account. That exercise was duly undertaken by the adjudicator."*

Issue 3: Abandonment

There was however a further issue, that of abandonment. Again consistently with the previous cases, the Judge held that if on the facts QFS had abandoned the proceedings, then the saving proviso would fall away (as it cannot have been the intention of the parties that a party could abuse its ability

3 Lanes Group plc v Galliford Try Infrastructure Ltd [2012] BLR 121, CA.

to commence proceedings by lacking any intention to resolve the dispute pursuant to those proceedings).

As summarised above, QFS had chosen not to issue the Referral on 3 February 2023, despite the fact it had the document ready to go on 26 January and despite being formally on notice that BPS was taking the point that this would mean the Referral was out of time.

There were also some without prejudice negotiations over the relevant period (the parties waived privilege in these during the adjudication). These are described at paragraphs [83] to [101] of the judgment. In summary:

1. There was an exchange on 23 and 24 January as to the desirability of negotiating. BPS said, "*Any discussion would need to be on a without prejudice basis and to avoid doubt, I wouldn't want you to suspend any of the current proceedings or hold off from what you need to do*" and QFS replied "*Understood.*" The Judge held that, "*... Mr Parrish's email cited above should be understood to mean that the proposed without prejudice discussions should not be taken as a reason for not serving the Referral if that was what QFS needed to do. As I have found, QFS did not serve the Referral. It needed to do that if it wanted to maintain the efficacy of the adjudication commenced on 19 December 2022.*"

2. Discussions did not resume until 24 February 2023. There was a meeting on 7 March. There were then some further negotiations starting on 17 March. On 28 March 2023, BPS sent an email warning that none of its rights were waived and stating that its position was that the Referral ought to have been served by 3 February 2023 and specifically stating that "*BPS does not waive the conclusive effects of the Final Payment Notice issued on 22 December 2022 including (without limitation) determination of the Final Sub-Contract Sum.*" QFS replied stating it disagreed. The negotiations ultimately failed and QFS re-issued its Notice on 10 May 2023.

The Judge found at [108] to [119] that:

1. The test for abandonment was an objective one, of whether QFS had abused its timely commencement of proceedings either by lacking or losing any genuine intention to resolve the underlying dispute raised by the Notice. It would not be enough for a party to have a private intention to pursue, if that was not made manifest. "*It could do that by its words or conduct (or both) although I accept there may come a point when words would, in themselves, be insufficient to demonstrate that proceedings had not been abandoned. Ms Garrett argued that it ought not to be possible to keep adjudication proceedings "in limbo" forever, simply by repeating that you intend to pursue them but without taking action. I agree. When it becomes necessary to take action depends on the circumstances.*"

2. It was not enough that QFS consciously, but mistakenly, decided not to serve the Referral on 3 February. It did that because it erroneously believed it did not need to, not because it had abandoned the proceedings.

3. It was not right to approach the question of abandonment by looking at the pursuit of the specific adjudication which was the subject of the timely Notice, for the same reasons as discussed in relation to the meaning of "such proceedings."

4. It was clear from the without prejudice exchanges both that QFS intended to pursue its dispute, and that the purpose of those discussions was to try to avoid the need for Adjudication 11 which would otherwise be pursued. BPS's warning on 28 March made no difference to the situation.

5. The commercial context was also relevant: at the time of Adjudication 11, the dispute on the final account stood at c. £40m.[4]

It follows that it will be a rare set of circumstances in which a party is found, on the facts, to have abandoned their proceedings – by definition, the fact that such an issue comes before the Court will mean that the proceedings must to some degree have been pursued. However, adjudication continues to generate unpredictable factual situations: it will be interesting to see how permutations of this play out over the next decade.

In the meantime, as long as proceedings are issued within the time limits set by a conclusive evidence clause, it is likely that the party issuing those proceedings has protected itself no matter what happens next.

4 In the event, the adjudicator determined that QFS was due c. £3m.