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Second Adjudications, Fresh Particulars & Jurisdiction

DDA Curated Series

Key Words:

Serial adjudication, second adjudication, jurisdiction, substantially the same dispute, further and better particulars, adjudicator's powers, overlap of disputes, payment disputes, true value adjudication, notified sum, extension of time, liquidated damages, re-adjudication, estoppel in adjudication, temporary finality, Carillion v Smith test, Harding v Paice, Brown v Complete Building Solutions, abuse of process, adjudication enforcement

Summary

From time to time, I find the following helps, so I thought I'd share it.

Core Principle

A second adjudicator **may not re-decide** any issue already determined by the first adjudicator.

However, a second adjudication **is permitted** if it concerns a **different dispute**, a **different valuation date**, **new causes of action**, or **additional issues** that were not, and did not need to be, decided previously.

The courts give substantial weight to earlier adjudicators' decisions but will enforce later decisions unless they trespass on matters already resolved.

Key Case Law Themes

1. Same subject matter ≠ same dispute

Two adjudications may concern similar subject matter (payment, delay, defects, final account) but still be **different disputes**.

Sherwood & Casson Ltd v Mackenzie **[1999] EWHC 274 (TCC)**

The court will only intervene where there are **real grounds** to conclude the adjudicator erred on jurisdiction.

Interim valuation issues were not the same as a later final account dispute.

***Holt Insulation Ltd v Colt International Ltd* [2001] EWHC 451 (TCC)**

(TCC, Liverpool DR, HHJ MacKay QC, 23 July 2001, LVOI 5929)

A losing party may **reformulate** a claim and succeed in a second adjudication. Same "matter" ≠ same "dispute".

***Skanska Construction UK Ltd v. The ERDC Group Ltd & Anor* [2002] ScotCS 307; [2003] SCLR 296**

New information, a later contractual stage, and different contractual provisions can mean the second dispute is genuinely different.

2. A party can bring a second claim based on improved evidence

Better particulars, expanded evidence, or new arguments do **not** make a second adjudication impermissible.

***Mivan Ltd v Lighting Technology Projects Ltd* [2001] ADJCS 04/09 (TCC)**

First adjudication: payability of invoices. Second adjudication: recovery of alleged overpayment. Held to be **separate disputes**.

***KNN Coburn LLP v GD City Holdings Ltd* [2013] EWHC 2879 (TCC)**

If the first adjudicator did not have to decide an issue (e.g. entitlement to liquidated damages), a second adjudicator may address it later.

3. Limits: the no "second bite of the cherry" rule

If the first adjudicator has **actually decided the underlying dispute**, the same dispute cannot be re-run, even with new arguments.

***Benfield Construction Ltd v Trudson (Haddon) Ltd* [2008] EWHC 2333 (TCC)**

Classic "second bite of the cherry" case.

An attempt to reargue practical completion was rejected as an impermissible re-run.

Shows where the red line lies.

***Birmingham City Council v Paddison Construction Ltd* [2008] EWHC 2254 (TCC)**

Demonstrates that simply adding better evidence in adjudication 2 does not create a new dispute.

Excellent authority when someone is trying to "patch" the first claim.

***Carillion Construction Ltd v Smith* [2011] EWHC 2910 (TCC)**

More documents, different figures, or alternative analysis does not turn the same delay/loss & expense claim into a different dispute. Sets out Akenhead J's eight-factor test for deciding when disputes are "the same or substantially the same".

This is the single most useful practical framework.

***Vertase FLI Ltd v Squibb Group Ltd* [2012] EWHC 3194 (TCC)**

The same adjudicator cannot **change their mind** on a previously determined and temporarily binding point.

4. What counts as a "different dispute"?

The courts recognise that certain features usually indicate a genuinely new dispute:

- later valuation dates,
- new heads of claim (e.g. retention),
- claims arising after the first adjudication,
- new parties,
- different causes of action.

***Kilker Projects Ltd v Purton* [2016] EWHC 2616 (TCC)**

Along with *Grove v S&T*, forms the backbone of the "notified sum vs true valuation" distinction.

Essential wherever interim/final payment valuations are involved.

First adjudication: the **notified sum**.

Second adjudication: **true valuation** of the final account.

Held to be different disputes.

***Universal Piling and Construction Ltd v VG Clements Ltd* [2016] EWHC 3321 (TCC)**

Valuation at a later date and inclusion of retention created a genuinely new dispute. Illustrates:

- Different valuation dates = different disputes.
- True valuation adjudication remains available even after a "notified sum" adjudication.

Useful when discussing F&BP and extra evidence in a second valuation context.

***Michael John Construction v Golledge & Ors* [2006] EWHC 71 (TCC)**

Where new defendants were added, the issues against them were not determined previously and could be adjudicated.

5. Court of Appeal: focus on what the first adjudicator *decided*

***Harding v Paice & Springall* [2015] EWCA Civ 1281; [2016] BLR 85**

Second adjudication allowed because the first adjudicator had decided only the **pay less notice** issue, not the **valuation**.

The Court of Appeal confirms the modern test:

- Look at **what the first adjudicator actually decided**, not what was referred.
- Anything left undecided is fair game for a later adjudication.

This is now the leading English authority.

Brown v Complete Building Solutions Ltd **[2016] EWCA Civ 1**

Confirms Harding. A later notice with different consequences created a **new route to entitlement**, not a redetermination of the first adjudication.

These cases establish the modern test:

The question is **what the first adjudicator actually decided**, not merely what was raised.

6. Practical test for identifying whether two disputes are substantially the same

From ***Carillion Construction Ltd v Smith*** **[2011] EWHC 2910 (TCC)** (Akenhead J):

Courts consider:

1. **Ambit and scope** of each dispute (broad brush).
2. New evidence does **not** usually create a new dispute.
3. New or better arguments do **not** usually create a new dispute.
4. New quantum or new valuation method does not necessarily matter.
5. Don't be distracted by volume of documents.
6. Motivation for the second adjudication can be relevant.
7. Notices are not pleadings—interpret liberally.
8. Same **cause of action** = likely the same dispute.

This is now the standard framework.

7. Holding back arguments in adjudication 1

Mailbox (Birmingham) Ltd v Galliford Try Buildings Ltd **[2017] EWHC 1405 (TCC)**

If the employer's entitlement to liquidated damages is decided in adjudication 1, the contractor cannot hold back extension-of-time arguments for adjudication 2.

Extensions of time under JCT forms are **defensive only**; once LDs are temporarily fixed, so too is the associated EOT entitlement for that period.

However, issues not arising in adjudication 1 (e.g. **validity of termination**) remain open. Shows the consequences of:

- Not advancing all relevant EOT arguments in adjudication 1,
- Interaction between LDs and extensions of time,
- What a "crystallised dispute" encompasses.

Good for adjudications where the responding party tries to "save" points for later.

8. Use of earlier adjudicators' findings in later adjudications

A second adjudicator may refer to earlier reasoning, but must not:

- contradict binding conclusions, or

- treat non-binding comments as binding.

***SW Global Resourcing Ltd v Morris & Spottiswood Ltd* [2012] CSOH 200**

Scottish authority but influential.

Shows that an adjudicator may refer to earlier findings w**ithout being bound by them**, unless the first adjudication expressly determined the same point.

Useful when exploring how far earlier findings influence later disputes.

***Petition of W H Malcolm Ltd* [2010] CSOH 152; [2011] SLT 239**

Earlier comments outside the referred dispute are not binding on later adjudicators.

***Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA Civ 1737; [2007] BLR 67**

Key authority on:

- What is "decided" in adjudication 1,
- How adjudicators should treat issues excluded for jurisdictional reasons,
- When ignoring a point is (or is not) a breach of natural justice.

This is the standard case for understanding the boundaries of jurisdiction.

9. Other modern illustrations

***Laker Vent Engineering Ltd v Jacobs E&C Ltd* [2014] EWHC 1058 (TCC)**

Different findings in separate adjudications about completion dates were **not inconsistent** and both remained temporarily binding.

***Amey Wye Valley Ltd v Herefordshire Council* [2016] EWHC 2368 (TCC)**

The first adjudicator decided the meaning of the agreed VOP mechanism; the second adjudicator correctly decided its financial consequences.

Calculation errors do not undermine enforceability.

***Imperial Chemical Industries v Merit Merrell Technology Ltd* [2016] EWHC B30 (TCC); [2016] EWHC 3586 (TCC)**

If parties ask the adjudicator to decide an issue, they cannot later argue he lacked jurisdiction to decide it.

Key Takeaway for Second Adjudications:

You *can* run a second adjudication where:

- the issue was **not decided** previously,
- the valuation date is **different**,
- the contract stage is different,
- better particulars/evidence become available,

- the cause of action changes,
- new parties are involved.

You *cannot* run a second adjudication where:

- the **same underlying dispute** was already decided,
- you are trying to repair evidential weaknesses from adjudication 1,
- you are reframing the same claim under a different contractual clause,
- you seek to contradict binding findings from adjudication 1.

If adjudication 1 decided the entitlement, adjudication 2 must not undermine it.

If adjudication 1 did not decide the point, adjudication 2 is free to address it.

#Adjudication #ConstructionLaw #SecondAdjudication #SerialAdjudication #Jurisdiction #SecondBiteOfTheCherry #TrueValueAdjudication #NotifiedSum #PaymentDisputes #ConstructionDisputes #TCCJudgments #ADR #DisputeResolution #DDALegal

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