

JUDGMENT : His Honour Judge Richard Havery QC. TCC. 1st February 2007

1. This is an application on the part of the claimant under part 24 of the Civil Procedure Rules to enforce the decision of an adjudicator under the Housing Grants Construction and Regeneration Act 1996 ("the Act"). The claimant was engaged by the defendant to carry out plumbing and mechanical works pursuant to a contract dated 8th August 2005 incorporating the GC/Works sub-contract conditions. The claimant undertook to design, instal, test and commission the plumbing and mechanical works to 89 of the 109 dwellings at the Rockingham Estate, London SE1 where the defendant was engaged as main contractor. The adjudicator was Mr. M.E.Pontin, who gave his decision on 17th November 2006. The adjudicator decided that the gross value of the claim was £369,331.20, plus a further net payment of £15,767.20 plus VAT, plus interest and the claimant's costs and expenses.
2. Mr. Davies submitted that the terms of the contract were not compliant with the Act. Clause 38A.5 of the contract begins "*The adjudicator shall notify its decision to the Contractor and the Sub-Contractor not earlier than 10 and not later than 28 Days from receipt of the notice of referral, or such longer period as is agreed by the Contractor and the Sub-Contractor after the dispute has been referred.*"
3. Mr. Davies submitted that that provision was not compliant with section 108(2)(c) of the Act, which provides that the contract shall require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred. "Referral", he submitted, meant dispatch of the notice of referral. Receipt might (and in this case did) occur later. I reject that argument. A thing is not referred to another unless that other receives it. It may be sent with the intention of referring it but never received. It has then not been referred. In my judgment, the word is unambiguous. Referral takes place upon receipt of the notice by the adjudicator.
4. Nevertheless, the contract is in my judgment non-compliant on another ground. Clause 38A.5 provides: "*The adjudicator shall notify its decision to the Contractor and the Sub-Contractor not earlier than 10 and not later than 28 days from receipt of the notice of referral, or such longer period as is agreed by the Contractor and the Sub-Contractor after the dispute has been referred. The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred. The adjudicator's decision shall nevertheless be valid if issued after the time allowed.*"

In *Epping Electrical company Limited v. Briggs and Forrester (Plumbing Services) Limited* [2007] EWHC 4 (TCC) I held a provision equivalent to the last sentence of that passage not to be compliant with the Act. Following the decision of the Inner House of the Court of Session in *Ritchie Brothers (PVC) Ltd. v. David Philp (Commercials) Ltd.* [2005] BLR 384, I held the provisions of section 108(2)(c) and (d) to be mandatory rather than directory, so that the adjudicator had no jurisdiction to reach his decision out of time. I went on to say in paragraph 19 of my judgment

"The Scheme applies in place of the adjudication provisions of the contract. If it were otherwise, two competing adjudication provisions would simultaneously apply to the contract and many other contracts. That is a recipe for confusion and uncertainty and in my judgment cannot have been the intention of Parliament in passing section 108(5) of the Act."

Section 108(5) of the Act provides that if the contract does not comply with the requirements of section 108 subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts ("the Scheme") shall apply.

5. Mr. Webb submitted that I was wrong in saying that if the contract was not compliant with the provisions of the Act, so that the Scheme applied, the Scheme applied in place of the provisions of the contract. He drew my attention to the following passage in Keating on Construction Contracts, 8th ed., paragraph 17-014: "*..... The Act does not render void a non-compliant procedure and a party to such a contract could adjudicate under that contractual arrangement, but is not bound by statute to do so. That party could still insist on adjudication under the Scheme.*"

It is not suggested that the defendant to the adjudication could insist on adjudicating under the Scheme. A footnote to the same paragraph, though not to the passage quoted, contradicts that passage. It says "*..... The extent to which the contractual mechanism does not comply with the Act is irrelevant. If it does not comply the whole contractual mechanism is tainted and falls by the wayside to be replaced by the provisions of the Scheme, see John Mowlem Ltd. v. Hydra-Tight Ltd. (2002) 17 Const. L.J. 358.*"

John Mowlem was a decision of H.H. Judge John Toulmin C.M.G., Q.C. What he said (which appears at p.363) may suggest, but does not imply, the above proposition: "*I have considered whether, if some parts of the sub-contract comply with the Act, they can be retained and the Act can be used in substitution for or to fill in those parts of the subcontract which are contrary to the Act. But the words of the Act are clear. Either a party complies in its own terms and conditions with the requirements of sections 108(1) to (4) of the Act or the provisions of the Scheme apply.*"

Judge Toulmin did not say whether, if the provisions of the Scheme apply, the contractual provisions of the adjudication can be used as they stand, in the alternative to the provisions of the Scheme.

6. Mr. Webb submitted that I was wrong to say in paragraph 19 of *Epping Electrical* that to have two competing adjudication provisions in a contract would be a recipe for confusion and uncertainty. He submitted that on the contrary, my conclusion would lead to uncertainty. There might be uncertainty whether the contractual scheme

survived. Allowing the parties to follow the things they agreed to would give certainty. Moreover, in general the terms are imposed by the employer on the contractor and it is the contractor, being the person to whom payment is or should be moving, who initiates an adjudication. It cannot be right, he submitted, that the employer can turn round and say that the procedure he stipulated is not in accordance with the Act.

7. It is true that the Act does not say that if the Scheme applies, the contractual adjudication provisions are void. But if they are not void, then the contract contains competing and to some extent mutually contradictory provisions. One could then make sense of the contract only if, in the case of every pair of mutually contradictory provisions, only one member of the pair were to be treated in any given case as prevailing over the other. I unhesitatingly follow Judge Toulmin in reaching the conclusion that that is not the intention of the legislation. The solution stated in the text of Keating is simpler. It is that the two sets of adjudication provisions, contractual and the Scheme, exist as alternative packages, only one of which (at the option of the party initiating the adjudication) applies in any given case. Although in the present case the notice of intention to refer a dispute to adjudication clearly refers to the contractual adjudication provisions, that may not always be so. Thus there might well be confusion and uncertainty over which terms apply.
8. Mr. Webb said that in general the terms are imposed by the employer. But they are standard terms presumably designed to secure compliance with the Act. If the parties had intended to have their own private non-compliant adjudication system (necessarily in addition to an express or implied compliant system), that would surely have been expressed. No such intention appears in the present agreement. In my judgment, the Scheme and the contractual provisions cannot coexist in the contract unless provision is made in the contract how that is to work. I thus conclude that it is the footnote to paragraph 17-014 of Keating that applies in this case, not the text of that paragraph.
9. I conclude that the Scheme was implied into the contract in place of clause 38A. Mr. Davies submitted that the decision of the adjudicator was made out of time. The Scheme provides by paragraph 19 that the adjudicator shall reach his decision not later than 28 days after the date of the referral notice, subject to provision for extension of time. The referral notice was dated 11th October 2006. The time was validly extended by 7 days, so that the decision, Mr. Davies submitted, had to be reached by 15th November. It was not reached until 17th November.
10. In *Ritchie's* case at first instance, [2004] BLR 379, 381, 382, Lord Eassie gave powerful reasons why, in paragraph 19 of the Scheme, the "date of the referral notice" means the date of dispatch of that notice. That is anomalous if I am right on the construction of section 108(2)(c) of the Act. Particularly since a referral notice may be undated, and given my interpretation of section 108(2)(c), I conclude that the date of the referral notice means the date of its receipt by the adjudicator. There seems to be no reason why the Scheme should provide a lesser time than is permitted by the Act. The adjudicator received the referral notice on 13th October. I conclude that his decision was in time.
11. Mr. Davies's next point was that the matter was not referred to the adjudicator within 7 days of the notice of adjudication as required, he submitted, by section 108(2)(b) of the Act or paragraph 7(1) of the Scheme. The notice of adjudication was dated 6th October 2006 and the notice of referral was served on the adjudicator 13th October. Thus this point fails.
12. Mr. Davies further submitted that the adjudicator was not appointed under the Scheme although the Scheme applied, since the notice of adjudication was expressly based on clause 38A of the GC/Works sub-contract. Thus he was not validly appointed and was without jurisdiction. Mr. Davies relied on paragraphs 16, 30 and 33 of the decision of the Court of Appeal in *Pegram Shopfitters Ltd. v. Tally Weijl (UK) Ltd.* [2003] EWCA Civ 1750 and paragraphs 5 to 11 of the decision of the Court of Appeal in *AMEC Capital projects Ltd. v. Whitefriars City Estates Ltd.* [2004] EWCA Civ 1418. Neither of those decisions supports the proposition for which Mr. Davies contends. In my judgment this argument of Mr. Davies fails.
13. Mr. Davies submitted that the adjudicator's decision was out of time even if not due until 17th November. The adjudicator acknowledged receipt of the notice of referral by letter dated 13th October 2006 apparently faxed at 16:24. Thus the time for reaching the decision would expire at 16:24 on 17th November at latest (I have given times which appear to me to be correct and which differ from those given by Mr. Davies, but that difference does not affect the argument). The decision appears to have been sent to the parties by fax timed at 18:29 on 17th November. Moreover, 18:29 was after business hours, and the fax message was not in fact received by the defendant until opening of business at 09:00 on Monday, 20th November. In my judgment, no account is to be taken of fractions of a day. The adjudicator reached his decision on 17th November, within the time allowed.
14. Mr. Davies submitted that the claimant did not expressly consent to an extension of time to 17th November. The claimant did, however, expressly consent in writing on 7th November to an extension of time of 7 days, which in my judgment is sufficient to give rise to a valid extension. Mr. Davies also submitted that the extension was granted retrospectively. That is not right even on Mr. Davies's contention that the time limit for reaching the decision was 7th November.
15. Mr. Davies submitted that the notice of intention to refer the matter to adjudication did not comply with the requirements of paragraph 1(3) of the Scheme and was thus not a notice of adjudication. As to the dispute, the notice said "The dispute concerns non payment of amounts considered due in an interim payment."

Mr. Davies submitted that it did not specify to which interim payment it referred contrary to paragraphs 1(3)(a) and (b) of the Scheme, not did it specify the nature of the relief claimed, contrary to paragraph 1(3) (c) of the Scheme. Paragraphs 1(3) (a), (b) and (c) of the Scheme require the notice of adjudication to set out briefly

- (a) the nature and a brief description of the dispute
- (b) details of when the dispute has arisen
- (c) the nature of the redress which is sought.

In my judgment, the notice did not comply with sub-paragraph (b) or (c). On the other hand, the nature of the redress sought in a dispute which concerns non-payment of amounts considered due is fairly obvious. I consider below whether sub-paragraph (a) was complied with.

16. Mr. Davies referred me to the decision of HH Judge Humphrey Lloyd Q.C. in *Ken Griffin and John Tomlinson v. Midas Homes Ltd.* (unreported) 21st July 2000. He relied on paragraph 2 of that decision, in which Judge Lloyd said "The purposes of such a notice are first, to inform the other party of what the dispute is; secondly, to inform those who may be responsible for making the appointment of an adjudicator, so that the correct adjudicator can be selected; and finally, of course, to define the dispute of which the party is informed, to specify precisely the redress sought, and the party exercising the statutory right and the party against whom a decision may be made so that the adjudicator knows the ambit of his jurisdiction."

I shall consider further the important question whether the dispute was sufficiently defined. But the other purposes mentioned in that passage were, in my judgment, sufficiently fulfilled. Judge Lloyd went on in paragraph 21 of his decision to say "The claimants were only entitled to exercise their right to call for adjudication if [they] first complied with paragraph 1(3) of the Scheme. They did not do so in part...."

Judge Lloyd enforced the award only to the extent of the matters in dispute mentioned in the notice of adjudication. If Judge Lloyd was intending to say that compliance with all the requirements of paragraph 1(3) is a condition of enforcement of an award I respectfully disagree. The Scheme is more prescriptive than the Act in relation to the requirements of a notice of adjudication. In my judgment, those requirements must be regarded as directory rather than mandatory. The notice of adjudication was entirely sufficient for the purpose of selecting a suitable adjudicator, nor has the contrary been suggested.

17. Mr. Davies responded to the notice of adjudication by letter dated 9th October 2006 to the defendant's solicitors. He wrote

"Pursuant to clause 16.3.4 of the Sub-Contract Aveat Heating Ltd has ".....accepted [our valuation] notification under clause 16.3.3, and no further claim shall be made by [Aveat Heating Ltd] in respect of the Variation[s]" thereby a dispute does not and cannot exist

Accordingly, in the absence of a dispute there is nothing to refer to Adjudication, and any third party that you may seek to be appointed will be without jurisdiction."

On 11th October Mr. Davies wrote to the Adjudicator at much greater length. The letter included the following passages:

"..... Your appointment is defective and you do not have jurisdiction

..... it is not possible to bring an adjudication in respect of an agreement that has been settled

Clause 16.3.4 states

"If [Aveat Heating Ltd] disagrees with the whole or part of [Jerram Falkus Construction Ltd's] Valuation, it must, within 7 days of [Jerram Falkus Construction Ltd's] notification under clause 16.3.3, give its reasons for disagreement and [Aveat Heating Ltd's] own Valuation. In any other case [Aveat Heating Ltd] shall be treated as having accepted the notification under clause 16.3.3, and no further claim shall be made by it in respect of the variation"

Neither Aveat Heating Ltd, or the Sharman Barton Partnership on its behalf, issued any such notice in accordance with clause 16.3.4. In accordance with the sub-contract Aveat Heating Ltd has accepted our valuation notification issued under cover of our letter dated 28 September 2006 and may not make any further claim in respect of the variations.

Given that the matter of the variation account is settled, a dispute does not and cannot exist

..... it is incumbent upon the party issuing the notice to describe the alleged dispute in sufficient detail to enable the other to understand what it is that it intends to refer to adjudication; such an ambiguous statement as "..... an interim payment" denies us the opportunity to understand what it is that is being attempted to be referred to adjudication.....

.....any information not previously disclosed within Aveat Heating Ltd's Final Account issued under cover of Sharman Barton Partnership's letter dated 22 August 2006 is information not previously relied upon by Aveat Heating Ltd and thereby cannot be the subject of dispute"

Most of the propositions quoted above in this paragraph are matters of defence rather than matters showing the absence of a dispute. However, the penultimate passage ("*it isincumbent...*") is in a different category. And in the last extract the case of *Edmund Nuttall Ltd. v. RG.Carter Ltd.* [2002] BLR 312 was referred to. Mr. Davies relied on the following passage in paragraph 36 of the judgment of His Honour Judge Richard Seymour, Q.C. in that case (ib., p.321):

"No doubt, for the purposes of a reference to adjudication under the 1996 Act or equivalent contractual provision, a party can refine its arguments and abandon points not thought to be meritorious without altering fundamentally the nature of the "dispute" between them. However, what a party cannot do, in my judgment, is abandon wholesale facts previously relied upon or arguments previously advanced and contend that because the "claim" remains the same as that made previously, the "dispute" is the same."

18. I have to consider the overlapping questions whether there was a dispute, and if so whether it was sufficiently clearly identified in the notice of adjudication. Mr. Davies submitted that the claimant wrongly claimed in the notice of referral that the parties were in dispute in relation to a 19-page application for payment number 7, although such alleged dispute was not mentioned in its notice of adjudication. He submitted that the referral notice, taken separately from or together with the claimant's reply dated 26th October 2006 to the defendant's "response", was substantially different from the 19-page application for payment number 7. The "response" in question was the defendant's valuation of the sub-contract final account. That was a 124-page document complete with 2 lever arch files containing 19 appendices. It had been sent to the claimant on 28th September 2006.

19. The notice of referral showed that the alleged dispute arose from application number 7, as Mr. Davies pointed out. Many documents were appended to the notice of referral. Appendix 10.4 consisted of application number 7 plus a few pages, plus some pages emanating from the defendant. Application number 7 was for a gross sum of £385,631.35, of which a summary was given on the first page. In paragraph 4.04 of the referral notice it was stated

".... it is [the claimant's] case that by virtue of its interim application for payment no.7 dated 18 April 2006 a further interim payment became due in the gross sum of £381,996.67* (cumulative, excl VAT)

*[The claimant's] application for payment no.7 was actually in the amount of £385,631.35. Whilst this differs slightly from the gross sum referred [to] in this adjudication, the principle of the amounts claimed remain[s] unaltered."

By far the largest item in the claim is "Contract Works as attached schedule" £320,942.42. That sum, and the items and figures that compose it, appears in application number 7 and in appendix 10.4 to the notice of referral. The referral notice, in paragraph 6.02, states that the total value of £320,942.42 for contract works is arithmetically incorrect and should actually be £321,260.92, the difference being in respect of plot 5 sanitaryware in the sum of £318.50.

20. Adopting that small correction to the claim of 18th April 2006, I set out in the table below the items of the claim and their respective amounts as claimed on 18th April and as claimed in the notice of referral:

Item	Application no.7 (£)	Referral notice (£)
Contract works as attached schedule	267,437.52	263,573.00
Plumbing & heating		
Sanitaryware	24,524.50	24,639.54
Condensing boilers & associated works	24,123.90	23,757.90
Washing machines	2,212.50	2,183.00
Cookers	2,962.50	2,923.00
Subtotal	321,260.92	317,076.44
Alumasc rainwaters as schedule RW03	15,358.76	15,358.76
B.O.Q. rainwaters as schedule RW01+2+4	9,152.12	9,152.12
B.O.Q. rainwaters as schedule RW05	3,576.84	3,576.84
B.O.Q. rainwaters as schedule RW06	960.02	960.02
B.O.Q. rainwaters as schedule RW07	240.80	240.80
Subtotal	29,288.54	29,288.54
Variations as schedule no. 1	10,855.98	11,087.28
Variations as schedule no. 2	5,488.23	5,488.23
Subtotal	16,344.21	16,575.51
Prelims	7,000.00	7,000.00
Design	6,000.00	6,000.00
Increased cost 7000X77 of 89 flats	6,056.18	6,056.18
Subtotal	19,056.18	19,056.18
Gross value	385,631.35	381,996.67

Thus the claim as referred to the adjudicator was substantially the same as that made on 18th April. Prima facie, one would expect the dispute to be the same, especially since the claimant had stated in its notice of referral that the principle of the amounts claimed remained unaltered.

21. Mr. Davies said that since he had not seen all the documents referred to in the adjudication before he received the referral document a dispute could not have crystallized at that time. Many of the matters and documents relied on by the claimant in the adjudication had not formed part of the claimant's application number 7. The package constituting the 19-page application number 7 did not include that contained in the "two lever arch files

and further document” that purported to be the claimant’s alleged referral notice and purported reply to a non-existent response. Moreover, the case on which the adjudicator purportedly decided was based on two lever arch files of material and another document.

22. The two lever arch files to which Mr. Davies referred were the appendices to the referral notice. It is apparent from the adjudicator’s decision that he also considered (as the response) the defendant’s valuation of the final account. Mr. Davies did not specify the differences that he was alleging between the claimant’s application number 7 and its notice of referral. It is abundantly clear that there was a dispute over application number 7. It appears to me that exactly the same dispute is the subject of the notice of referral. I have not been asked to look at the voluminous detail nor has it been described to me. I conclude that there was a dispute, and that that dispute was referred to the adjudicator.
23. The question remains whether the dispute was sufficiently described in the notice of adjudication. Given the background, there is not the slightest doubt that the defendant knew what the dispute was. It chose to take only a limited part in the adjudication. I am satisfied that the notice in the circumstances was sufficient, and that the adjudicator had jurisdiction to make his decision.
24. Mr. Davies submitted that the adjudicator lacked jurisdiction because a condition precedent to his appointment had not been fulfilled. Clause 38A.3.2 of the GC/Works standard form provides
“It shall be a condition precedent to the appointment of an adjudicator that it [sc., the adjudicator] shall notify both parties that it will comply with this clause 38A and its time limits.”
The adjudicator gave no such notification. The only effect of that can be that he is not appointed under clause 38A (as I have found for other reasons). In my judgment, he is not deprived of his jurisdiction on that account.
25. Finally, Mr. Davies submitted that the adjudicator in asking the claimant for a schedule of its costs and expenses and in awarding £12,044.25 by way of costs and expenses without having received any substantiation showed a real danger that he was biased and did not comply with the principles of natural justice. I am not satisfied that he was biased. However, he would have jurisdiction to award costs only by virtue of clause 38A.6 of the GC/Works conditions. Under the Scheme, an adjudicator has no jurisdiction to award a party its costs or expenses. Since I have held that the adjudicator’s jurisdiction derived from the Scheme, his award of costs and expenses cannot stand. To that extent only, I grant the defendant permission to defend the claim.

William Webb (instructed by Birketts LLP) for the claimant.
Nigel Davies of Nigel Davies Associates for the defendant.