Before Lord Justice Potter, Lord Justice Rix, Sir Murray Stuart-Smith. Court of Appeal. 31st January 2002

JUDGMENT : Sir Murray Stuart-Smith :

Introduction :

1. This is an appeal from a judgment of Mr Recorder Moxon-Browne QC in the Technology and Construction Court given on 21 June 2001 in which he dismissed the Claimant's application for summary judgment. Permission to appeal was granted by Mance LJ.

2. By its claim the Claimant sought to enforce a decision made on 4 April 2001 by an Adjudicator, Mr Brian Holloway, in an adjudication commenced by the Claimant in relation to its entitlement to payment of three interim applications for payment (Applications Nos 4, 5 and 6) purportedly made under a design and build contract for work done to Unit 2 Leisure Wood, Southampton, involving the design, construction and fitting out of a cafe-bar. The employer under the contract was the Defendant, Isobars Ltd.

The Contract :

3. The contract consisted of a JCT Standard Form of Building contract with Contractors Design, 1988 Edition, "Employer's design requirements" dated 17.8.2000 and certain revised "contractor's proposals" sent under cover of a letter dated 10.10.2000.

4. The 'Revised contractor's proposals' incorporated a term that any *"Specific requirements of the Employers regarding the works notified after [10.10.2000] and/or not expressly contained in the Employers' Requirements annexe 1 hereto, must be agreed between the parties before implementation which agreement shall include express provision as to variation of the work and the contract price."*

5. The letter accompanying the 'revised contractors proposals' stated 'there is no need to sign a formal copy of the JCT contract, but it will be sufficient that the parties are agreed on those terms that incorporate the JCT provisions, subject to any alteration made by the special terms agreed."

6. Provisions as to payment are contained in Clause 30 of the JCT Form of contract. Clause 30.1 requires the parties to elect which of alternatives 'A' or 'B' they will adopt. The two alternatives are set out in Appendix 2. Alternative 'A' provides for interim payments to be made in accordance with predetermined stages in the work: while Alternative 'B' provides for interim payments to be made according to the elapse of predetermined periods of time. The alternatives are quite different and they govern not only when the payments are to be made, but how they are to be calculated. But the parties did not make an election; they did not complete Alternative 'A' and delete Alternative 'B'; nor did they delete Alternative 'A' and complete Alternative 'B' (though if they had deleted Alternative 'A' but not completed Alternative 'B' by inserting a period of time, the form provides that the period should be one month.)

7. In the absence of contractual provisions as to how much should be paid by interim payments and when that payment should be made, the provisions of s.109 of the Housing Grants Construction and Regeneration Act 1996 ('the Act') come into play so as to imply the relevant provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ('the Scheme').

The Interim Applications :

8. In January 2000 the Claimant sent to the Defendant 3 applications for interim payments as follows:
   (a) No. 4 'as per original agreement' in the sum of £69,000
   (b) No. 5, in respect of 7 alleged variations, in the sum of £45,496.33
   (c) No. 6 in respect of "AA Print and Design' in the sum of £1500.

9. The Defendant contended that there were a number of things wrong with these applications. Of the original contract sum of £450,000 the Defendant had paid at least £436,000, so that on any view £69,000 was not owing 'as per original agreement'. While there was a dispute about variations, it was not suggested that the machinery envisaged by the 'revised contractors proposals' was ever implemented (especially in relation to requirements that variations be agreed and priced before implementation). Nor was there any attempt to calculate amounts due in accordance with paragraph 2 of Part II of the Scheme. In relation to Application No. 6 it was contended that this work did not form part of the Design and Building contract.

10. By letter dated 29 January 2001 the Defendant disputed the applications for payment and said that it was unaware of any variation to the works. It is common ground that the letter was not served in time to satisfy the requirements of clause 30.3.3 of the JCT Form (which requires a written note to be sent within 5 days of receipt of the applications in payment) nor within the time specified in paragraph 9 and 10 of the scheme.

The Referral to Adjudication :

11. Article 5 of the JCT Form of contract provides "that if any dispute or difference arises under this contract either party may refer it to adjudication in accordance with clause 39A." Adjudication is not compulsory: but either party may avail themselves of it. It is unnecessary to refer to the detailed provision of Clause 39A save to note that the Adjudicator must give his decision on the dispute or difference referred to him within 28 days (unless the parties agree to extend it by up to 14 days): Clause 39A.7.1 provides that the decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or legal proceedings. Clause 39A.7.3 provides:

"If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to seek compliance pending any final determination of the referred dispute or difference pursuant to clause 39A.7.1."

12. In its notice of referral the Claimant stated under the heading ***'The dispute – the referring party's case'***

"31. A dispute has arisen between the parties as to the Employer's obligation to make payment and the Contractor's entitlement to receive payment following receipt by the Employers of the Contractor's Applications for Interim Payments No.'s [1] 4, 5 and 6:"

(Application 1 is no longer material).

13. In paragraph 32-49 of the Notice of Referral the nature of the claim is set out. In summary it is contended that, in the absence of Alternative 'A' and 'B', the contract is supplemented by the provisions of the Scheme, which provides that the Contractor is entitled to be paid by the Employer on 'the making of a claim'; that the contract by clause 30.3.3 requires the Employer to give notice within 5 days signifying the amount of payment proposed to be made by the employer and the method of calculation of the amount; under clause 30.3.4 the Employer was required to specify any amount proposed to be withheld or deducted from the amount due, the ground or grounds for such withholding or deduction and the amount of withholding or deduction attributable for each ground; no such notice having been served, the Claimant was entitled to payment pursuant to clause 30.3.5.

14. By its Response to the Referral notice the Defendant in paragraph 39 admitted paragraph 31 of the Referral notice. Mr Constable submits that this shows that there was agreement as to the dispute which was referred to the Adjudicator. I agree. The Defendant in its response did not deal with the argument summarised in paragraph 13 above. It disputed its liability to pay on the grounds to which I have already referred in paragraph 9, namely £69,000 not being due under the original contract, and the variations were not authorised, etc, and also raised allegations of poor workmanship.

15. The Adjudicator acceded to the Claimant's argument. He said:

"83 Such matters [the grounds upon which liability was disputed] might be germane if the contract conditions were other JCT or alternative institutional standard forms, where applications in respect of interim statement or payments, employ terminology such as "amounts due". That description (without qualification by the introduction of further clauses) arguably allows an employer to abate amounts otherwise due on the basis of defective works or works not carried out, without even having to issue a withholding notice.

However, that is not the case in the contract between the Parties, which incorporated the JCT With Contractor's Design 1998 Edition Form.

Uniquely, I believe, at least among JCT Forms, the With Contractor's Design include the term as condition 30.3.5.

'Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4 the Employer shall pay the contractor the amount stated in the Application for Interim Payment.'

It is clear from the Parties' submissions that the Employer has not given written notice pursuant to clauses 30.3.3 and 30.3.4, in respect of any of the Applications for Interim Payments made by the Contractor."

And later he said:

"90. Thus, in my view, clauses 30.3.3, 30.3.4 and 30.3.5 taken together impose an absolute imperative obligation on the Employer to pay the Contractor the amount stated in the Application for Interim Payment, in the absence of the written notices specified.

Those written notices have not been given by the Employer, thus I decide that the Employer shall pay to the contractor the amounts stated in Application Nos 4, 5 and 6 for Interim Payment."

16. He decided that the Claimant was entitled to be paid £115,996.33 plus V.A.T. and interest which together amounted to £140,855.34, the sum for which summary judgment was sought.

17. When the matter came before Mr Recorder Moxon-Browne, QC Mr Christopher Lewis on behalf of the Defendants made a number of submissions as to why the claimants were not entitled to summary judgment. For present purposes only three of those submissions are important.

1. *That since the parties had failed to elect Alternatives 'A' and 'B', the whole of clause 30, and not only the provisions as to how and when the interim payments were to be made, fell away. Accordingly the express provision in clauses 30.3.3 and 30.3.4 as to the requirement of the employer to give notice, and clause 30.3.5 as to the effect of failure to give notice, fell by the wayside. Instead the provisions of the Scheme, not only as to how the amount of the interim payments was calculated and the time when they were due but also the provisions as to notice, and the effect of failure to give notice, were implied into the contract.*
2. *That both under the Act (ss110 and 111) and under the Scheme failure to give a notice within the stipulated time does not preclude the Employer from contending on an adjudication that the sums claimed are not "due under the contract" for the reasons upon which the Defendant wished to rely.*
3. *That by failing to appreciate that the contractual provisions of Clause 30 had been superseded by the provisions of the Scheme, the Adjudicator addressed himself to the wrong question and in so doing he exceeded his jurisdiction.*

18. The Learned Recorder acceded to the first of these submissions, and held that the second and third were at least arguable, such that there was an arguable defence entitling the Defendant to permission to defend.

19. In this Court the Defendant/Respondent did not appear. Mr. Constable in his helpful and attractive submissions, addressed himself first to the third proposition, although he maintained in his skeleton argument (and oral submission in relation to the first point), that the Recorder was in error on the other points. The second point is one of some general importance in construction contracts, and is one upon which there has been some difference of view at first instance. But although we obtained every assistance from Mr Constable, we did not think it right, in the absence of argument from the Respondent, to express a view on this point, which would in any event be obiter, if we concluded, as we do that the Recorder's decision on the third point was erroneous.

20. Equally it is unnecessary to decide whether the Recorder was wrong on the first point. Mr. Constable relied on words which I have underlined in s.110(3), which provides: "If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) and (2) [Requirements as to how the amount of an interim payment is to be calculated and when it is to be made], the relevant provisions of the Scheme of Construction Contracts apply."

21. Mr. Constable submitted that only the provisions as to how and when (i.e. those contained in clauses 30.1, 30.2A and 2B and 30.3.1) are substituted; all the other provisions of Clause 30 remain intact.

22. For the purposes of this judgment I am content, without deciding, to assume that the Recorder was right on both these first two points and that accordingly the Adjudicator was wrong; he ought as a matter of law to have held that Clauses 30.3.3-6 were not part of the contract and that under the scheme the failure to serve a timeous notice did not prevent the Defendant relying on the matters of the defence which it wished to advance, on the basis that all the Claimant was entitled to be paid was what was 'due under the contract'; or at least that these points were arguable.

23. The real question is whether this error on the part of the Adjudicator went to his jurisdiction, or was merely an erroneous decision of law on a matter within his jurisdiction. If it was the former the Recorder was right to hold that summary judgment should not be entered. If it was the latter, then in

my judgment the proper course, subject to any question of stay of execution, is that the Claimant is entitled to summary judgment.

24. The whole purpose of s.108 of the Act, which imports into construction contracts the right to refer disputes to adjudication, is that it provides a swift and effective means of resolution of disputes which is binding during the currency of the contract and until final determination by litigation or arbitration. s.108(3). The provisions of s.109-111 are designed to enable the contractor to obtain payment of interim payments. Any dispute can be quickly resolved by the Adjudicator and enforced through the courts. If he is wrong, the matter can be corrected in subsequent litigation or arbitration.

25. In **Northern Developments (Cumbria) Ltd v J & J Nichols**, His Honour Judge Bowsher QC cited with approval the following formulation of principles stated by His Honour Judge Thornton QC in **Sherwood v Casson**:

> *"(i) a decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;*
>
> *(ii) a decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;*
>
> *(iii) a decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;*
>
> *(iv) the adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction;*
>
> *(v) an issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence."*

26. I respectfully agree with this formulation. I would also add, as I have already pointed out, the provisional nature of the adjudication, which, though enforceable at the time can be reopened on the final determination.

27. Errors of procedure, fact or law are not sufficient to prevent enforcement of an adjudicator's decision by summary judgment. The case of **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR 522 is a striking example of this. The Adjudicator had made an obvious and fundamental error, accepted by both sides to be such, which resulted in a balance being owed to the contractor, whereas in truth it had been overpaid. The Court of Appeal held that the Adjudicator had not exceeded his jurisdiction, he had merely given a wrong answer to the question which was referred to him. And, were it not for the special circumstances that the claimant in that case was in liquidation, so that there could be no fair assessment on the final determination between the parties, summary judgment without a stay of execution would have been ordered.

28. In the course of his judgment at p. 525 Buxton LJ approved the test formulated by Knox J in **Nikko Hotels (UK) Ltd v MEPC plc** [1991]2 EGLR 103 at 108B: *"If he answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."*

29. The Recorder purported to direct himself by this test. He said at paragraph 40 of his judgment that the Adjudicator's *"decision is based exclusively on consideration of a contractual provision which did not apply to the agreement between parties to the adjudication"*. And later: *"the Adjudicator's conduct in considering Clause 30.3.5 of the JCT Form rather than Part II of the HGCRA Scheme was in excess of jurisdiction."*

30. But the Adjudicator's jurisdiction is determined by and derives from the dispute that is referred to him. If he determines matters over and beyond the dispute, he has no jurisdiction. But the scope of the dispute was agreed, namely as to the Employer's obligation to make payment and the Contractor's entitlement to receive payment following receipt by the Employer of the Contractor's Applications for interim payment Nos 4, 5 and 6 (see paragraph 12 above). In order to determine this dispute the Adjudicator had to resolve as a matter of law whether Clauses 30.3.3-6 applied or not, and if they did, what was the effect of failure to serve a timeous notice by the Employer. Even if he was wrong on both these points that did not affect his jurisdiction.

31. It is important that the enforcement of an adjudicator's decision by summary judgment should not be prevented by arguments that the adjudicator has made errors of law in reaching his decision, unless the adjudicator has purported to decide matters that are not referred to him. He must decide as a matter of construction of the referral, and therefore as a matter of law, what the dispute is that he has to decide. If he erroneously decides that the dispute referred to him is wider than it is, then, in so far as he has exceeded his jurisdiction, his decision cannot be enforced. But in the present case there was entire agreement as to the scope of the dispute, and the Adjudicator's decision, albeit he may have made errors of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination.

32. The Recorder held in relation to Application No.6 for £1,500 for 'AA Print and Design', that this did not arise under the contract and therefore the Adjudicator exceeded the jurisdiction in this respect as well. I do not agree. The entitlement to payment under Application No.6 was a dispute specifically referred to him and he decided it. He may have made an error of law in holding that the Claimant was entitled to it under the contract. But he did not exceed his jurisdiction, he decided the question that was referred to him. For these reasons I would allow the appeal.

33. Before the Recorder the Defendant contended that if it was wrong in its main contention, there should nevertheless be a stay of execution pending determination of cross-claims and final determination of the dispute. It was also suggested that the Claimants were in financial difficulty, and this was a ground for a stay. In the event that he found in the Defendant's favour, the Recorder did not need to address the question of a stay. The Defendant/Respondent has not appeared in this Court and has not served any Respondent's notice. In my judgment there is no material before the Court to enable it to depart from the usual rule that the Claimant seeking to enforce an adjudicator's award is entitled to summary judgment.

Lord Justice Rix: I agree.

Lord Justice Potter: I agree.

Adam Constable (instructed by Foot Anstey Sargent for the Appellant)