JUDGMENT : His Honour Judge Gilliland Q.C. : 31st May 2001 Salford District Registry. TCC.

1. On 4 April 2001 Mr Christopher Randel ("the Adjudicator") issued an award in relation to a claim by the defendant for payment of 4 invoices in respect of services rendered by the defendant to the claimant pursuant to a contract dated 21 May 1998, reference number 190303. The Adjudicator held that the defendant was entitled to payment under 3 of the invoices in the total sum (inclusive of interest and VAT) of £31,024.94, which he ordered to be paid within 7 days. He also ordered that his fees and expenses totalling £2,940 should be borne by the parties equally. By Particulars of Claim served on 17 April 2001 the claimant now seeks a declaration that the Adjudicator had no jurisdiction to make any award in relation to those invoices under that contract. The Particulars of Claim also raised a number of other matters which were said to have made that award unenforceable, but those matters have been abandoned as stated in the letter dated 21 May 2001 from the claimant's solicitors. Likewise the challenge to the Adjudicator's award under contract 290311 which was also raised in the Particulars of Claim has been abandoned. I am thus only concerned with the question of the jurisdiction of the Adjudicator to make the award under contract 290303. There is a cross application dated 15 May 2001 by the respondent to enforce the award. Leave to issue and serve that application was without objection from the claimant granted by me at the start of the argument at the hearing of the matter on 25 May 2001.

2. The dispute with which I am concerned arises out of certain construction works carried out in 1997 by a building contractor at the claimant's premises, the Fence Gate Inn, at Fence, near Burnley, in Lancashire. The claimant was dissatisfied with some aspects of the work and by contract 290303 the defendant, which provides consultancy services in relation to construction work, was appointed to provide architectural and surveying services to the claimant. The contract is evidenced by a formal Confirmation of Appointment from the defendant and this document is the contract referred to as contract 290303. The services which the defendant agreed to provide were described as *"Preliminary Report on defective kitchen floor"*. The document then set out the basis of charge for that work. It is also clear however that it was contemplated that litigation support services might be required from the defendant because the contract went on to state:-

   "Thereafter standard expert witness rates will apply for any work in connection with litigation".

   No question arises in respect of the preliminary report and the adjudication with which I am concerned did not involve any invoice for that aspect of the services provided by the defendant. The adjudication relates to the subsequent work which the defendant carried out in relation to an arbitration which took place in 2000 between the claimant and the contractor. There is no dispute between the parties (at least for the purposes of the present application) that the services which the defendant did provide in relation to the arbitration are to be treated as work carried out under contract 290303.

3. The Adjudicator in paragraph 18.1 of his award stated that the work for which the defendant was seeking payment under the invoices in question was *"a) providing evidence as a witness of fact architect or engineer; (b) assisting in an arbitration as architect or engineer."*

   It is accepted for the purposes of the present application that the invoices in question are to be regarded as invoices for the work as described by the Adjudicator. I mention this because in relation to one of the invoices no timesheets had been provided and the Adjudicator concluded that all the invoices were for work of the character he described. In paragraph 2(g) however of the defendant's cross claim to enforce the adjudication it is said that one of the invoices, Invoice 293536, was for contract administration work. This is by far the largest of the invoices the subject of the adjudication and it may be that the Adjudicator was in fact in error in treating that invoice as relating to work in relation to the arbitration. However nothing turns on that point so far as the issue of jurisdiction is concerned and both counsel have proceeded on the footing that the Adjudicator's finding should be accepted for the purposes of the present application. It would be difficult to suggest that contract administration work was not within Part II of the 1996 Act or that the Adjudicator did not have jurisdiction to deal with a claim for payment under a contract relating to contract administration. Contract 290303 is not however on its face a contract for contract administration work.

4. In para 2(f) of the defendant's Part 20 Particulars of Claim a point was raised as to whether it was open to the claimant to make the present application and it was suggested that by a letter dated 26 February 2001 from the claimant's solicitors and the Adjudicator's response dated 5 March 2001 the claimant had conferred jurisdiction on the Adjudicator to determine his own jurisdiction and that the claimant was accordingly now bound by or estopped from disputing the Adjudicator's decision that the defendant's claim was within the 1996 Act. It is clear that the adjudication, assuming that there was jurisdiction to proceed with an adjudication in respect of the invoices in question, was governed by the scheme for construction contracts and that there were no terms expressly conferring on the adjudicator the power to determine his own jurisdiction in a manner which would bind the parties. If the decision of the Adjudicator that he had jurisdiction were to be binding, it could only be on the basis that the parties had agreed either expressly or by implication to confer that power upon him. When I raised the matter with Mr Singer at the outset of his argument, he did not pursue the point further.

5. In my judgment he was correct not to do so. First it is not in my judgment open to one party unilaterally to confer jurisdiction on the adjudicator to determine his own jurisdiction. If the adjudicator is to have ad hoc jurisdiction to decide the issue of his jurisdiction so as to bind the parties, the request must be assented to by the other party in circumstances where it is appropriate to conclude that both parties have agreed to confer that power upon the adjudicator. Secondly it is in my judgment perfectly clear from the later correspondence that both the claimant's and the defendant's solicitors took the view that any decision of the Adjudicator would be open to challenge on any enforcement proceedings and that the matter was governed by **Christiani & Neilson Limited v The Lowry Centre Development Company Limited** decided on 29 June 2000. See the letters dated 2 March 2001 from the defendant's solicitors and 5 March 2001 from the claimant's solicitors. In that case, HHJ Thornton QC after observing that it was trite law that an adjudicator had no jurisdiction under the scheme for construction contracts to decide in a binding sense whether he had jurisdiction to act as an adjudicator, pointed out that there were 3 courses open to an adjudicator when faced with an objection to his jurisdiction to deal with the matters referred to him.

   "1. He can ignore the challenge and proceed as if he had jurisdiction leaving it to the court to determine that question if and when his decision is the subject of enforcement proceedings.

   2. Alternatively, the adjudicator can investigate the question of his own jurisdiction and can reach his own conclusion as to it. If he was to conclude that he had jurisdiction, he could then proceed to decide the dispute what has been referred to him. That decision on the merits could then be challengeable by the aggrieved party on the grounds that it was made without jurisdiction if the adjudicator's decision on the merits was the subject of enforcement proceedings.

   3. Having investigated the question, the adjudicator might conclude that he had no jurisdiction. The adjudicator would then decline to act further and the disappointed party could test that conclusion by seeking from the court a speedy trial to determine its right to an adjudication and the validity of the appointment of the adjudicator."

   HHJ Thornton QC then said: "It is clearly prudent, indeed desirable, for an adjudicator faced with a jurisdictional challenge which is not a frivolous one to investigate his own jurisdiction and to reach his own non-binding conclusion as to that challenge. An adjudicator would find it hard to comply with the statutory duty of impartiality if he or she ignored such a challenge". In the present case the solicitors for the parties were ad idem that the Adjudicator was being asked to make a non binding decision on his jurisdiction and indeed that appears also to have been the view which was taken by the Adjudicator himself who after referring to the Christiani decision in paragraph 17.3 stated that he had reached "the non-binding conclusion" that he had jurisdiction under contract 290303. The present is not a case like **Whiteways Contractors (Sussex) Limited v Impresa Castelli Construction UK Limited** in which it can properly be concluded that both parties had agreed to widen the jurisdiction of the Adjudicator so as to refer the dispute as to his jurisdiction to the same adjudicator.

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6. The substantive questions are whether providing evidence as a witness of fact architect and engineer and assisting in an arbitration as architect or engineer are matters which fall within the definition of a "construction contract" within S.104(2) of the 1996 Act. There are 2 limbs to S.104 (2). First the contract must be a contract to do or perform work of the character specified in subsections (a) or (b) and secondly that work must be work "in relation to construction operations". Construction operations are defined in S.105 as being operations of the descriptions there set out. It is clear in my judgment that providing factual evidence at an arbitration or assisting a party at an arbitration are not themselves construction operations as defined by S.105 but it does not follow that these activities may not have been carried out "in relation to construction operations" for the purposes of S.104(2). Unless however these activities fall within either subsection (a) or (b) of S.104(2), the question whether they were provided or done in relation to construction operations does not arise.

7. S.105(5) of the Act provides that "where an agreement relates to construction operations and other matters, this Part applies to it only in so far as it relates to construction operations". It is difficult however to see what that subsection adds to the second limb of S.104(2) which itself imposes a requirement that matters which are not themselves construction operations are only brought within the definition of a construction contract and are thus within Part II of the Act if they relate to construction operations. It seems to me that S.104(5) is intended to make clear that where a contract relates both to construction operations to other activities, that the contract is to be treated as severable between those parts which relate to construction operations and those parts which relate to other activities and that Part II and the other provisions for adjudication are to apply to the contract only in so far as the contract relates to construction operations. Thus for example in the present case although the preparation of a preliminary report on the defective kitchen floor is not itself a construction operation, it is sufficiently connected with construction operations so that it can properly be said to relate to construction operations, but if the giving of factual evidence or the provision of advice at an arbitration is not sufficiently connected with the construction operations so that it does not relate to construction operations, the contract can be severed and adjudication will be available in relation to any disputes in connection with the preliminary report. It is common ground between the parties that Part III does apply to that part of contract 290303 which relates to the preliminary report but no issue has arisen in relation to that part of the contract.

8. Mr Singer on behalf of the defendant has submitted that the giving of factual evidence and assisting at the arbitration falls within the extended definition of a construction contract under S.104(2) which provides:-

   "References in this Part to a construction contract include an agreement: (a) to do architectural, design, or surveying work, or (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape in relation to construction operations"

9. It was submitted that the giving of factual evidence as an architect or surveyor was the "doing" of architectural design or surveying work and that assisting at the arbitration was the "provision" of advice in relation to construction operations because the arbitration itself concerned construction operations. Reliance was also placed on the circumstance that the defendant's work in relation to the arbitration followed on from their original engagement to provide a report on the defective floor. In substance these were the grounds upon which the Adjudicator held that he did have jurisdiction in relation to the invoices. Miss Gordon for the claimant on the other hand submitted first that to give evidence of fact and to assist at the arbitration was not itself to "do architectural, design or surveying" work nor was it to provide "advice on building" or engineering; secondly that, if contrary to her submission it was such work or advice, it was not done or provided "in relation to construction operations" but in relation to an arbitration. Miss Gordon submitted that Part II of the 1996 Act was intended to deal with disputes and to assist cash flow in the construction industry and was not intended to affect what she described as the "arbitration" or legal industry. It is common ground between counsel that no assistance on the matter is to be found in any reported decision and that the matter is free from authority. Neither has it been suggested that any assistance may be found in the Latham Report or in the debates leading to the passing of the 1996 Act.

10. Mr Singer has drawn attention to the decision of the Court of Appeal in **Ashville Investments v Elmer Contractors** [1989] QB 488. That was a case in which the court had to consider the meaning of the words *"any dispute or difference…as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder **or in connection therewith**"* (my emphasis) in an arbitration clause in a contract. It was held that the words extended to include claims for rectification based upon allegations of mistake and for negligent misrepresentation. Mr Singer relied upon the case as an authority indicated that a broad meaning should be given to the words "in relation to" in S.104(2) of the 1996 Act. Mr Singer also referred to the dicta of HHJ Wilcox at para 30 in **Joseph Finney plc v Vickers** where the learned judge was willing to give a wide meaning to the works "in connection with" so as to require arbitration on the question whether a dispute had been compromised. I do not find these decisions of assistance when considering the meaning and effect of different words in a statute. There is a fairly clear policy in favour of upholding arbitration clauses but the issue in the present case involves a consideration of what is the policy involved in Part II of the 1996 Act. The starting point for that consideration must, it seems to me, be a consideration of the actual language of the statute and not what has been said in cases dealing with a different subject matter and in a different context.
11. I am bound to say that the giving of factual evidence by an architect, designer, or surveyor at an arbitration does not prima facie appear to me to fall within the words in S.104(2)(a) of the 1996 Act. It is not in my judgment the "doing" of architectural designing or surveying work itself. Although the reporting back to the client of what has been discovered upon a survey will form an essential part of the services which he has agreed to provide as a surveyor & should be regarded as part of the actual survey and thus included in the "doing" of the work, giving factual evidence at an arbitration or in court of what has been found in the course of the survey is a significantly different activity from actually surveying the property and reporting to the client. A witness of fact is stating what he or she has seen or done for the purpose not of assisting or advising the client but to inform the tribunal to whom the evidence is given of matters of which the tribunal otherwise would have not have any knowledge of its own. The witness must normally be prepared to be challenged on his or her evidence and be able to justify what he or she may say. In truth any relevant work has been carried out before the evidence is given. Further it by no means follows that because a survey has been carried out, that the surveyor will be required to give appear as a witness of fact. The giving of factual evidence in connection with a dispute is an activity which is additional to the survey itself and is not an incident of the survey. Indeed the surveyor may be called as a witness of fact not by the person who commissioned the survey or report but by some other party to the dispute which is being heard by the tribunal. It may be that factual evidence in relation to how for example a floor has been designed or constructed or what its appearance was or what defects were manifesting themselves can be described loosely as evidence *"in relation to construction operations"* within S.104(2) of the Act but the act of giving factual evidence describing what the witness has seen or done is not the same thing as the doing or performance or carrying out of the surveying work. In my judgment they are a different & distinct activity from the performance of the architectural, design, or surveying work and are not an incident thereof or incidental thereto.
12. Likewise assisting at an arbitration is not in my judgment the same thing as providing advice on building or engineering. If and to the extent that any advice is involved, it will, it seems to me, prima facie be advice in relation to how the arbitration should be conducted. The advice may for example be advice as to what questions the advocate should ask or as to tactics. Although this may well involve an element of professional skill or judgment in relation to construction matters, it is not, it seems to me, properly to be regarded as advice "on" building or engineering matters within S.104(2) of the Act. It is advice not on or about the construction operations" but in relation to the litigation. Disputes in relation to the payment of fees properly payable for services rendered as a witness of fact or for assisting at an arbitration or in litigation are in my judgment not disputes "in relation to construction operations" as defined by S.105 of the Act even if the arbitration concerns construction operations. They are disputes in relation to litigation support work and they arise under a contract for the provision of litigation support services and not under an agreement to do design or surveying work or to provide advice on building or engineering matters in relation to construction operations as defined by S.105 of the Act. There is in my judgment no reason why the court should seek to give what would be in my judgment a strained meaning to the ordinary meaning

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of the words "to do architectural design or surveying work" or *"to provide advice on building or engineering"* in order to bring within the language activities which are essentially part of the litigation or dispute resolution process and not part of the construction process. The words in S.104(2) are ordinary words which are in everyday use and prima facie are used in their ordinary surveying work and to the provision of advice on building or engineering matters. They do not in my judgment extend to refer to or to include advice or assistance as to how an arbitration should be conducted or to the giving of factual evidence at an arbitration hearing.

13. The adjudicator placed some weight on the fact that the defendant had already acted in a professional capacity in relation to the floor for the claimant before providing the advice or services in relation to the arbitration which were the subject of the adjudication, but it seems to me that Miss Gordon was correct when she submitted that the fact that the defendant had acted at an earlier stage as a surveyor and had provided surveying services in relation to the construction work did not alter the nature of the services which were being provided by the defendant at the arbitration. The contract itself had contemplated that litigation services would be charged at a different rate indicating that the parties did not consider that the services were of the same character. The circumstance that the defendant had been engaged in a professional capacity to consider and advise upon the defects in the kitchen floor does not actually alter the nature of the act of giving evidence as a witness of fact. It will no doubt have provided the defendant with information which it might not otherwise have had, but it does not in my judgment convert the giving of factual evidence into the "doing" of architectural design or surveying work as the Adjudicator concluded in Para 18.3(a) of his award. Neither does the fact that the defendant had been engaged to advise in a professional capacity at an earlier stage in my judgment convert assisting at an arbitration into the provision of advice on building or engineering.
14. The result is that the Adjudicator did not in my judgment upon the true construction of S.104(2) of the 1996 Act have jurisdiction to rule upon the entitlement of the defendant to payment for the services rendered by it as a witness of fact or by way of assistance at the arbitration. The claimant is in principle entitled to the declaration sought in para 1 of its Particulars of Claim & the application to enforce the award should be refused. There are still outstanding matters as to costs upon which I have still to hear submissions. I will hear submissions at a day to be fixed in consultation with my clerk, unless of course the parties can resolve the outstanding issues.
15. I direct that no further note or transcript be made of this judgment and that it may be released to the parties subject to editorial correction.

Kate Gordon (instructed by Hammond Suddards Edge, Manchester) for the claimant.
Andrew Singer (instructed by Davies Wallis Foyster, Liverpool) for the defendant.