JUDGMENT : HIS HONOUR JUDGE THORNTON : TCC : 29th June 2000.

Introduction :

1 This is an application by the claimant ("Christiani") to enforce an adjudicator' S decision dated 23 March which was given, or purportedly given, under the Housing Grants, Construction Regeneration Act 1996 ("HGCRA") . The decision was to the effect that The Lowry Centre Development Company Limited ("The Lowry") should pay Christiani a total sum of £188,064.36. This sum represented liquidated damages that The Lowry had deducted from sums certified in Christiani's favour. The adjudicator directed that this sum should be paid within 28 days of his decision but it has not been paid. The claim form was issued on 8 May 200(3 and the application notice on 24 May 2000.

2 That decision arose under a contract entered into by the parties which is a deed executed and dated on 1 December 1998. This deed either superseded, varied or was additional to an earlier simple contract created by a letter of intent which governed the same project. The letter of intent took effect when The Lowry countersigned the letter, dated 11 August 1997, which Christiani had already signed. The deed incorporated the Fifth edition of the ICE Conditions of Contract whereas the letter of intent arguably did not. The works involved the construction of a footbridge over the Manchester Ship Canal to provide access to the new Arts Centre in Manchester which is named after the artist Lowry. The work has been completed but, according to The Lowry, was completed nearly 34 weeks late. Accordingly, The Lowry has sought to recoup liquidated damages for this period and the sum that was awarded by the adjudicator is a substantial part of the sum The Lowry had previously deducted from certified sums otherwise due to Christiani.

3 The dispute arose because the deed stated that the contract period was 81 weeks whereas The Lowry contended that the deed should have stated that the contract period was 57 weeks and that, in consequence, it was entitled to have the deed rectified. The Engineer has certified that the works were completed on 22 June 1999 and that Christiani was entitled to an extension of time of 5 weeks. If the contract period was 81 weeks, the works should have been completed on 11 April 1999 and, therefore, on the basis of the period provided for in the deed, the works were completed nearly 10 weeks late. However, once the extension of time is taken into account, liquidated damages for only 36 days are payable. On The Lowry's case, however, The Lowry is entitled to act on the basis that it is entitled to have the deed rectified and, therefore, is entitled in the meantime to deduct liquidated damages for an additional period of 24 weeks. The adjudicator decided that liquidated damages for only 36 days could be withheld. He also decided that the balance of the sum then withheld by The Lowry, once an allowance had been made for such liquidated damages, should be paid to Christiani.

4 The Lowry now contends that this decision should not be enforced on four separate grounds. These are essentially jurisdictional in nature and are based on the contention that there was no jurisdiction to appoint an adjudicator under the HGCRA and also that there was no jurisdiction for him to decide the dispute referred to him, even if there was jurisdiction for him to be appointed. There is also a dispute as to whether the parties agreed to an ad hoc appointment of the adjudicator so as to enable him to determine his own jurisdiction. The adjudicator thought that he had been so appointed and, in a separate decision, decided that he had jurisdiction to decide the dispute referred to him. If I determine that this separate jurisdictional decision was one that the adjudicator had jurisdiction to decide, I must then determine whether The Lowry can now challenge that decision since The Lowry contends that it was based on an error of law which is discernable from the reasons provided by the adjudicator and which goes to the root of his jurisdiction to decide the substantive dispute referred to him

5 Thus, in summary, the following issues arise:

1 Did the parties agree that the adjudicator could decide his own jurisdiction?

2 If so, may The Lowry now seek to challenge the adjudicator's decision that he had jurisdiction on the grounds that that decision was based on a jurisdictional error of law discernable from the reasons given for his decision?

3 If the issue is still open for determination by the court, did the adjudicator lack jurisdiction on the grounds that the dispute in question arose under a construction contract that was entered into before the relevant part of the HGCRA came into force on 1 May 1998?

4 Is it now open for The Lowry to argue that Christiani is estopped from contending that the dispute is subject to the adjudication provisions of the HGCRA and, if Christiani may still contend for an estoppel, is Christiani estopped, thereby precluding it from seeking to enforce the decision in question?

5 Is the decision unenforceable on the grounds that it purports to decide a question of rectification of the deed which the adjudicator had no power to decide?

Essential Background : Contractual Background :

6 Christiani submitted a tender for the work on 6 December 1996. The sum tendered exceeded The Lowry's budget and, in consequence, the design was reduced in scope. This exercise involved detailed discussions between The Lowry, the Engineer, Christiani and a consultant who provided value engineering services for this purpose. A letter of intent was then sent to Christiani in April 1997 which indicated that Christiani would be appointed as the contractor subject to a Guaranteed Maximum Price. Further meetings and design revisions followed arid a second letter of intent, dated 11 August 1997, was signed by both parties Following this, Christiani started work and further negotiations took place as to the precise terms of the formal contract which the parties and the second letter of intent envisaged would be entered into. This formal contract was entered into as a deed and was dated 1 December 19981, The precise nature of the changes between the scope of the contract provided for by the second letter of intent and that provided for by the deed is disputed but that dispute is immaterial in determining the jurisdictional question that confronts me.

7 A deed, which is a formally executed contract was traditionally known as a contract under seal but, as is pointed out in Chitty on Contracts, it is more appropriate nowadays to refer to such a contract as a deed since the requirement for sealing a deed has been abolished by the law of Property (Miscellaneous Provisions) Act 1969 (See Volume. 1, General Principles, Twenty-eighth Edition (1999), paragraphs 1-004 (footnote 16) and 1-43). To execute a deed, each party to he bound by it must attest, or make clear on the face of the deed, an intention to make a deed.

8 The Lowry now contends that the contract period was 57 weeks and that the deed erroneously provided for a period of 81 weeks, an error which was said to be common to both parties. In support of its contention, The Lowry pointed to the fact that the contract period provided for in the second letter of intent was 57 weeks but Christiani's response was to the effect that that shorter period was the envisaged construction or programmed period. The adjudicator decided that there was no such error or, at least, that there was no mistake common to Christiani since Christiani did not have the requisite intention to enter into a contract with a contract period of 57 weeks so as to enable The Lowry to apply to a court for the rectification of the deed In these proceedings, I am not concerned with the adjudicator's findings of fact which led him to that conclusion. Either his decision was made within jurisdiction, in which case these findings are not open to challenge in these proceedings, or it was made without jurisdiction, in which case his decision is not enforceable whether or not his findings of fact are correct.

9 The deed contained this provision*: "This Agreement made the 1 day of December 1998 Notwithstanding the date of execution of this Agreement, this Agreement shall take effect from 11 August 1997."*

10 This provision was, so far as The Lowry was concerned, intended to have the effect that the deed would not be subject to the adjudication provisions of the HGCRA. This intention was communicated to Christiani in a detailed letter that The Lowry's solicitor sent to Mr P.D. Bridges of Christiani on 28 May 1988 to explain to Christiani the amendments that had been made by The Lowry to the then prevailing draft of the proposed formal contract. The letter contained this statement: *"1. A clause has been added in the agreement confirming the effective date of the contract being the date of the letter of intent from the Trust. The reason for inserting this clause is simply to make it clear that the contract applied before 1 May 1998 when the Housing (;rants Construction and Regeneration Act came into force."*

11 Mr Bridges replied by fax on 19 June 1998 that, subject to two immaterial points concerning other provisions, Christiani was in agreement with the letter. This expression of agreement by Christiani1 therefore, extended to that part of the letter sent on The Lowry's behalf which dealt with the applicability of the HGCRA which I have already set out.

Background to the Adjudication :

12 The dispute was first made the subject of the statutory adjudication procedure when Christialli, on 22 February 2000, served a notice of its intention to refer the dispute to an adjudicator. On the same day, Christialli applied to the Institute of Civil Engineers, the appointing body provided for in the ICE Conditions of Contract, to appoint an adjudicator and that body appointed Mr Guy Cottam1 an Engineer, as adjudicator. Mr Cottam accepted that appointment by a letter dated 2~ February 2000. Christiani submitted a notice of referral on 29 February 2000. This notice anticipated and answered one of The Lowry's jurisdictional challenges, namely that the contract was not a construction contract since, according to The Lowry, the work was being carried out under a contract entered into before 1 May 1998.

13 The Lowry, through its solicitors, sent a fax to the adjudicator on 1 March 2000 which invited him to agree that he had no jurisdiction. The fax referred to the same grounds of objection that Christiani's notice of referral had already dealt with. On receipt of this fax, the arbitrator held a conference telephone call with Miss Alderson, the partner of Masons, who are The Lowry's solicitors who had been acting for them in the negotiations leading up to the execution of the deed and are now acting for them in this subsequent dispute. According to Miss Alderson's letter, which was written immediately following this call to Christiani's solicitor, the adjudicator had intimated a proposed procedural timetable whereby Christiani should respond to The Lowry's challenge to jurisdiction and he would then make a decision as to whether or not he considered he had jurisdiction. This letter was followed by a discussion between the two solicitors, following which Miss Alderson wrote a letter to the adjudicator proposing a modified timetable as follows. "We discussed the matter of jurisdiction with Gateley & Wareing. They suggested that, as they had already made submissions about jurisdiction in their submission document, that we should respond to their submissions first. We therefore enclose our response to the arguments raised in the paragraphs dealing with jurisdiction of the Christiani submission document. Gateley & Wareing advise us that they will make any comment on our submissions by close of business on Monday March 6th, after which we would invite you to make your decision on jurisdiction."

14 The Lowry's submission contained this conclusion, *"The Lowry therefore invite the adjudicator to decline the invitation to determine the dispute as set out in Christiani's submissions on the grounds that he has no jurisdiction."*

15 The adjudicator decided that he had jurisdiction. He communicated this decision to the parties in a document which was, in form, a formal decision. In it the adjudicator stated:

"10. The Referral Notice anticipated a challenge to jurisdiction ... it was agreed between the parties that Masons would respond ... both parties complied with this agreement.

11. From this agreement I infer that the parties have agreed that I may reach a decision on different aspects of the dispute at different times.

12. Having carefully considered all the documents, I do hereby reach my Decision.

The issues

13. ... The Lowry has challenged the right of Christiani to invoke adjudication under the [HGCRA]

14. Although it is not possible for an adjudicator to determine his own jurisdiction it is nevertheless necessary to consider the issue in order to decide whether to proceed with the adjudication or not.

DECISION

31. Having carefully considered all the submissions made to me, I now make my decision. I DECIDE THAT:

31.1. The Contract for the construction of the footbridge was entered into by the Agreement dated 1 December 1998, and

31.2. The [HGCRA] applies to the contract~

32. It follows that I have jurisdiction to decide matters properly referred to me under the provisions of the Act."

The adjudicator then went on to decide the underlying dispute and issued a second decision dated 23 March 2000 which Christiani now seeks to enforce.

The First Issue - Did the parties agree that the adjudicator could determine his own jurisdiction?

16 It is trite law that the adjudicator had no jurisdiction to decide whether he had jurisdiction to act as an adjudicator under the scheme provided for by the HGCRA. This limitation was one which the adjudicator clearly accepted that he was subject to. However, the parties to an adjudication can always agree to vest in the adjudicator ad hoc jurisdiction to determine his own jurisdiction. Thus, the parties could have agreed to vest the adjudicator with the power to decide whether or not the relevant contract under which the dispute arose was entered into before 1 May 1998. What the status of such a decision would have been, and whether or not it could be challenged on the ground that it disclosed an error of law can only be decided following a consideration of the express and implied terms of the agreement to confer such ad hoc jurisdiction. I must therefore first determine whether such an agreement was entered into by the parties.

17 It has to be borne in mind when considering whether the parties did reach such an agreement that an adjudicator, faced with a challenge to his own jurisdiction, has a choice as to how to proceed. The adjudicator has three options:

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 that had 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.

18 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. Thus, given that the adjudicator in this case was clearly conscious of, and conscientiously seeking to comply with, his duty to act impartially, I have to consider whether the procedure adopted by him prior to his reaching his conclusion as to his own jurisdiction was one that followed an agreement to confer on him ad hoc jurisdiction to determine his own jurisdiction or was one which followed his adoption of an impartial procedure to assist him in reaching his own non-binding conclusion as to that jurisdiction.

19 The relevant agreement in this case, if there was one, could only have arisen immediately before, or during and in consequence of, the discussion between the parties' two solicitors that took place on 2 March 2000. In deciding whether the parties reached agreement, it is helpful to consider The decision of Devlin J. in **Westminster Chemicals & Produce Ltd V Eicholz & Loeser** [1954] 1 LlR 99. That case concerned the question of whether parties to an arbitration agreement had conferred on an arbitrator ad hoc jurisdiction to determine a particular dispute. Devlin J. stated that a party who had protested that the arbitrator had no jurisdiction to determine the dispute in question before participating in the arbitration hearing could not subsequently be held to have agreed to have conferred ad hoc jurisdiction on the arbitrator to determine that dispute. In **The Project Consultancy Group V The Trustees of the Gray Trust** [1999] Building Law Reports 377, Dyson J adopted and applied that principle to HGCRA adjudications.

20 In this case, The Lowry did protest that there was no jurisdiction to appoint the adjudicator at all and it was against that background that any suggestion that it had agreed to confer on him jurisdiction to determine his own jurisdiction must be considered. It can be seen that The Lowry made and continued with its protest from the following facts.

1. As soon as The Lowry had been served with the notice of the appointment of Mr Cottam as adjudicator, Masons wrote to him, and sent a copy to Christiani, stating clearly that he had no

jurisdiction and invited him to agree to that proposition. The adjudicator immediately telephoned Ms Alderson and stated that although he was aware that he could not decide conclusively the limits of his own jurisdiction, he would have to investigate the question of jurisdiction to satisfy himself that he had jurisdiction and could and should proceed to decide the dispute referred to him. He invited Masons to summarise The Lowry's contentions as to jurisdiction and to send these to him.

2. Masons informed Christiani immediately after the telephone call from the adjudicator that the adjudicator had suggested a timetable for the submission of further contentions as to his jurisdiction. This letter also clearly stated that Masons believed that the relevant contract predated the coming into force of the HGCRA and also clearly challenged the adjudicator's jurisdiction.

3. The parties' solicitors then spoke by telephone and agreed a revised sequence for the preparation of submissions as to jurisdiction. The Lowry's submission was 1to be prepared and submitted before Christiani responded. The Lowry's submission invited the adjudicator to decline the invitation to decide the dispute but did not state that the adjudicator could himself decide this jurisdictional question.

21 It follows that Masons were, when their conduct is closely analysed, doing no more than agreeing a procedure which would enable the parties to put before the adjudicator their respective contentions as to jurisdiction so as to enable him to reach his own conclusion as to whether he should proceed and decide the dispute that had been referred to him. Masons' actions were made against the background of their continuing protest as to jurisdiction. Thus, The Lowry was not agreeing to confer on the adjudicator the necessary jurisdiction to enable him to decide his own jurisdiction. It is true that the adjudicator's decision as to his own jurisdiction has the hallmark of a decision that the adjudicator thought would be definitive but that was because he had understood that the parties' solicitors had reached such an agreement. He is not to be criticised for reaching that understanding but, on analysis, no such understanding was in fact reached.

22 It follows that I can and should myself decide whether the adjudicator had jurisdiction. It also follows that the second issue, namely whether The Lowry can challenge the adjudicator's decision that he had jurisdiction on the grounds that that decision was based on an error of law does not arise. If the parties had conferred ad hoc jurisdiction on the adjudicator to determine whether there was statutory jurisdiction to appoint him under the HGCRA, it does not necessarily follow that the parties had agreed that any decision as to jurisdiction would be unreviewable by the court, particularly if the adjudicator's reasons disclosed an error of law. This is because this jurisdictional adjudication could not have been conducted under the provisions of the HGCRA since the jurisdictional dispute it would have been concerned with would not have arisen under a construction contract. Since that question is not an easy one to decide and given that it is a moot question in this case, I will not attempt to decide it.

The Third Issue - Did the adjudicator lack jurisdiction because the dispute arose under a contract entered into before the HGCRA came into force?

23 The contractual relationship between the parties, as I have already shown, came into being in two stages. Firstly, work started following a letter of intent dated 11 August 1997 and, secondly, the parties entered into a deed dated 1 December 1998. There are three different ways in which these two contracts might inter-relate. The two might operate simultaneously; the letter of intent might have been superseded by, or merged with, the deed; or the deed might have varied the letter of intent and be taken to form part of earlier contract as thereby varied. The appropriate analysis depends on the intention of the parties derived from the words of the two contracts.

24 The letter of intent dated 11 August 1997 states:
"I can confirm that it is the intention of [The Lowry] to enter into a contract with you for the construction of the footbridge over the Manchester Ship Canal to serve the Lowry Centre….

The basis of the contract shall be your guaranteed maximum price of £4,349,820 and a contract period of 57 weeks, and your letter to Parkman Ltd dated 30th July 1997, subject to the comments raised by Parkman Ltd in their letter to yourselves dated 31st July 1997 ...

Pending our entering into a contract with you, you are instructed to proceed with the works which are intended to be carried out under the contract as authorised by Parkman in order to effect completion within the contract period based on an anticipated Date for Commencement of the Works of 18 August 1997 ...

In the unlikely event that we do not enter into a contract with you, you will be reimbursed such costs in respect of activities undertaken from the date of the receipt of this letter, and such other costs expended by yourselves as authorised under our previous letter dated 23rd May 1997, as agreed as reasonable by Parkman Ltd acting on our behalf."

25 The letter of intent refers to two letters written in July 1997. These are the letters in which Christiani set out its re-tendered lump sum price and Parkman responded with amendments to certain points of detail contained in the re-tender letter The re-tender was based on drawings, specifications, bills of quantities and the Fifth edition of the ICE Conditions of Contract. In summary1 therefore, the letter of intent stated that it would be effective pending The Lowry entering into a contract with Christiani. The letter of intent also instructed Christiani to proceed with the works provided for by the two July letters and stated that "in the unlikely event" of there being no contract, Christiani would be reimbursed for the costs incurred in carrying out work pursuant to it.

26 It follows that the letter of intent envisaged that a contract would be entered into subsequently and that the work carried out prior to that contract being entered into would not be subject to the ICE Conditions. This is because the letter of intent merely stated that, pending the entering into of that formal contract, Christiani was to: "proceed with the works which are intended to be carried out under the contract authorised by Parkman". Thus, the only provisions of the re-tender documents that would govern the pre-contract work would be those documents that defined the scope of the works.

27 When the deed was finally executed, it was in conventional form. In particular, the 7 categories of documents deemed to form, and to be read and construed as part of, the deed were defined. Amongst other obligations provided for was the need for Christiani to execute collateral warranties in favour of three third parties whose properties were affected by the works. The deed also provided, as I have already set out, that notwithstanding its date of execution, it took effect from 11 August 1997.

28 In the light of these provisions, it is clear that the deed superseded the letter of intent. The letter of intent, as is clear from the extracts that I have set out, was intended to have a limited shelf life which would cease when the subsequent deed was entered into. Moreover, the letter of intent makes it clear that the deed would govern the work once it had been entered into since the retender documents would form the basis of the contract formed by the deed. It is clear, therefore, that it is immaterial whether the scope of the works changed between the date of the letter of intent and the date that the deed was executed. Once the deed was executed, the letter of intent ceased to have any effect or independent existence.

29 This conclusion is reinforced by the provision included by the parties in the deed which provides that the deed would take effect from the earlier date of 11 August 1997, being the date of the letter of intent. This provision made it clear that all work carried out after that earlier date was to be referrable and subject to the provisions of the deed. There would have been no need for this provision if the earlier work was to continue to be subject to the terms of the letter of intent but it was an obvious necessity if the letter of intent was no longer to be effective once the deed had been executed.

30 I conclude, for reasons that are similar to those of the adjudicator, that the whole of the works was subject to a construction contract, being the deed, that was entered into after 1 May 1998 since that was the only surviving contract between the parties at the date that the dispute was referred to adjudication. It was, moreover, the only contract under which that dispute could have arisen.

The Fourth Issue - Is Christiani Estopped from Relying on the HGCRA?

31 The basis of The Lowry's contention that Christiani is estopped from relying on the adjudication provisions of the HGCRA is that the parties entered into the deed after Christiani had been made

aware of The Lowry's understanding of paragraph 7 of the deed. That understanding was to the effect that that contract would be taken to have been entered into before I May 1998 and that the HGCRA would not apply to it. Given the extracts from the correspondence exchanged before the deed was executed which I have already set out, there are clearly good grounds for contending that the deed was executed with the parties sharing that common understanding.

32 However, Christiani contends, on two separate grounds, that The Lowry may not rely on any estoppel founded upon that common understanding and that, in consequence, it is not necessary for me to determine whether the estoppel is in fact made out.

33 The first of these grounds is procedural. Christiani points to the absence of any reference to an alleged estoppel in the documents submitted by The Lowry to the adjudicator when asked to identify the reasons why it contended that the adjudicator lacked jurisdiction. In consequence so Christiani contends, The Lowry has waived any entitlement to rely on the alleged estoppel. The Lowry responds by pointing out that it did challenge the jurisdiction of the adjudicator and, in consequence, cannot now be taken to have waived any jurisdictional challenge open to it, even if the grounds of challenge communicated to the adjudicator omitted, or only made passing reference to, the existence of an estoppel.

34 I find that Christiani's objection is a good one. It has to be borne in mind that The Lowry accepted an invitation from the adjudicator to set out its arguments as to why he lacked jurisdiction and sent him a detailed submission entitled: "Challenge to Adjudicator's Jurisdiction'. One of the arguments raised in this document was entitled: "Contract given retrospective effect". The relevant passage in the submission stated:

"14. The statement in the signed form of agreement that 'this agreement shall take effect from 11 August 1997' was to emphasise that the contract had been in existence since 11 August 1997. This would not have been reflected by the date that the contract was signed because it is not possible to backdate the date of the sealing of the contract."

35 Thus, The Lowry was submitting, in summary, that the words of para 7 of the deed meant that the deed was to be taken to have been executed on 11 August 1997. However, para 7 clearly has no such meaning and the adjudicator correctly reached the same conclusion. All that para 7 did is to make it clear that the provisions of the deed would govern work carried out after 11 August 1997 even though the deed itself was dated, executed and became effective (or was "delivered" to use the formal language of deeds) on 1 December 1998.

36 The Lowry's submission to the adjudicator made no reference to its present contention which is to accept that the wording of the deed meant that the HGCRA applied to the deed but to contend that, nonetheless, the parties understood that they were entering into the deed on the basis that the relevant words did not have that meaning. Thus, The Lowry's present estoppel contention is based on an opposing meaning of paragraph 7 to that contended for in its submission.

37 Since the purpose of the submission was to seek to persuade the adjudicator not to act and to place before him all available arguments as to why he had no jurisdiction, it would be unfair to allow The Lowry now to argue for a lack of jurisdiction on a ground that was not then advanced, particularly when that argument is based on a contention which is inconsistent with the argument advanced to the adjudicator. Having represented to the adjudicator that the only grounds upon which it could challenge his jurisdiction were those set out in its submission, The Lowry has clearly waived its entitlement to rely now on an estoppel.

38 However, I also accept Christiani's further submission that The Lowry cannot make out an estoppel even if it is now able to advance such an argument. An estoppel argument is not open to a party where, to quote from Chitty on Contracts:

"... the term in respect of which such an estoppel is alleged to operate would, if actually incorporated in the contract, have been invalid (eg because it amounted to an attempt to deprive a tenant of statutory security of tenure which could not be excluded by contract) ...

2. ibid., paragraph 3-1O6. The authority relied on, which does indeed support this proposition, ***is Keen V Holland*** *[1989] 1 W.L.R., C.A.*

39 The reason why this principle is applicable here is that the terms of the HGCRA are mandatory and cannot be contracted out of. Section 108(1) of the HGCRA provides:
'A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section…'

40 Any agreement or understanding of the parties that the HGCRA would not apply even though the contract had been entered into after 1 May 1998 and would therefore be a contract to which the Act would apply would be one which robbed one of the parties of its statutory entitlement to an adjudication. Just as parties cannot contract out of the applicability of the Rent Acts, the Landlord & Tenant Act (without prior court sanction) or the Agricultural Holdings Acts, so parties cannot contact out of the adjudication provisions of the HGCRA.

41 Thus, on the twin grounds that The Lowry has waived its entitlement to rely on the suggested estoppel and that that estoppel is unsustainable, I dismiss this further ground of challenge to the adjudicator's appointment and to his jurisdiction to decide the referred dispute.

The Fifth Issue - Is the decision unenforceable because it decides a question concerning the rectification of the deed which the adjudicator had no power to decide?

42 The Lowry contends that the real dispute referred to the adjudicator for determination was whether the deed should be rectified so that it provided for completion of the works in 57 weeks rather than in the 81 weeks actually provided for in the deed. It is necessary to consider the nature of the dispute referred to the adjudicator by reference to the notice of adjudication. This was not put in evidence, However, the adjudicator summarised the nature of the dispute referred to him in his Decision dated 23 March 2000 in this way:
"The dispute that [Christiani] referred to adjudication concerned the amount that The Lowry were entitled to deduct as liquidated damages from monies now due to Christiani."

The accuracy of that definition of the dispute was not challenged by The Lowry in this application.

43 Underlying that dispute was the prior deduction or withholding of liquidated damages from sums otherwise due to Christiani by The Lowry. Christiani challenged the entitlement of The Lowry to make those deductions on the ground that the deed provided for a contract period of 81 weeks and yet the deductions had been made on the basis that Christiani had a contractual obligation to complete the works in 57 weeks despite the clear provision of an 81-week contract period contained in the deed.

44 The Lowry could only have legitimately deducted liquidated damages on the basis of a 57-week completion period if it was entitled to have the deed rectified and, equally importantly, was entitled to deduct liquidated damages in advance of the deed being rectified.

45 Thus, the adjudicator had to decide whether any deduction could be made on the basis of an entitlement to rectification prior to that rectification having occurred and, if so, whether The Lowry had made out an such an entitlement to rectification by the court. It was only in this sense that the adjudicator was concerned with the remedy of rectification since it was not necessary for the adjudicator himself to rectify the deed to decide the dispute referred to him.

46 The adjudicator was fully conscious of the nature of the dispute he was concerned with. His decision contains this admirably clear and succinct statement:
"42. [Christiani] argue that The Lowry have not brought proceedings seeking rectification but have raised it as a defence. Since this point is fundamental to their right to deduct liquidated damages I consider that it is necessarily connected with this dispute.
In this dispute the situation is that the party who prepared the draft contract1 which was subject to almost six months negotiation, for sealing by the other party, is now seeking rectification on the grounds that its own draft was in error. There is no evidence that [Christiani] in their checking process became aware that a mistake had been made. In my opinion it is most unlikely that rectification would be ordered on the facts of this case. Therefore the arguments concerning the adjudicator's jurisdiction are irrelevant in this dispute."

47 Thus, the adjudicator first decided whether The Lowry had any legal basis for asserting an entitlement to rectification. He decided that, on the available evidence, there was no basis for The Lowry to claim rectification in court. Had he taken a different view of the evidence, he would then have had to decide a second question1 namely whether a prima facie entitlement to rectification could provide The Lowry with an entitlement to deduct liquidated damages in the meantime.

48 In fact, The Lowry could only have legitimately deducted liquidated damages for the longer period of delay if it could have shown that Christiani was estopped from contending for its legal right to complete in 81 weeks. For such an estoppel to have arisen, it would have been necessary for The Lowry to have shown that it would have been unfair for Christiani to rely on its legal right to complete in 81 weeks. Such an estoppel would have required The Lowry to have demonstrated that Christiani was aware, or should have been aware, that the terms of the true agreement arrived at by the parties had not been accurately stated in the deed when it had been executed3. However, the adjudicator's decision would have precluded that argument since it decided that the factual basis for such an estoppel had not been established by The Lowry.

49 The Lowry was, in effect, claiming that Christiani was estopped from relying on the terms of the deed because it had, when executing the deed, sufficient knowledge of The Lowry's pre-contractual intentions and of the erroneous expression of those intentions in the deed. Thus, The Lowry wee contending for relief of the kind expounded upon by the Court of Appeal in **Roberts & Co Ltd v Leicestershire C.C.** [1961] Ch.555

50 It follows that the adjudicator had full jurisdiction to decide the dispute in the way he did. It also follows that I do not have to decide whether an adjudicator appointed under the provisions of the HGCRA has the power to decide a claim for rectification. Such a claim would have arisen, for example, had The Lowry sought the appointment of an adjudicator to decide its entitlement to rectification. It was contended by The Lowry that since the adjudicator was appointed, by virtue of section 108 (1) of the HGCRA, to decide disputes "under the contract", he could not have decided disputes that were merely connected with the contract. This argument is dependent on the line of authorities which are concerned with the limited jurisdiction of arbitrators whose jurisdiction is derived from an arbitration clause which refers only to disputes arising "under the contract". Such a clause has been held not to extend to disputes involving misrepresentation or rectification claims or claims as to the ambit and content of the contract. Interesting and important as this question is, it does not arise in this case and I express no view about it.

51 The ambit of this doctrine is explored in such cases as **Heyman v Darwins** [1942] A.C. 356, H.L. **(E) Ashville Investments Ltd V Elmer Contractors** (1987) 37 BLR 55, C.A; **Overseas Union Insurance v AA Mutual International Insurance Co Ltd [**1988] 2 Lloyds Rep. 62, **Evans J. Fillite (Runcorn) Ltd V Aqua-Lift (A firm)** (1989) 45 BLR 32 C.A

Conclusion :

52 It follows that the adjudicator's decision was made within jurisdiction and that Christiani is entitled to summary judgment for the sum that the adjudicator directed should be paid. That sum is £188,064.36.