JUDGMENT : HIS HONOUR JUDGE JOHN TOULMIN CMG QC : TCC : 16th October 2000

1. This is an application for summary judgment dated the 19th June 2000, arising out of a claim by MayMac Environmental Services Ltd. ("MayMac") against the defendant, Faraday Building Services Ltd. ("Faraday") to enforce an adjudicator's decision in its favour, given by the adjudicator, Mr C.M.S. Hall, dated the 31st May 2000.

2. The decision was given under sec.108 of the Housing Grants Construction and Regeneration Act 1996 ("the Act"). The claim is for payment of £49,073.91 awarded under the adjudication, together with interest from the date of the award.

3. The particulars of claim are brief. They record that on the 18th April 2000 Maymac referred a dispute to adjudication for the sum of £35,870.03, plus VAT. On the 31st May 2000 the adjudicator gave his decision that Faraday should pay MayMac £35,870.03 plus VAT, and, in addition, £5,895 plus VAT, in respect of the adjudicator's costs. The payment was to be made by the 7th June 2000. The defendant has refused to pay the award or the costs.

4. By an application notice dated the 20th July 2000 Faraday applied for summary judgment in its favour, and that the particulars of claim should be struck out pursuant to CPR, Part 24, and r.3.4, on the grounds that MayMac has no prospect of succeeding on the claim, that there is no reason why the claim should proceed to trial, that the particulars of claim disclose no reasonable grounds for bringing the claim.

5. In essence, the claim of Faraday is set out in the witness statement of Mr. Bange, an associate solicitor employed by Fenwick Elliott, namely that the adjudicator has no jurisdiction to make the award because no construction contract ever came into existence. Faraday asserts that on the documents before the adjudicator it may well have appeared to him that there was a concluded contract between the parties, evidenced as it was by a purchase order dated the 29th November 1999, but in fact there was no concluded contract because of a letter not before him, dated the 6th December 1999, reference 067, sent by Mr. McGovern, a director of Maymac, to Mr. David Browne, a director of Faraday. The letter said, under the heading *"Contract Conditions"*, that MayMac was unaware of the terms of the head contract between Faraday and Hilton Hotels contained within the JCT minor works contract. Until they received a copy of the same they could not accept or be bound by the relevant conditions, nor could they be aware how they impacted upon the subcontract between Faraday and MayMac. The letter went on: *"Again until we are provided with a specific DOM/1 contract between Faraday and MayMac we cannot consider and/or accept the same. This is obviously an area we need to fully understand and agree at this stage bearing in mind no mention was made of the above in the tender documentation."*

6. The letter went on to say that there was no mention of £2,500 a week liquidated damages in the tender documents, and that MayMac had made no allowance for this in the tender.

7. This letter was never replied to by Faraday. Faraday say that this letter is decisive in showing there was in fact no concluded contract between the parties, or at least not one subject to the adjudication procedure. It is conceded that the substance of the works would have been capable of being covered by a construction contract, and therefore within the terms of the Act. It is said that the parties proceeded on the basis of a shared mistake, i.e. on the basis that they thought they had a contract when they had no contract.

8. Faraday also claims that the adjudication should be set aside if the terms of the contract turn out to be different to the contract put before the adjudicator.

9. Faraday's claims are disputed by MayMac on the basic facts. Mr. McGovern, who wrote the letter reference 067 is, and was, a director of MayMac, in charge of mechanical work on the project. He says that the letter was not decisive and did not amount to a rejection of the contract between the parties, nor was it regarded as such by Faraday at the time MayMac contend that there was a concluded contract between the parties on the basis of Faraday's earlier letter of the 3rd November 1999, which was an order to proceed with the work for which they had tendered. In Mr. McGovern's view, the schedule of works for which they had tendered defined the scope of the works. MayMac argue further that, in any event Faraday agreed to take part in the adjudication and is bound by the result.

10. At the adjudication Faraday was represented by Mr. Anthony Barker, who describes himself as a construction and quality consultant in dispute resolution. He is a chartered builder and a Fellow of the Chartered Institute of Arbitrators. He is relatively experienced in adjudication work. Mr. Barker says in his witness statement dated the 6th July 2000 that, in essence, he had very little time in which to consider the merits of the case prior to the adjudication. Although he then had no knowledge of the letter of the 6th December 1999, he was nevertheless concerned about the written terms of the contract and formally denied in his response that a contract existed. Since the letter of the 6th December 1999 (reference 067) was not then apparently drawn to his attention by Faraday, he can hardly be blamed for not drawing it to the attention of the adjudicator.

The History of the Adjudication

11. By a notice of reference to adjudication dated the 17th April 2000, Maymac referred to adjudication its dispute with Faraday, claiming that it was entitled to payment on the 26th February 2000 of the whole of the sum in its application for payment No. 2, dated the 28th January 2000, in the sum of £100,797.66, net of retention but excluding VAT, and that as at the 6th March 2000 Maymac had received £65,094.95, net of retention, and was owed the balance of £35,870.03, plus VAT. The notice of reference sets out very fully the history of the contract as MayMac understood it. It was summarised in paras 3, 13 and 14 of the reference as follows.

12. Paragraph 3 says that, by a letter (reference No. 010) dated the 3rd November 1999, Faraday sent Maymac a schedule of works in the sum of £225,565 that had been agreed with the clients, and instructed Maymac to proceed with the work. The schedule of works contained no provision for the riser pipework. It further stated that an official order would be sent within the next week. In fact Faraday supplied to MayMac a purchase order dated the 2nd December 1999.

13. Paragraph 13 of the reference says that Faraday responded to another letter dated the 6th December 1999 (reference 069) in a letter to Maymac dated the 6th December 1999, confirming that its purchase order covered *"…the scope of work for the original scheme as described in your quotation MME1069, revision A, but has been varied in line with various meetings and discussed with ourselves and the client."*

14. In addition to referring to item 3, in "Roof riser pipework adds", it also stated, quoting the 8th December 1999 letter, that Maymac was: *"….to carry out the riser pipework as originally described in [Maymac's] quotation MME1041* ***and in line with the latest requirements*** *(emphasis added). The contract as evidenced by Maymac's quotation reference MME1069RevA dated the 15th October 1999, and Faraday's letter reference No. 010 dated the 3rd November 1999, enclosing the schedule of works, in conjunction with Maymac's letter reference 059 dated the 24th November 1999, and Faraday's purchase order, was, therefore, to be varied so as to provide the revised riser pipework scheme in the sum of £27,200.00. This meant that as far as the client and Faraday were concerned, subtracting the cost of the original riser pipework in the sum of £23,910.83, and replacing it with the cost of the new riser pipework scheme in the sum of £27,200.00."*

15. Paragraph 14 of the reference said as follows: *"Accordingly, a contract was concluded between Maymac and Faraday for the mechanical and electrical installation. Although the contract and its variations did not specify that the Act was to apply, the contract is a construction contract within the definition in the Act, and so the Act and the Scheme thereto apply to determine when applications become due for payment."*

16. The reference then went on (paragraph 15) to set out the history of payments, pointing out that on the 28th January 2000 MayMac submitted to Faraday payment application No. 2 Faraday did not object that there was no contract, or even gave notice of intention to withhold payment. They did write on the 2nd February 2000 requesting a breakdown of costs in relation to the cost of the new riser pipework scheme.

17. Paragraph 18 of the reference alleged that in the course of further correspondence, MayMac, by letter dated the 28th February 2000, drew attention to the fact that the valuation of MayMac`s work was based on pre agreed prices recorded either in orders placed by Faraday, and/or in correspondence, and/or in accordance with the schedule of rates to assist in the pricing of variations.

18. Paragraph 18 also alleged that MayMac had written a MayMac's second letter of the 28th February 2000 in which it provided further information to substantiate its contention that

Faraday had incorrectly valued the works actually installed, together with materials on site, either in accordance with the contract or the schedule of rates for riser pipework.

19. The correspondence between the parties continued until the reference to the adjudicator. This correspondence is set out in the annex to the reference, and amounts to over 100 pages. Mr. Barker was clearly instructed, on behalf of Faraday, by the 20th April 2000, because he wrote a letter to Shoosmiths, acting for Maymac, on the 25th April 2000, referring to a previous letter he had written on the earlier date. His letter of the 25th April 2000 says that although the letter dated the 18th April 2000 from Shoosmiths does not contain all the ingredients required by the Scheme for Construction Contracts for a Notice of Adjudication, he accepted it as such on behalf of his clients.

20. In the letter of the 25th April 2000 Mr. Barker also said that he had taken instructions from his client, and affirmed that: *"Subsequent to 6th March '00, your client has received a further payment as provided by the subcontract".*

21. The letter concluded: *"I therefore suggest you discontinue this adjudication forthwith. Having said that, my client is aware of the disagreement of your client regarding the valuation of his subcontract works (as opposed to a valuation for the purposes of an interim application) and invites you to reconsider your submissions to the Adjudicator."*

22. Faraday's reply to the Notice of Adjudication is dated the 8th May 2000, more than two weeks after Mr. Barker was first instructed. It is a detailed document of eight pages and it could only have been prepared by Mr. Barker after receiving detailed instructions from Faraday. Far from contesting the adjudicator's jurisdiction, para.2.1 of the response says in terms:
"The adjudicator is requested to decide whether the Applicant is entitled to payment in the sum of £100,797.66 or £100,964.98 against its application for payment No. 2 dated the 28th January '00, and no other matter can be decided by him."

23. In para 5.1 the response says: *"It is denied that the contract included the sum of £67,341 for chilled water pipework (CHW)."*

24. Paragraph 5.2 of the response says that there were budgeting difficulties: *"In that situation, as is made clear in the Respondent's letter of the 2nd December, the order was placed in terms which could and would be varied. It was further known by the Applicant that many of the items to be omitted under the order would probably be carried out at a later date when the employer's budgets would allow."*

25. Paragraph 6.1 of the response denies that no variations have occurred since the applicant's letter of the 24th November 1999.

26. Paragraph 6.3 should be set out in full. *"During the course of the works by issue of the Consulting Engineer's drawing No. M06/Rev3 dated the 14th January '00, the number of pipes was reduced for the full extent of the riser and horizontal pipework from 8 no. pipes to only 3 no. Thus the last sentence of paragraph 13 of the Notice of Reference was correct at the time the contract was formed, but was later further varied to reduce the extent and, therefore, the price of the works."*

27. It is also implicit in paras.7.4, 9 and 14 of the submissions that jurisdiction is conceded to the adjudicator. Under para.14, *"Costs"*, the respondent says that it believes that without the parties' agreement the adjudicator has no jurisdiction to decide who pays the cost of the parties, and it therefore agrees that the adjudicator should have this jurisdiction.

28. In its reply dated the 17th May 2000, MayMac noted that Faraday did not take issue with the definition and content of the contract as defined in paras.3 and 13 of the referral notice. This underlines, in Maymac's view, the fact that these matters were not in issue.

29. By a fax dated the 23rd May 2000, over one month after he had been instructed, Mr. Barker faxed his skeleton opening in the adjudication to Mr. Cook of Shoosmiths. He noted three issues to be decided. They did not include a challenge to the adjudicator's jurisdiction on the basis that there was no contract or a different contract to the one which had been referred.

30. The closing submission by Faraday was signed by Mr. Browne, the contracts manager, and a director, on behalf of Faraday, and faxed to the adjudicator on the 24th May 2000. This is the same Mr. Browne

to whom the three letters from Mr. McGovern dated the 6th December 2000 had been sent and who had not replied to the one which is now said to be decisive, although he had replied to the other letter of that date to which I have specifically referred (ref.069) through Mr. Bharaj, the commercial manager. It is to be assumed that he received the letters of the 6th December 1999 since they were addressed to him. He does not suggest otherwise in his witness statement dated 30th June 2000.

31. Mr. Browne set out Faraday's view of the contract in these terms in his closing submission:

"2.1. The order dated the 29th November 1999 (Ap.33) instructs work to be carried out as quotation dated the 15th October 1999 (Ap.18) and Faraday's letter of the 3rd November 1999 (Ap.24) and as attached schedule revision in the sum of £198,358.17 (Ap.25 and 26).

2.2. By letter dated the 8th December (Ap.37) (two days after the controversial letter of the 6th December) Faraday added to the work to the vertical riser as quotation dated the 16th August 1999 (Ap.13).

2.3. That what is stated above is understood by MayMac to be the basis of the contract is evidenced by the letter dated the 4th April 2000 (attached) which at paragraph 2 states:

'The client has revised the scope of our works by removing items from the schedule which formed part of our original contract on which our previous tender was based.'"

32. It is clear that as contracts manager involved in the continuing correspondence he was in a position to know whether or not the letter of the 6th December 1999 was of any significance in the dispute. He did not refer to it.

33. There was further correspondence with the adjudicator, Mr. Hall, on the 26th May 2000 on behalf of MayMac, and by Mr. Browne on the 30th May 2000 on behalf of Faraday. Under part 2 Mr. Browne referred to events in December 1999 and January 2000, but not to the letter of the 6th December 1999 to which such importance is now attached by Faraday.

34. Mr. Hall gave his decision as adjudicator on the 30th May 2000. In a carefully reasoned decision, he set out the scope of the works and described in para.3 the purpose of changes in the four potential work scopes to obtain price savings. Also in para 3 of the adjudication, he noted that by the 2nd December 1999 Faraday did not consider that the savings achieved were sufficient. He noted (para.6) that they wrote to MayMac on the 8th December 1999 for the purpose of clarifying their order.

35. Mr. Hall noted that, among other things, Faraday said: *"For the record, we would again confirm that you are to carry out the riser pipework as originally described in your quotation MME1040 and in line with the latest requirements."*

36. On the 6th June 2000 Shoosmiths, on behalf of MayMac, wrote to Mr. Barker asking him to confirm that the sum awarded by the adjudicator would be paid by Faraday on the 7th June 2000. On the 8th June 2000 Mr. Barker wrote back, saying that there was no contract on which Mr. Hall could properly base his award, and that therefore he had no jurisdiction to make the award under the Housing Grants Construction and Regeneration Act 1996.

37. The witness evidence in support of the defendant is provided by Mr. Barker, Mr. Browne, the contracts manager who signed the final written submissions in the adjudication, and Mr. Bange, a solicitor with Fenwick Elliott. Mr. Barker seems to suggest that he was at a disadvantage because he is not a solicitor and because he had to deal urgently with the new process of adjudication. He said that at the time he had no knowledge of the letter of the 6th December 1999 (ref 067). It does not seem to me that his level of competence, on which I am unable to make any comment, was a relevant factor. As to the timing, in the period between the 17th April 2000 and the 25th May 2000 he had ample time to investigate the dispute on behalf of his clients and to receive the fullest instructions.

38. The crucial point is that he was not shown the letter of the 6th December 2000 *[sic]* (ref.067) by Mr. Browne, the letter on which Faradays now place so much reliance. A representative can only act on instructions, and he was not shown what Faraday now claims to be the crucial letter from MayMac.

39. In his witness statement for these proceedings, dated the 30th June 2000, Mr. Browne sets out the history as he sees it. He says (para.12) that on the 2nd December the Hilton Hotel came up with a scope of works. The idea was to place a contract for quotation 1069 revision A, but with some alterations, and that a schedule of rates was needed for measuring and valuing variations.

"This would work with the DOM/1 form of subcontract under the method therein for valuing variations."
"13. At the same time the purchase order was written out it covers:

1. *Work scope and price.*
2. *Programme.*
3. *Payment terms.*
4. *DOM/1 forms and Faraday's terms.*
5. *LADS."*

40. The statement then refers to two letters from Mr. McGovern dated the 6th December 1999. There is no explanation from Mr. Browne as to why the letter, now claimed to be decisive, was not put before the adjudicator or why it was that Mr. Browne had not previously appreciated the importance of that letter and why, in the course of the adjudication, Mr. Browne had made his own submissions, and Mr. Barker had been instructed on the basis that there was a concluded contract on which Mr. Hall had jurisdiction to adjudicate.

41. The real explanation of the extent of the significance of the MayMac letter dated the 6th December may well be that which is set out in Mr. McGovern's witness statement dated the 3rd July 2000, made from his own knowledge as a director of MayMac in charge of mechanical work on the project, and writer of the three letters dated the 6th December 1999. He said that he was unaware that there had in fact been any difficulty in MayMac and Faraday agreeing a contract. It was always his understanding that a contract was made on receipt by MayMac of Faraday's letter, reference 010, dated the 3rd November 1999, enclosing a schedule of works and instructing MayMac to proceed with these works. In his view (para.8) MayMac's letter of the 6th December 1999 did not reject the work content, nor the pricing contained in Faraday's subcontract pricing order. It stated that MayMac could not accept certain of the terms in the purchasing order until it had sight of them.

42. It is clear that the objections raised in the letter of the 6th December 1999 were not persisted in. The letter was not replied to by Faraday, nor was it followed up in correspondence by MayMac. On the contrary, on the 8th December 1999 Mr. Bharaj, Faraday's commercial manager, replied to the letter reference 069 of the 6th December explaining the scope of the works that had been agreed, and that the riser pipework had been instructed under cover of Faraday's letter dated the 2nd December 1999: *"….as a variation to the original scope of the works, and will be dealt with as costed as a valuation once we have received your schedule of rates which were requested in our letter…."*

43. The letter concludes: *"However, for the record, we would again confirm that you are to carry out the riser pipework as originally described in your quotation MME1040, and in line with the latest requirements."*

44. This letter was responded to by Mr. McGovern by letter dated the 6th January 2000, asking for further clarification of details of the contract in accordance with the common understanding of the parties. This letter was in turn responded to by Faraday (Mr. Browne) on the 7th January 2000, in a letter which confirmed, among other things, that the order included work on the riser, and was based on Maymac's quotation for the work dated the 16th August 1999.

45. There was further correspondence on detailed items on the 11th January 2000 (two letters passing between Mr. McGovern and Mr. Browne), and a faxed response from Mr. Browne dated the 12th January 2000. In the letter dated the 11th January 2000 from Mr. McGovern to Mr. Browne, reference 110, Mr. McGovern referred specifically to: *"We will need to be informed at the earliest opportunity of any works currently identified, 'awaiting confirmation order' being activated (i.e. items 61 and 62) and/or any works required to be carried out in addition to that which we are currently contracted to provide in the event they carry design and lead time implications."*

46. In none of the correspondence before me was the letter dated the 6th December 1999, reference 067, referred to. It is clear that there was a common understanding between the parties that there was a concluded contract in writing on agreed terms, and that it was one to which the Act applies.

47. I conclude, in these circumstances, that the letter dated the 6th December 1999, reference 067, placed in context, does not show either that there was no concluded contract between the parties or that the contract was different to the one on which the adjudicator based his adjudication. There is overwhelming evidence that the parties reached agreement on the terms on which they agreed to be

bound, and, as the contract progressed and further details were agreed, they also agreed to be bound by those further terms. There was thus a concluded contract (see **Pagnan SPA v. Feed Products Ltd** [1987] 2 Lloyds.Rep.601 at 619).

48. On the facts, Faraday has no realistic prospect of defending the claim. However, in case I am wrong about that, I go on to set out briefly the nature of the jurisdiction and the legal contentions of the parties on the basis that there was an arguable case that there was no agreement between the parties, or a different agreement to that on which the adjudicator based his decision.

The Law

49. In ***Bouygues v. Dahl Jensen***, Court of Appeal Judgement of the 31st July 2000, the Court of Appeal broadly upheld the way in which this Court has been developing this jurisdiction. Section 108.1 of the Housing Grant Construction and Regeneration Act 1996 confers on a party to a construction contract the right to refer a dispute arising under the contract for adjudication under a procedure complying with that section. Section 108.3 provides:

"3. The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

As Lord Justice Buxton put it succinctly:

"The purpose of this procedure is to enable a quick and interim but enforceable award to be made in advance of a final resolution of what are likely to be complex and expensive disputes. That feature is reinforced by the provision of the Construction Industry Model Procedure by which the adjudication in this case was governed. Rules 4 and 5 of that procedure provide as follows:

'4. The adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration…. or by agreement.

The parties shall implement the adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration.'"

50. I should emphasise that the decision is provisional and that the losing party has the opportunity to overturn the adjudicator's decision in the courts at a later stage.

51. It is therefore necessary to consider the ambit of the adjudicator's powers. I adopt the approach of His Honour Judge Thornton, Q.C., in ***Fastrack Contractors Ltd. v. Morrison Construction Ltd.*** [2000] B.L.R.166 at 176. *"During the course of a construction contract, many claims, heads of claims, issues, contentions and causes of action will arise. Many of these will be, collectively or individually, disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus, the 'dispute' which may be referred to adjudication is all or part of whatever is in dispute at the moment the referring party first intimates an adjudication reference. In other words, the 'dispute' is whatever claims, heads of claims, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation to be made of the dispute referred. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the underlying factual background from which it springs and which will be known to both parties."*

52. The notice of reference in this case related to an application for payment No. 2 dated the 28th January 2000, pursuant to the contract set out in detail in the notice. This construction contract was accepted by Faraday as one to which the Act and the scheme applied. Faraday explicitly sought to limit the adjudicator's jurisdiction to Maymac's entitlement to payment under their application for payment No. 2. They therefore accepted the adjudicator's jurisdiction to determine the dispute which Maymac had referred to the adjudicator and on which the adjudicator made his decision.

53. In these circumstances, it is clear that the adjudicator's decision cannot be challenged on the basis that he found the wrong contract to which the Act applied. He clearly adjudicated on the dispute which was put before him.

54. Faraday go further. Their primary submission is that the adjudicator's decision can be challenged on the grounds that he had no jurisdiction because no construction contract complying with the Act had been established. I have already concluded that Faraday has no realistic prospect of succeeding on the facts.

55. Assuming that I am wrong about this, Maymac make a further submission: they say that Faraday agreed that the dispute should be adjudicated on and cannot resile from their agreement. I agree with this submission. Faraday consented to submit to the adjudication and admitted that there was a contract to which the Act and the Scheme applied. The adjudication was conducted on that basis. Accordingly, Faraday are estopped by representation and convention from now arguing that the Act and the Scheme did not apply, and that the adjudicator was not entitled to make an adjudication which would be binding until the final determination of the dispute. Assuming that no contract existed and that the referral was not under the Act, it was made by the parties on the basis that the adjudication took place by agreement between the parties on the same terms as the Act and the Scheme. Such an agreement between the parties is enforceable on the same basis as if the Act had applied.

56. In all the circumstances, I order summary judgment in favour of MayMac in the sum of £49,073.91, plus interest, plus costs and reject the claim for Summary Judgment and other relief in Faraday's Application Notice of 20th July 2000.

MRS. N. JEFFORD (Instructed by Messrs. Shoosmith & Harrison, Fareham) appeared on behalf of the Claimant.

Mr. A. BINGHAM (Instructed by Messrs. Fenwick Elliott) appeared on behalf of the Defendant