JUDGMENT : MR. JUSTICE FORBES: TCC. 20th March 2003

1. By its particulars of claim, dated 12th March 2003 the claimant seeks a declaration that the adjudicator, Mr. Bob Juniper, has no jurisdiction to determine three claims referred to him by the defendant in its second referral to adjudication dated 17th February 2003. The grounds of the claimant's claim are that there was no dispute between the parties with regard to either of the claims as at the date of the referral and that, therefore, the adjudicator has no jurisdiction to hear the matters in question. The simple point is whether, in the circumstances of this case, a dispute did exist between the parties as at 17th February 2003, within the meaning of section 108(1) of the Housing, Grants, Construction and Regeneration Act 1996, which (so far as material) provides as follows:
"A party to a construction contract has the right to refer a dispute arising under the contract to adjudication ... For this purpose 'dispute' includes any difference."

2. Before turning to the facts I will refer briefly to the law. On behalf of the claimant, Mr. Jinadu has submitted that the law with regard to what constitutes a "dispute" for the purposes of adjudication is in an unsatisfactory state. He suggested that there is a degree of conflict between the decisions of the judges of the TCC in London and those made by TCC judges elsewhere. Stated simply, it is said that, for the purposes of adjudication, the judgments of the TCC judges in London have correctly diverged from what can be described as the **Halki** approach, an expression derived from the decision of the Court of Appeal in **Halki Shippinq Corporation v. Sopex Oils Limited** [1998] 1 W.L.R. 727, in which the Court of Appeal considered (inter alia) what constituted a dispute for the purposes of arbitration. It was suggested by Mr. Jinadu that in **Halki** the Court of Appeal had defined the word "dispute" in terms that were not appropriate for the purposes of adjudication.

3. Mr. Jinadu submitted that an important feature of the decisions of the London TCC judges has been the apparent conclusion that a claim not only has to be made but that a reasonable period of time for it to be considered must elapse before the matter can be said to have crystallised into a dispute: see, for example, the judgment of His Honour Judge Thornton Q.C. [2000] B.L.R. 168 at p.177. Stated shortly, it was Mr. Jinadu's submission that there had not been any such period for consideration of the claims in this case, and that no dispute had crystallised by 17th February 2003. He suggested that the decisions of the London TCC judges suggested a more restricted approach to the meaning of "dispute" in adjudication than that adopted by the Court of Appeal in **Halki.** However, I am not persuaded that the cases support the propositions advanced by Mr. Jinadu. Nor do I consider that the word "dispute" has been interpreted by judges of the TCC, for the purposes of adjudication, in a way that is inconsistent with **Halki,** a decision that is fully binding on this court.

4. In my view, the law is satisfactorily stated by His Honour Judge Lloyd Q.C. in his unreported decision of **Sindall v. Solland** dated June 2001, in which he said this:
"For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided."

   As it seems to me, that is a statement of principle which is easily understood and is not in conflict with the approach of the Court of Appeal in **Halki**. I would have been very surprised if it was. It has to be borne in mind that, as observed in **Halki**, *"dispute"* is an ordinary English word which should be given its ordinary English meaning. This means that there will be many types of situation which can be said to amount to a dispute. Each case will have to be determined on its own facts and attempts to provide an exhaustive definition of "dispute" by reference to a number of specified criteria are, in my view, best avoided. I therefore reject the suggestion that the word "dispute" should be given some form of specialised meaning for the purposes of adjudication.

5. In my view, Judge Lloyd's definition is simple and easily applied. It accords with the ordinary meaning of the English word "dispute", and has much to commend it. It is not in conflict with **Halki**. I propose to approach this case on that basis. I do not believe, in so doing, that I am in any way approaching this matter in a fashion inconsistent with the Court of Appeal's decision as to what constitutes a "dispute" in the case of **Halki,** and I did not understand Mr. Jinadu to suggest otherwise.

6. Having briefly outlined the law I now turn to the facts. The claimant was the defendant's sub-contractor in relation to construction works at First Central Guinness headquarters. The works are now completed. There are, however, three matters which are the subject of the referral to adjudication by the defendant on 17th February, namely: (1) whether the claimant is entitled to any further extension of time beyond the five weeks already allowed by the defendant; (2) the final evaluation of any loss and expense payable to the claimant; and (3) the final evaluation of the variation account.

7. These matters have been the subject of discussion and negotiation between the parties for some considerable time. The relevant chronology is set out very helpfully in para.4 of Miss Jackson's written skeleton argument prepared on behalf of the defendant. I refer to some of the main dates. The first notification of delay to the progress of works was on 22nd February 2002. On 29th April 2002, the claimant submitted a claim for an extension of time for the sub-contract works. In June 2002, the claimant engaged Henry Cooper, consultants, in connection with their various claims for extensions of time and additional payments. On 1st July 2002, the claimant notified the defendant that the delay now amounted to 15 weeks. On 9th August 2002, practical completion was achieved under both the main contract and the sub-contract. On 13th August 2002, the defendant granted two weeks extension of time to the claimant. On 13th August 2002, the claimant commenced adjudication proceedings in relation to 19 claimed variations to the subcontract-works.

8. On 19th October 2002, the claimant indicated a further ten matters in respect of which it was said that the defendant had required variations to the sub-contract works. On 23rd October 2002, the defendant wrote to the claimant to indicate that it required documentation to be submitted for the purposes of the final account. On 24th October 2002, the claimant repeated its claim for a 12 weeks' extension of time, and on 1st November the defendant requested appropriate information from the claimant to substantiate that particular claim.

9. On 18th December 2002, the claimant's chairman decided that decisive steps should be taken towards resolving the claimant's various claims against the defendant. He wrote to the defendant in terms which it is necessary, for the purposes of this judgment, to quote:

"Dear Sirs,

"Re Beck Peppiatt Limited/Re First Central Guinness Headquarters

"This is to formally advise you that a detailed review has been undertaken of Beck Peppiatt's account on the above contract and it is clear that there is a substantial under-valuation on our overall account on a contract that was completed in August 2002. In particular, little progress has been made on the variation account which has been valued at £552,574.11 less than our submission. There is also an excessive over-statement regarding contra charges and snagging setoffs totalling £213,852.18, which we have valued at under £5,000. There is therefore currently a shortfall of monies due to Beck Peppiatt Limited of over £750,000, excluding submissions to be made regarding extension of time/loss and expense/ disruption/uneconomic working and sub-contractors' claims.

"Accordingly, we would put your company on notice that unless our account is settled at a minimum of £2,300,000 and 90 per cent of the balance of monies due excluding retention/deduction are paid by the end of January 2003 we will issue independent adjudication regarding the following: contra charges, snagging set-off, variation account, extension of time/loss and expense, disruption/uneconomic working, subcontractors' claims."

It should be noted that, included in the list of matters to be referred to independent adjudication by the claimant are the same three matters that the defendant ultimately referred to adjudication on 17th February 2003.

"With regards to the letter from Ken Baines of Beck Peppiatt dated 13th December 2002 the content clearly demonstrates that the nominal sum only is justified, it being offset against the contra charges and snagging and our group and advisers are of the strong opinion that you have applied the same criteria to the valuation of our variation account and extension of time claim.

"Our analysis of the total value of our claim through adjudication will be in the region of £3 million and, as group chairman, I have instructed our management and our professional advisers to process the necessary documentation with the target of issuing adjudication proceedings by the end of January 2003. It is hoped that this action will be unnecessary. However, the treatment of our account to date has left us with no alternative but to protect the group's financial position. We therefore await your response."

On any view, that letter constituted an ultimatum by the claimant that it would resort to adjudication at the end of January 2003 if its various claims, including the three matters that are the subject matter of these proceedings, had not been satisfactorily dealt with by the defendant by that date.

10. On 23rd January 2003, the defendant awarded a further three weeks extension of time to the claimant in respect of the sub-contract works. On 29th January 2003, the claimant received the defendant's final account statement and on 31st January 2003, the claimant's ultimatum contained in the letter of 18th December 2002 expired without any agreement being reached in respect of the final account.

11. The situation that relates to the present adjudication can best now be picked up by reference to the correspondence passing between the parties in February 2003. This has to be considered against the background that there was an earlier first reference to adjudication by the defendant, which is still proceeding in respect of contra charges, but has been withdrawn by the defendant in respect of other matters, after the adjudicator indicated that he felt that he did not have jurisdiction to deal with those other matters. It was his view, expressed in a letter written to the parties, that in respect of those matters, which are the same as those the subject of these proceedings, he was not satisfied that the disputes had crystallised. It should be said that at that stage, the defendant was content to accept that position. It was on 17th February that the defendant later issued its second referral to adjudication in respect of those other matters.

12. It is important to refer to the correspondence between the parties leading up to 17th February 2003, in order to see whether a dispute had crystallised by that date. I pick up the correspondence, therefore, on 7th February 2003, when the defendant wrote to the claimant as follows:

"Dear Sirs,

"First Central Guinness Headquarters

"The current adjudication has, apart from the contra items, been curtailed as you maintain that the case you are now being asked to consider is not one that you have seen before and therefore a dispute has not crystallised at the date of referral. Whilst you may be able to make out a strict legal case to the adjudicator that no dispute had crystallised at the time of the referral."

I interpolate, that is a reference to the first referral.

"... it is clear to us that you are well aware of the arguments, as indeed you, yourselves, were threatening your own adjudication by the end of January.

"Following your referral to adjudication in August last year there has been a considerable amount of correspondence and a number of meetings held to attempt to agree this account, the last of these being on 30th October, unfortunately without success.

"You received our assessment of extension of time on 24th January and you subsequently received full information with regard to extension of time, our evaluation of the variation account, loss and expense and setoff on 29th January."

I interpolate, that is a reference to 11 lever arch files served on the claimant by the defendant on 29th January.

"The supporting information was contained within our adjudication documents and attached files and it remains to be seen whether you agree our figures or not. We do not believe that the earlier information provided, coupled with the recent material included within our referral, would have given you undue difficulty and that you have had more than enough time and information with which to proceed promptly to agree the final account.

"Please therefore take this position as notice that unless we hear from you agreeing the account by close of business on 12th February we will consider that the account is not agreed and that our two companies are in dispute and the contract adjudication procedure will be immediately commenced."

13. It is important to realise that this letter in fact states the defendant's position in opposition to the claimant's position as stated in its letter of 18th December 2002, to which I have already referred.

14. On 11th February, the claimant wrote to the defendant as follows:

"Dear Sirs,

"Re First Central Guinness Headquarters

"We acknowledge receipt of your letter of 7th February and reply as follows. It has been clearly established within the current adjudication that for there to be a dispute there has to be a rejection of an assertion and that a party who receives an assertion is entitled to have a reasonable time to consider the assertion. Precisely what constitutes a 'reasonable time' will depend on the particular circumstances of each case, but in the current case the fact that you have presented us with

11 lever arch files of data speaks for itself. Accordingly, under no objective examination can it be considered reasonable that we not only consider your 29th January 2003 submission but also agree it by 12th February 2003. Therefore, your expressed intention to immediately commence another adjudication, should we not accept your submitted account by 12th February 2003, is, to say the least, ill-founded and will no doubt result in you finding yourself in precisely the same position as with your current ill-fated attempt to adjudicate issues before a dispute has crystallised.

"We therefore suggest that, rather than your currently adopted confrontational stance, resolution and agreement of the account will best be achieved and the interests of Norwest Hoist and Beck Peppiatt best served by meaningful and constructive dialogue and co-operation. We therefore request that a meeting be arranged for the purposes of discussing and agreeing a way forward."

In my view, that letter is disingenuous, given the tone and content of the claimant's own letter of 18th December 2002, in which it had put forward the claimant's position with regard to the very self-same matters as the defendant was putting forward in the 11 lever arch files that had been sent on 29th January 2003 and which were plainly a rejection of the claimant's December 2002 position.

15. On any view, as it seems to me, a dispute came into existence from 29th January 2003, if not before, by the defendant's rejection of the claimant's position, as put forward in its December 2002 letter, by the service on the claimant of the defendant's position with regard to the various items that remained outstanding for the purposes of resolving the final account.

16. However, on 13th February 2003 the defendant wrote in response to the claimant as follows:

"Dear Sirs,

"First Central Guinness Headquarters

"We are in receipt of your letter dated 11th February. Your attempts at prevarication appear limitless. It is of course transparently misleading of you to attempt to hide behind the receipt of 11 lever arch files as an excuse for insufficient time to consider the submission. You appear to assert that this is all completely new information when you know very well that it is not. It is easily demonstrated that you have already had the vast majority of the contents of the files during the course of the subcontract and we set this out below:

"File number 1 contains the basis of our claim, the contents of which you have been aware for some time. The remainder is predominantly drawings, all of which you have. Files numbers 2 to 5, the variation account. Your last application was number 12 on 30th August 2002. There are a total of 214 variations listed in the summary of variation account. Of these 24 were marked 'Not used' and 33 have been agreed in full. A further six are agreed subject to the resolution of minor overhead and profit levels and the resolution of the plastering credit, which you dispute. There appear to be 41 duplicated items and 52 budget items.

"File number 6 refers to extensions of time and loss and expense. Whilst you will not have seen the narrative before, the bulk of this file is our replies to correspondence and our response to your own claim.

"Files number 7 to 9 relate to your failure to progress and our costs. File 7 does contain some new information, but files 8 and 9 are correspondence files of which you are already familiar.

"File number 10 relates to contra charges and that matter is proceeding. File number 11 contains a sub-contract and the meeting minutes.

"You criticise us of a confrontational stance and now wish to have a meaningful and constructive dialogue and request a meeting. This is a volte face of the highest order when you ignore your own chairman's letter threatening adjudication by the end of January if we did not then meet your outrageous demands. You are clearly stalling for time.

"We do not share your view that a further adjudication will be ill-founded. Whilst a dispute must have crystallised your failure to comply with your contractual responsibilities and the time you have already had to consider the claim are more than sufficient. You have not accepted or even commented upon our account and therefore, as we indicated in our letter of 7th February, we consider our companies to be in dispute and the adjudication provisions will be invoked."

Thereafter the defendant initiated the second referral to adjudication on 17th February 2003.

17. On behalf of the claimant, Mr. Jinadu said that the defendant's documents, served in 11 lever arch files on 29th January 2003, made it necessary for the claimant to have a sufficient and reasonable period of time to decide what its position was in relation to those claims before it could be said that a dispute relating to those claims had crystallised or come into existence. In my view, that is taking an unrealistic and wholly unsupportable view of the overall facts of this case.

18. It is pointless to simply look at the defendant's 11 lever arch files in isolation and then say it is necessary for the claimant to have sufficient time to consider its response to those lever arch files before it can be said that a dispute has crystallised. That is to take the 11 lever arch files entirely out of the factual context in which they appear. That factual context makes it quite clear that those 11 lever arch files were the defendant's response to the claimant's asserted position in December 2002 in respect of the self-same matters. On a simple view of the facts, the mere service of those lever arch files in the factual circumstances of this case would be sufficient, in my view, to give rise to a dispute because it is quite clear that the defendant was rejecting the claimant's stated position as put forward under cover of its letter of 18th December 2002 and was putting forward a position of its own.

19. As it was, the defendant, very sensibly, agreed to give a certain amount more time to the claimant in order to consider the matter. That was sensible because, in the event, it might have been possible to resolve matters by agreement. To say that that means that there was no dispute seems to me to be totally at variance with the ordinary meaning of the word "dispute", as used in the English language. Plainly there was a dispute by the end of January 2003, if not before.

20. In my view, the factual circumstances of this case, when considered in the light of the helpful observations of His Honour Judge Lloyd in **Sindall v. Solland,** plainly satisfy the requirements of a dispute. It is clear, in my view, that a point was reached in February 2003 when the process of discussion and negotiation had ended and that something was needed to be decided, namely the correct position with regard to the outstanding items on the final account.

21. Indeed, for the reasons I have already indicated, that position had been reached, in my view, as early as the end of January 2003, although it is not necessary for the purposes of this judgment to state that as a concluded decision. On any view, that position had been reached by the time the defendant's so-called ultimatum of 7th February 2003 had expired.

22. Accordingly, the relief the claimant seeks by way of declaratory relief is dismissed; and by agreement I proceed to deal with the counterclaim of the defendant, which is to the effect that a dispute did exist as at the date of 17th February. I leave it to counsel for the parties to draw up the form of the necessary declaration to reflect that finding on my part and on that basis I will make the order in question on the counterclaim.

All of you will realise, of course, that that is an entirely extempore judgment. If the matter is to go any further I reserve the right to adjust the grammar and the syntax and tidy it up and perhaps make it a little more elegant, but you will rest assured that the basic reasoning will remain the same.

MS. JACKSON: *Thank you very much. That leaves the question of costs, and I am covered with embarrassment to say that, because of the haste with which these proceedings were brought in ---*

MR. J.FORBES: *You are not in a position to ask for a summary assessment.*

MS. JACKSON*: I am not. Neither party has actually got in a statement of costs, but Mr. Jinadu does not have to be embarrassed about that because he is not making an application for costs. We did discuss this before. We felt that the most appropriate way might be to ask your Lordship to give us some time so that the parties can perhaps agree what the costs should be.*

MR. J.FORBES: *Sure.*

MS. JACKSON: *Then it can be referred back to you for the assessment, if necessary.*

MR. J.FORBES: *If you can agree first that I should make a summary assessment and you can agree the amount of that summary assessment, then I will make the order in those terms. What do you have to say about the costs, Mr. Jinadu?*

MR. JINADU: *My Lord, I cannot see any basis upon which I can resist them.*

MR. J.FORBES: *The claimant will pay the defendant's costs of the proceedings, to be assessed on a standard basis, if not agreed. If they are agreed then of course you can do it by way of a summary assessment. It does not even have to say that it is a summary assessment. If you can agree the costs then I will incorporate that into the order by administrative means.*

MR. JINADU: *I will seek permission to appeal at this stage, my Lord, on the question of your Lordship's determination on the question of law.*

MR. J.FORBES: *What was the determination on the question of law which you take exception to?*

MR. JINADU: *My Lord, the characterisation and application of the tests done by His Honour Judge Lloyd in* ***Sindall****.*

MR. J.FORBES: *I thought in the course of argument you agreed that that was appropriate.*

MR. JINADU: *Yes, I did, but it was the characterisation of it that I take issue with, my Lord, and its application to these particular facts.*

MR. J.FORBES: *That is not an issue of law. That is an issue of fact.*

MR. JINADU: *To cover all bases, my Lord, I would seek to couch it both as an issue of law and an issue of fact.*

MR. J.FORBES: *I thought I was, to some extent, building some bridges and trying to defuse the suggestion that there is this divergence of view between the judges of this court, the Court of Appeal and everybody else.*

MR. JINADU: *My Lord, absolutely. That is an entirely laudable aim, my Lord.*

MR. J.FORBES: *Not only that, but I used as the test a statement of His Honour Judge Lloyd which you accepted was entirely appropriate.*

MR. JINADU: *My Lord, absolutely. I do not diverge from that. That is an absolutely appropriate ---*

MR. J.FORBES: *What is the point of law then?*

MR. JINADU: *The point of law, my Lord, is the application ---*

MR. J.FORBES: *That I do not know how to apply the facts to the law - is that what it is?*

MR. JINADU: *I would not go so far as to say that, my Lord. In this particular case, I would seek permission to appeal the application of that test to the facts in this case.*

MR. J.FORBES: *That I should not have applied that test?*

MR. JINADU: *No, that you should have applied the test, but, in my submission ---*

MR. J.FORBES*: In other words, you are saying that I have not applied the facts correctly.*

MR. JINADU: *My Lord, in this case you have not applied it properly to the test, my Lord.*

MR. J.FORBES: *If that is the only thing you have got to complain about then permission is refused on the basis that not only do you not have a realistic prospect of success, but you have absolutely no prospects of success whatsoever.*

MR. JINADU: *Indeed, my Lord.*

MR. J.FORBES: *That is my view. Nor are there any other special circumstances for the grant of permission. It is a case which turns entirely on its own facts, and I think your clients would be well advised to get on with the adjudication.*

MR. JINADU: *Thank you, my Lord.*

MR. J.FORBES: *Anything else?*

MS. JACKSON: *Thank you very much.*

MR. J.FORBES: *Thank you both very much. If I may say so, thank you very much for your very helpful detailed skeleton arguments which made my job a great deal more straightforward and made it possible for me to contemplate giving an extempore judgment and running the risk of incurring the wrath of all those academics out there who just collect adjudication decisions and write articles about them.*