**JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM :** TCC. 22 May 2003

1. The claimant, Orange, applies pursuant to CPR Part 24 for summary judgment to enforce decisions of an adjudicator made pursuant to the Housing Grants Construction and Regeneration Act 1996.

2. **Background :** Oxford Radcliffe Hospital NHS Trust contracted with Bovis Lend Lease Ltd for work at the Trauma Centre at the John Radcliffe Hospital. Bovis sub-contracted work to the defendant, ABB, who in turn sub-contracted mechanical services work to Orange. Orange and ABB contracted in December 2001. The sub contract price was £98,227. The sub contract envisaged two weeks of off-site work and 12 weeks work on site. The form of contract was DOM/1 1980 edition, and ABB's terms and conditions were incorporated.

3. Work began. In March 2002, Orange submitted their penultimate application for payment of a gross sum of £81,399.05 based on approximately 75% of work having been completed.

4. Orange withdrew from site on 28 May 2002. ABB issued a notice in early June 2002 contending that Orange had failed to complete their work. ABB refused Orange access to site.

5. Orange contends it made an application for payment dated 19 June 2002 in the sum of £101,280.50. ABB deny having received this. For the purposes of this application for summary judgment, I assume that ABB did not receive this application.

6. ABB wrote a letter to Orange dated 6 July. It appears, in fact, to have been faxed to Orange just after mid-day on 5 July 2002. It states:
*"Due to the nature and extent of the defects in your work and your abandonment of the site, the employer is unwilling to readmit you to site. In the circumstances the sub contract is terminated.*
*Please provide us with a final account for work done adjusted to take account of defective and incomplete work. In due course we will let you have full details of the cost of remedial works and details of any other losses suffered by ABB.*
*For the time being the position is that there are no further sums due to yourself in respect of the contract."*

7. Orange replied by letter dated 8 July. They refuted ABB's allegations as to defects and that Orange had abandoned their work.

8. By letter dated 10 July Orange replied to ABB's letter dated 6 July. Orange referred to "the contractual dispute that now exists between our companies". I have not been referred to any other correspondence between the parties, after Orange's letter of 10 July and their letter to ABB dated 2 December 2002. On 2 December 2002, Orange wrote to ABB, contending that ABB had wrongfully denied Orange access to site and/or terminated the sub contract. Orange enclosed their final account, seeking a gross valuation of £270,417. Orange stated:

   *"The damages in respect of such breaches are as represented by Orange's final account in the total sum of £270,417.04 which represents a residual sum due of £203,930.04 plus VAT after deducting previous payments..... Whilst the factual details underlying and supporting our Final Account have been previously well rehearsed as recorded in the correspondence we nevertheless submit herewith a copy same for your perusal."*

9. In that letter, Orange warned that they intended to refer *"this dispute"* to adjudication. They enclosed a formal notice of intention to refer to adjudication. By that notice, Orange sought decisions to the effect that *(1) ABB had wrongfully terminated the sub contract (2) Orange were entitled to an extension of time for completion (3) ABB pay Orange £203,930.04 plus VAT (ie the net sum claimed in Orange's final account) or such other sum as the adjudicator assessed as being due, and (4) Orange were not liable for allegedly defective work.*

10. The summary of Orange's final account lists their claims, namely for remeasured work, variations, prolongation, materials supplied (extra to contract scope) disruption, head office overheads, profit for the extended contract period, loss of profit on remaining work and financing costs. The cost of remaining work at the date when access was denied and payments made to date were deducted. The net total was £203,930.04 excluding VAT.

11. After receipt of the final account on 2 December, ABB instructed M K Daly & Co to assist with investigation into and evaluation of Orange's final account. Daly is a company offering amongst other

matters cost consultancy and quantity surveying services. They had previously been involved with the project.

12. On 9 December 2002 the first adjudicator, Mr Salisbury, was appointed. He resigned on 11 December 2002, because Orange had not referred the dispute to him. Nothing appears to turn on the fact and circumstances of this appointment.

13. On 12 December 2002 ABB's solicitors wrote to Orange's representative, contending that there was no extant dispute between the parties at that stage capable of adjudication because ABB had not had an opportunity to consider Orange's final account. They went on to say:
*"Our clients are actively looking at your client's final account but will not have completed that exercise until 20 January 2003. As you are aware the construction industry closes completely for two weeks over the Christmas period, which elongates, slightly, the time our clients will require to assess your client's final account. In any event our client will respond substantively to your client's final account by the above date. Our clients are willing to agree that should the parties have not reached agreement within seven days of the date of our client's substantive response to your client's final account that we will agree to [the first adjudicator] being appointed adjudicator to determine the dispute that will then exist between our respective clients. We put you on notice that should you proceed with issuing a further notice of adjudication we will dispute jurisdiction on the grounds that there is no extant dispute between the parties at the present time."*

14. By letter dated 13 December 2002, Berkeley Consulting on behalf of Orange replied to Wragge & Co's letter dated 12 December. Amongst other matters, Berkeley stated that they were taking Orange's instructions on Wragge's letter and would revert to Wragge & Co "in due course".

15. I have not been referred to any correspondence between the date of that letter and Berkeley's letter to ABB dated 6 January 2003. It was suggested in submissions that there may have been some telephone contact between the parties or those acting on their behalf, but I have no details. By their letter dated 6 January 2003, Berkeley made reference back to ABB's letter of 6 July 2002. Berkeley repeated Orange's case, namely that the damages in respect of ABB's breach by denying Orange access to site were as represented by Orange's final account submitted on 2 December. Berkeley enclosed a formal notice of intention to refer to adjudication.

16. The adjudication notice stated at paragraph 3:
*"The dispute arose on or about 5 June 2002 [sic] and concerns the sum due to Orange in respect of their final account and/or damages under the sub contact as a result of the wrongful termination of Orange's sub contract by ABB including:*
*3.1 Valuation of the Orange works,*
*3.2 The amount of damages and/or alternatively direct loss and expense incurred by Orange as a result of delay and disruption to its works;*
*3.3 The repayment of monies improperly withheld by ABB from those otherwise due to Orange;*
*3.4 Dismissal of monies claimed by ABB against monies otherwise due to Orange;*
*3.5 Interest..."*
Orange claimed the same redress as in their notice to adjudicate dated 2 December 2002 (see paragraph 9 above).

17. Wragge & Co wrote to Berkeley by letter dated 6 January. They reiterated that ABB would not have finished considering Orange's account until 20 January 2003 and contended that ABB had not had a reasonable opportunity to consider that final account. They invited Berkeley to confirm that they would not proceed to seek appointment of an adjudicator until they had heard from Orange in accordance with Wragge & Co's letter of 12 December 2002. They reiterated their warning that, if Orange proceeded, ABB would dispute jurisdiction on the ground that no dispute existed.

18. On 9 January, the parties were advised that the second adjudicator, Mr C J Hough, had been appointed. On 14 February 2003, Mr Hough gave his first decision. He gave his second and final decision on 4 March 2003. By his first decision, Mr Hough decided that ABB's conduct in refusing Orange access to site and in purporting to terminate the sub contract on 5 July 2002 amounted to repudiatory breach of the sub contract. Orange accepted that repudiation. The sub contract was brought to an end. Both parties were therefore discharged from further performance of their

obligations under the sub contract. Orange were entitled to accrued rights under the sub contract and to damages for breach thereof. The adjudicator concluded that he was empowered to decide both Orange's accrued rights and their entitlement to damages. He decided that he would proceed to assess Orange's accrued entitlement to payment under the sub contract up to 6 July 2002, and in doing so, he would have regard to the value of work properly carried out and would thus have regard to ABB's allegations of incomplete and defective work.

19. By his second and final decision, dated 4 March 2003, Mr Hough decided the quantum of Orange's claim. He decided (1) that the variation account totalled £18,881.42 (2) that Orange were entitled to an extension of time for completion from 29 March to 5 June 2002 (and he assessed the sums which Orange should recover in respect of that extension of time) (3) that Orange had been disrupted in their work (and he assessed the value of that disruption claim) and (4) that Orange was entitled to recover loss of profit. Mr Hough concluded that the total value of those claims was £155,011.22. He decided that Orange was not in breach of contract and that their work was not defective. He calculated the net sum due to Orange, after giving credit for outstanding work and sums paid, as £84,628.72. He awarded Orange interest. The total award was £90,283.77 plus VAT plus ongoing interest. He decided that ABB should be responsible for his fees. Orange now seek to enforce payment of those sums together with the adjudicator's fees it has paid.

20. In correspondence prior to the hearing, ABB raised a number of objections to the adjudicator's decisions. However, ABB now rely on only one ground, namely that the adjudicator lacked jurisdiction to make decisions because there was no dispute between the parties within the meaning of the Act at the time that Orange commenced the adjudication. ABB accept that the adjudicator had jurisdiction to determine whether ABB were in repudiatory breach of the subcontract (as he did by his first decision) and to decide that Orange were entitled to damages of £194.78 (as he did by his final decision). Save to that extent, ABB's case is that the adjudicator did not have jurisdiction to decide how much ABB should pay Orange pursuant to Orange's final account claim.

21. Prior to the hearing of Orange's application, ABB suggested that they would not be able to proceed with the hearing today. However, ABB made no application to adjourn the hearing. They were ready to proceed.

22. **The relevant law :** In submissions, Mr Mort for Orange and Mr Hughes for ABB took me to a number of cases relevant to the question whether or not a dispute had arisen for the purpose of the Act, including **Halki Shipping Corporation v Sopex Oils Ltd** [1998] 1 WLR 726, **Monmouthshire County Council v Costelloe & Kemple Ltd** [1965] 5BLR, **Fastrack v Morrison Construction** [2000] BLR 168, **Sindall v Solland** June 2001, **Edmund Nuttall v R G Carter** [2002] BLR 312, **Cowling v CFW Architects** [20021 EWHC 2914 (TCC), **Watkin Jones & Son Ltd v Lidl GmbH**, **R Durtnell & Sons Ltd v Kaduna Limited** (unreported, 19 March 2003), and **Tomlinson v Midas Homes**.

23. Following the hearing, and prior to my completing this judgment, the decision of Forbes J **in Beck Peppiatt Ltd -v- Norwest Hoist Construction Ltd** [2003] EWHC 822 (TCC) was drawn to my attention. Counsel had not referred that case to me during the hearing. I invited the parties to make further submissions. Both have done so.

24. In his judgment, Forbes J said that the decision in **Halki** is fully binding on judges deciding whether a dispute has arisen in the context of adjudication and that the word "dispute" should not be given some specialised meaning for the purposes of adjudication. He also said:

*"4. In my view, the law is satisfactorily stated by His Honour Judge Lloyd QC 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. 1 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. 1 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."*

25. The meaning of dispute adopted in Halki is *that "there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable."* I consider myself, therefore, bound by the decision in **Halki**. Further, given the weight which a decision of a puisne judge carries (and particularly given the position which Forbes J occupies in relation to the TCC) I consider I should give careful attention to the guidance in **Beck Peppiatt**.

26. **Issues :** Orange's primary case is that the material dispute had arisen on or before 8 July at the latest. Orange rely on meetings and letters passing between the parties in the summer of 2002, culminating in ABB's letter of 6 July 2002. There immediately arose a disagreement between the parties as to whether the termination was legitimate and as to what sum was due to Orange as a consequence of ABB's wrongful repudiation of the sub-contract. By reason of ABB's breach, Orange became entitled to damages for that breach. Orange claim all sums, including sums due under the sub contract, as damages for ABB's repudiatory breach of contract. The claim was detailed in Orange's final account dated 2 December 2002. The dispute arose when ABB, by their letter dated 6 July 2002, made the negative assertion that no payment was due to Orange, an assertion with which Orange disagreed. In those circumstances, a dispute arose as to whether any further money was due to Orange.

27. Orange's alternative case is that the material dispute arose on or about 2 December 2002 when Orange delivered their comprehensive final account statement. ABB neither admitted that the sum claimed was due nor did they pay it. As at 2 December 2002, Orange had intimated all their heads of claim. The dispute arose when ABB failed to admit the claim.

28. ABB's case is as follows. The financial claim before the adjudicator was a final account claim by Orange. Although the point of departure for Orange's claim was ABB's breach of the sub contract in wrongfully terminating Orange's employment under the sub contract, the financial claim was a claim to the sums to which Orange had become entitled under the sub contract. Thus, Orange's claim was a claim to establish sums due under the sub contract on the final account. Orange submitted its final account on 2 December 2002. It is common ground that the sub contract incorporates the provisions of DOM/1. DOM/1 provides very detailed machinery for the calculation of entitlement at the final account stage in a project. The effect of the relevant clauses is that the parties agreed that the sums due under the sub contract were to be decided by a process which was triggered by the submission of the final account. Accordingly, there cannot have been a dispute because the contractual machinery had yet to run its course. Orange have sought to circumvent the payment machinery in the sub contract by simply claiming sums as damages rather than under the sub contract.

29. So far as Orange's alternative claim is concerned, Mr Hughes submits that delivery of a final account on 2 December 2002 and service of a notice to adjudicate on 6 January is an incredibly short period of time. Orange took no steps for five months (from July until December) then filed their final account and expected immediate response. ABB immediately instructed an investigator to assist. They suggested a reasonable timetable: they would respond by 20 January, if no agreement had been reached within seven days, they were willing to submit to adjudication by Mr Salisbury to decide what sum was due to Orange.

30. **Conclusion :** It appears from the correspondence I have seen that ABB issued a notice in early June contending that Orange were in breach of contract. The parties corresponded in June and early July on the questions whether Orange's work was defective and Orange were in breach of contract, and

whether ABB were entitled to terminate the sub contract and recover the cost of completing work. I conclude that a dispute arose by 8 July at the latest as to whether ABB had been entitled to terminate the sub contract. Orange had made clear in that correspondence, culminating in their letter of 8 July, that they refuted ABB's allegations as to defects and that Orange had abandoned work. Termination of a contract before completion is usually a serious matter. It is understandable that it did not take Orange long to decide that they did not accept that ABB had the right to terminate.

31. I reject Mr Mots submission that ABB's letter of 6 July constituted a denial of Orange's entitlement to any further payment. That letter indicates that ABB's position was that no sum was immediately payable to Orange; an accounting was needed to calculate what, if anything, was due to Orange. In their letter of 10 July 2002, Orange refer to *"the contractual dispute which now exists between us"*. In the context, that must refer to issues concerning ABB having refused to allow Orange back on to site. In the background was the dispute as to whether Orange's work was defective.

32. I conclude that a dispute arose on receipt by Orange of ABB's letter of 6 July, at the latest, as to whether or not Orange were entitled to payment for damages for ABB's breach in terminating early. Although in their letter of 6 July ABB made clear that an accounting was needed to decide what sums were due to Orange under the sub contract, there was no suggestion that ABB would be willing to pay Orange any damages for breach of contract. That is not surprising, given that ABB denied that they had breached the sub contract. By the time Orange wrote their letter of 8 July 2002, the issue was live and to be decided. .

33. However, as at July 2002, Orange had not provided any information to ABB as to the sums they claimed as damages for ABB's breach. It was not until 2 December that Orange submitted its final account. The first point to make is that Orange accept that a number of their claims were first made in that account; they had not been previously made known to ABB. For example, in the final account, Orange claimed 39 variations. They accept that they first claimed in respect of some of these variation in the final account. This appears to apply to 31 out of the 39 variations claimed. It is not clear to me how many, or which, variations fall into this category. It appears also that the first time that Orange claimed for prolongation, disruption, head office overheads and financing costs was in the final account.

34. Orange's primary case is that, even if no variations, prolongation, disruption and so on had been claimed before July 2002, a dispute arose in relation to them at that time by virtue of the contents of ABB's letter of 6 July. It is a startling proposition that a dispute arose in July 2002 in relation to matters which Orange admit had not been claimed at all until December 2002. It is a proposition which I cannot accept. I am not persuaded by Mr Mort's submission that a dispute had arisen as at 8 July as to whether Orange were entitled to be paid sums claimed by the final account. First, ABB had expressly invited Orange to submit such an account. There was no blanket denial of Orange's right to any payment. ABB had not refused to pay any sums properly due. They had simply said that, at that time, they considered that no sum was immediately payable. They invited Orange to submit an account. When Orange did submit their final account, some five months later, they claimed a gross sum of £270,417.04, and net payment of £203,930.04 excluding VAT. Even on Orange's case, the final account sum was well over twice their previous application; it was over three times the March 2002 application. Orange accept that ABB had not seen figures of this magnitude until 2 December 2002 or indeed, as I have outlined, some of the items claimed. If ABB had not even seen these sums, it cannot be said that they had failed or refused to pay them.

35. Mr Mort submits that all of the sums claimed by the final account were claimed as damages for ABB's breach by terminating the sub contract. I reject that submission. I cannot accept that claims which arise under the sub-contract (for variations, extension of time, prolongation, loss and expense, head office overheads) can be categorised as damages payable for ABB's repudiatory breach. I reject the submission that because damages for breach are payable immediately on breach, it follows that what are obviously sums due under the contract take on a different guise, as damages for breach, and are thus in some way related back to the date of ABB's breach. Sums which are obviously sums due under the contract (eg claims for variations or additional work, claims for prolongation of the contract

period) cannot be recategorised in that way. In my judgment, there is a difference between sums payable as a result of Orange's accrued right sunder the sub contract and damages for breach of the sub contract. In the final account, almost all of the sums claimed fall into the first category. As Mr Mort acknowledged, only the very small sum of £ 194.78 claimed in the final account was a sum which was directly related to the breach of contract claim. However, even that sum was not claimed until the final account submitted in December.

36. I conclude that there was no dispute as at 6 July 2002 as to the amount payable to Orange, whether as damages for ABB's breach of contract or as sums due under the sub contract.

37. The next question is whether a dispute had arisen between the parties in December in relation to the final account sum which could be referred to adjudication. I assume for the purposes of this application (as of course evidence has not yet been tested) that ABB did instruct Daly and that the final account was being actively worked upon after receipt by ABB in December 2002. I note that, when ABB eventually responded to the final account, they accepted some of Orange's claims.

38. Mr Hughes relies on the contractual mechanism for payment. Clause 21 of DOM/1 sets out a detailed mechanism to establish the amount finally due to Orange under the sub contract. Clause 30 sets out the reckoning process which occurs after a default of ABB. Relevant clauses in the subcontract as amended by ABB's conditions are:

*"2(2) The provisions of the Primary sub contract [ie the Bovis: ABB contract] relating to payment to or allowance by [Bovis] of direct loss and/or expense caused by the disturbance of the regular progress shall apply, mutatis mutandis as between [ABB] and [Orange] as if they were respectively the Main contractor and the Primary sub contractor except as is otherwise expressly provided in this Secondary sub contract.*

*4 (2) (ii) If in accordance with the terms of this Secondary sub contract [ie the ABB Orange sub contract] the Secondary sub contractor is entitled to any amount thereunder including any amount in respect of variations, fluctuations or loss and/or expense or damage, then to the extent that any such amounts are subject to an assessment, valuation or ascertainment under the Primary sub contract, such amount shall become due seven days after it becomes due under the Primary sub contract"*

*"21.8 ....Not later than 4 months after practical completion of the Sub Contract Works the sub Contractor shall send to the Contractor all document s necessary for the purpose of computing the Ascertained final Sub Contract Sum."*

*"21.9.2 The Final Payment shall be due not later than 7 days after the date of issue of the Final Certificate issued by the Architect under clause 30.8 of the main Contract Conditions and within 5 days of the date on which the Final Payment becomes due the Contractor shall by notice in writing ...notify the Sub contractor of the amount of the Final Payment to be made to the Sub Contractor..."*

39. Mr Hughes submits that, pursuant to those clauses, the sums due under the sub contract are to be decided by a process which is triggered by the submission of the final account. As at 2 December 2002, when Orange submitted its final account, there cannot have been a dispute because the contractual machinery had yet to run its course. Further, the contractual mechanism cannot have come to an end on or before 6 January 2003.

40. Mr Mort submits that the effect of repudiation was to bring the sub-contract to an end. There was thus no longer a mechanism by which Orange could pursue claims according to contractual procedures. Orange are entitled to what would have been due to them but for ABB's repudiatory breach. Their entitlement should be calculated in accordance with the contractual mechanism (e.g. variations should be valued as the sub-contract required) but the contractual requirements as to the timing for dealing with such matters was no longer applicable once the sub contract had terminated. I accept those submissions. Once the sub contract was terminated, the contractual mechanism for payment of sums due under the sub contract also fell away. Orange must prove an entitlement under the sub contract but, by reason of termination by ABB's repudiatory breach, are no longer bound to comply with the provisions of the clauses I have quoted to pursue such claims.

41. If I apply the simple test in Halki, I must decide whether ABB had refused to admit or failed to pay Orange's final account by the time Orange issued its notice to adjudicate on 6 January 2003. Orange

made their claim on 2 December 2002. By 6 January 2003, ABB had not admitted the claim nor had they paid it. A dispute had arisen.

42. In view of Forbes J's approval of the test in **Sindall v Solland,** it is right that I consider whether, as at 6 January 2003 when Orange served its notice to adjudicate, the process of discussion or negotiation had ended and whether there was something which needed to be decided. ABB rely on what they contend as the reasonable timetable and suggestion they made in their letter of 12 December. They were facing a much bigger claim than had previously been intimated and had to do so over the Christmas and New Year period when the industry shuts down. Berkley had said in their letter dated 13 December that they would revert to ABB after taking instructions on ABB's request, but did not do so; instead, they simply served the notice to adjudicate. Mr Hughes submitted that it would be bizarre, unreasonable, absurd and unworkable to conclude that a dispute had arisen before 20 January, the date which ABB had put forward as the date by which they would have completed their evaluation or would submit to adjudication.

43. I have found this aspect of the application difficult. On balance, I conclude that, by 6 January 2003, sufficient time had elapsed for evaluation then any discussion or negotiation of Orange's claim. I reach that conclusion notwithstanding that the holiday period intervened. Holidays at any time of year are a practical problem which companies must deal with. It is not fair that a company stands out of substantial sums of money simply because some in the industry do not work over the Christmas and New Year holiday. I bear in mind that Berkeley had not let ABB know that Orange did not accept the latter's suggestion to consider matters by 20 January. On the other hand, there was no agreement between the parties that Orange would hold off until 20 January. I conclude (if it be right to apply the approach in **Sindall v Solland**) that, by 6 January 2003, the process of negotiation and discussion of Orange's claim had come to an end so that a dispute then arose. I bear in mind that ABB had engaged Daly in December. Daly were already familiar with the project. Neither ABB nor Daly came to the matter cold. ABB had by then been in possession of the final account for about a month.

44. In all the circumstances, Mr Hough had jurisdiction to decide as he did in both decisions, and Orange are entitled to judgment.

 