JUDGMENT : HIS HONOUR JUDGE RICHARD SYMOUR Q. C. : TCC 29th October 2003.

Introduction

1. The action which has given rise to the Part 20 proceedings now before the court was commenced in the Chelmsford County Court by Mr. Anthony Barker as what, on its face, was a simple claim by him against both the Part 20 Claimant, Simons Construction Ltd. (*"Simons"*), and the Part 20 Defendant, Aardvark Developments Ltd. (*"Aardvark"*), for his fees for acting as an adjudicator in relation to disputes which were said to have arisen between Simons and Aardvark in respect of a project (*"the Project"*) described as Ely Central Area Redevelopment. There were in fact two references to Mr. Barker for his adjudication of what were contended to be disputes in relation to the Project. The first was made by Simons and Mr. Barker decided that it was premature because at the date of the reference to adjudication, so Mr. Barker considered, there was no crystallised dispute between Simons and Aardvark. He having communicated his view to the parties, Simons, by its solicitors, Messrs. Birketts (*"Birketts"*), then purported to notify him that his services as adjudicator were no longer required. Mr. Barker has sought to charge the sum of £200 plus Value Added Tax in respect of services provided by him between his appointment in relation to the reference made by Simons, to which it is convenient to refer as *"the First Reference"*, and the purported termination of that appointment. Subsequently a reference (*"the Second Reference"*) of disputes in relation to the Project was made to Mr. Barker by Aardvark. There was no dispute that by the date of the Second Reference there was a crystallised dispute which was fit for determination in adjudication. Mr. Barker proceeded to consider that dispute and in due course produced what he described as *"ADJUDICATOR'S DRAFT DECISION <u>For the Parties' comment</u>"* (*"the Draft Decision"*). The Draft Decision was published on 17 June 2002. The Draft Decision was published again, unchanged as to substantive text, on 25 June 2002 as a final decision (*"the Final Decision"*). Mr. Barker has sought to charge fees of £2,880 plus Value Added Tax in respect of his services which led, eventually, to the production of the Final Decision. By the Final Decision Mr. Barker found that Aardvark was substantially the successful party in the Second Reference and directed that his fees in respect of the Second Reference should be paid by Simons. Simons contended by way of defence to the claim of Mr. Barker for his fees in relation to the First Reference in the main action that the First Reference was a valid and effective reference, that Mr. Barker made plain that he was not prepared to reach a decision within 28 days of the making of the First Reference, and that in those circumstances Simons was entitled to determine his appointment and he was not entitled to any fees. So far as the claim for fees in relation to the Second Reference was concerned, Simons's case was that the Draft Decision, being a draft issued for comment by the parties, was not a decision in respect of the matters referred by the Second Reference, but, as it were, an invitation to debate the conclusions set out in it, while the Final Decision was not binding upon Simons or Aardvark because it was published later than the rules governing the Second Reference permitted. Simons added a Part 20 claim for declaratory relief in respect of its contentions as to the validity of the Draft Decision and the Final Decision to its defence in the main action and sought to pursue that Part 20 claim against both Mr. Barker and Aardvark. By an order made by Deputy District Judge Edgington on 13 May 2003 the Part 20 claim was dismissed as against Mr. Barker and the main action was stayed pending determination of the Part 20 claim as between Simons and Aardvark. The Part 20 claim was transferred to this court by an order made by me on 8 July 2003 and clarified on 7 October 2003.

The Part 20 statements of case

2. The relief claimed on behalf of Simons in its Part 20 claim was a declaration that:-

   "*In respect of the adjudication between Aardvark Developments Limited and Simons Construction Limited, referred to Anthony G. Barker as Adjudicator on 25 April 2002:*

   a) The document published by Mr. Barker on 17 June 2002 entitled "Adjudicator's Draft Decision" is not a valid "Decision" within the meaning of s 108 of the [Housing Grants, Construction and Regeneration] *Act* [1996] *and clause 39A of the Contract.*

   b) The document published by Mr. Barker on 25 June 2002 entitled "Adjudicator's Decision" is not a valid "Decision" within the meaning of s 108 of the Act and clause 39A of the Contract.

c) Consequently no Decision has been reached in respect of the disputes referred pursuant to the said adjudication."

3. The contentions advanced on behalf of Simons which it was said led to its entitlement to declarations in the terms quoted in the preceding paragraph were set out at paragraph 28 of its Defence and Part 20 claim as follows:-

"*In relation to Invoice A/892 and the Second Adjudication:*

28.1 Mr. Barker failed to reach a Decision within the time prescribed by the Contract and the Adjudication Agreement (that is, 28 days, extended in this case to 17 June 2002).

28.2 The "Draft Decision" published on the 17 June cannot amount to a "Decision" for these purposes as:

28.2.1 It invited the parties to make further comments and did not therefore represent the final view of Mr. Barker as it left open the possibility of him changing his mind on the issues in dispute.

28.2.2 Mr. Barker stated in publishing the "Draft Decision" that he would publish his "Final Decision" 7 days later.

28.3 The "Decision" published on 25 June 2002 cannot amount to a "Decision" within the meaning of the Contract as it was not reached on or before 17 June 2002 as prescribed by the Contract and by agreement of the parties. Accordingly it is not binding on the parties.

28.4 Accordingly, paragraph 4 of the "Decision" directing Simons to pay Mr. Barker's costs of £2,880 plus VAT of £504 is not binding on Simons."

4. A Defence to Simons's Part 20 claim was served on behalf of Aardvark which itself included a Part 20 claim. After a paragraph in the Part 20 claim in which it was recorded that Aardvark repeated, for the purposes of its Part 20 claim, the allegations in its Defence, the Part 20 claim went on:-

"*46. By reasons of the matters aforesaid and in particular paragraph 41, if Aardvark is found to be jointly and severally liable to Mr. Barker for his fees, Aardvark will claim:-*

46.1 a declaration requiring Simons to pay Mr. Barker's fees of the First Adjudication on the basis that Simons acted in breach of contract by hindering and/or preventing the Adjudicator reaching a decision in the First Adjudication; and/or

46.2 damages for the said breach of contract equivalent to any sum Aardvark has to pay to Mr. Barker;

46.3 interest on the said damages pursuant to s. 69 of the County Courts Act 1984 on such sum and at such rate and for such period as the Court may think fit.

47. Further, by reasons of the matters aforesaid and in particular paragraphs 42 and 43, the Claimant seeks a declaration:-

47.1 that the Draft Decision (including the order that Simons pay the costs of Mr. Barker) is a valid decision within the meaning of the Building Contract and/or s. 108 of the HGCRA and is enforceable; and/or

47.2 that the Final Decision (including the order that Simons pay the costs of Mr. Barker) is a valid decision within the meaning of the Building Contract and/or s. 108 of the HGCRA and is enforceable

47.3 requiring Simons to pay Mr. Barker's fees of the Second Adjudication."

5. In relation to the Second Reference the declarations sought on behalf of Aardvark in its Part 20 claim were simply the converse of the declarations sought on behalf of Simons in its Part 20 claim. Unsurprisingly, therefore, the parties before me agreed that the issues which arose in respect of the Second Reference were these:-

"*1. Did the Adjudicator reach a decision within the time agreed by the parties?*

2. Was the "draft decision" published on 17 June 2002 an effective decision or was it invalid for the reasons set out at paragraph 28.2 of the First Defendant's [that is, Simons's] *Defence?*

3. Was the "decision" published on 25 June 2002 an effective adjudication decision or was it invalid for the reasons set out at paragraph 28.3 of the First Defendant's Defence? "

6. The issues raised by the Part 20 claim of Aardvark in relation to the liability of the parties to pay the fees of Mr. Barker in relation to the First Reference do not fall for determination by me because the Part 20 claim of Aardvark has not been transferred to this court. Nonetheless, in reality the issues

raised by that Part 20 claim in respect of the Second Reference will be resolved by my decision concerning the Part 20 claim of Simons which has been transferred.

7. The principal contentions on behalf of Aardvark set out in its Defence to Simons's Part 20 claim in respect of liability to pay the fees of Mr. Barker for his services in respect of the Second Reference were these:-

"*42. It is expressly denied that Mr. Barker failed to reach a "decision" within the time prescribed by the Building Contract and the Adjudication Agreement and/or that the Draft Decision cannot amount to a "decision" within the meaning of the Building Contract, the Second Adjudication Agreement and/or the HGCRA and/or that is not enforceable. Without prejudice to the generality of that denial, Aardvark make the following specific averments to the allegations made at sub-paragraph 28.2:-*

42.1 It was clear to the parties, as evidenced by Birketts letter dated 17 June 2002 (which is quoted at paragraph 29 above) that the parties recognised and accepted that the Draft Decision did in fact constitute a final and binding decision on the merits.

42.2 The Draft Decision did represent Mr. Barker's final view on the merits of the dispute and did not leave open the possibility of his changing his mind on the substantive issues. It was clear that by issuing the Draft Decision Mr. Barker was intending to give the parties the opportunity to point out any errors which he might have made and was not intending to and did not as a fact give the parties the opportunity to comment on the core or merits of his decision.

42.3 The fact that Mr. Barker stated in publishing the Draft Decision that he would publish the "final decision" 7 days later does not effect [sic] *the actual legal effect of the Draft Decision.*

43. Further, it is expressly denied that the Final Decision published on 25 June 2002 cannot amount to a "decision" within the meaning of the Building Contract, the Second Adjudication Agreement and/or s. 108 of HGCRA and/or that it is not enforceable because it was not reached on or before 17 June 2002. If, which is denied, the Draft Decision was not a valid and enforceable decision, it is averred that the failure by Mr. Barker to deliver his Decision until 25 June 2002 when he published the Final Decision is a procedural irregularity and does not invalidate the Final Decision."

The relevant contractual terms

8. By an agreement in writing dated 28 January 1999 (*"the Building Contract"*) and made between Aardvark and Simons Simons undertook to carry out the Project for Aardvark. The Building Contract was in the Standard Form of Building Contract With Contractor's Design 1981 Edition issued by the Joint Contracts Tribunal, and incorporated Amendments 1 to 12 inclusive. Clause 39A of the Building Contract made provision for the reference to adjudication of disputes arising under the contract. The terms of clause 39A which are material for present purposes are:-

"*39A.4.1 When pursuant to Article 5 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice to adjudication. Within 7 days from the date of such notice or the execution of the Adjudication Agreement by the Adjudicator if later, the Party giving the notice of intention shall refer the dispute or difference to the Adjudicator for his decision ("the referral"); and shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party. …*

39A.5.1 The Adjudicator shall immediately upon receipt of the referral and its accompanying documentation confirm the date of that receipt to the Parties. …

39A.5.3 The Adjudicator shall within 28 days of his receipt of the referral and its accompanying documentation under clause 39A.4.1 and acting as an Adjudicator for the purposes of S. 108 of the Housing Grants, Construction and Regeneration Act 1996 and not as an expert or an arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days; and that by

agreement between the Parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision. …

39A.7.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

39A.7.2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; and the Employer and the Contractor shall ensure that the decisions of the Adjudicator are given effect.

39A.8 The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and this protection from liability shall similarly extend to any employee or agent of the Adjudicator."

9. Clause 39A.2 of the Building Contract envisaged that, in the event of a dispute or difference arising under the contract which was referred to adjudication, the parties to the Building Contract and the person agreed or nominated as adjudicator would enter into an agreement in the form of the Standard Agreement for the appointment of an Adjudicator issued by the Joint Contracts Tribunal (*"the JCT Adjudication Agreement"*). The JCT Adjudication Agreement in fact exists in two forms, one for use where the adjudicator is named in the relevant building contract, which was not this case, and the other for use where the adjudicator is not so named. The latter form of agreement contains the following provisions:-

"*1. The Contracting Parties hereby appoint the Adjudicator and the Adjudicator hereby accepts such appointment in respect of the dispute briefly identified in the attached notice.*

2. The Adjudicator shall observe the Adjudication Provisions [meaning those terms of the relevant contract relating to adjudication – in this case clause 39A of the Building Contract] *as if they were set out in full in this Agreement.*

3. The Contracting Parties will be jointly and severally liable to the Adjudicator for his fee as stated in the Schedule hereto for conducting the adjudication and for all expenses reasonably incurred by the Adjudicator as referred to in the Adjudication Provisions. …

5.1 The Contracting Parties jointly may terminate the Adjudication Agreement at any time on written notice to the Adjudicator. Following such termination the Contracting Parties shall, subject to clause 5.2, pay the Adjudicator his fee or any balance thereof and his expenses reasonably incurred prior to the termination.

5.2 Where the decision of the Contracting Parties to terminate the Adjudication Agreement under clause 5.1 is because of a failure by the Adjudicator to give his decision on the dispute or difference within the time-scales in the Adjudication Provisions or at all, the Adjudicator shall not be entitled to recover from the Contracting Parties his fee and expenses."

The First Reference

10. By a letter dated 27 February 2002 written on its behalf by Birketts Simons gave notice to Aardvark of its intention to refer to adjudication a dispute which it was alleged had arisen under the Building Contract *"in respect of Simons Construction Ltd's entitlement to extensions of time for the Completion of Section 1 of the Contract and the Date of Completion of Section 3 of the Works."* Birketts indicated in the letter that by copy of it it was applying to the President of the Chartered Institute of Arbitrators to appoint an adjudicator. In a letter dated 4 March 2002 to both Simons and Aardvark Mr. Barker recorded that he had been nominated as adjudicator by the President of the Chartered Institute of Arbitrators and stated that he was prepared to accept appointment.

11. In a letter dated 6 March 2002 to Mr. Barker Messrs. Freethcartwright (*"Freethcartwright"*), solicitors acting on behalf of Aardvark, indicated that Aardvark agreed Mr. Barker's terms for acting as adjudicator. The letter went on:-

"*We understand from our client that they have today received the Referral and supporting documents. From a brief analysis you will see that the contract commencement date was 28 January 1999 and that the date for completion of Section 1 of the works was 22 October 1999. The parties have previously been involved in dialogue*

regarding the presentation and consideration of claims for time entitlement on the part of Simons. Indeed as long ago as 11 September 2000 the Chairman and CEO of Simons wrote to the Chairman of Aardvark stating that they would complete the preparation of a claim for time and submit it to Aardvark by end September 2000. Indeed Mr. Hodgkinson on behalf of Simons stated that before any Adjudication Notice was submitted the key points would be discussed with Aardvark.

In the event Simons have not honoured that commitment, nothing was heard from them until last month on this issue when the Notice was served.

In the circumstances, as with any Responding Party, there is a need to consider the Referral, marshall [sic] *evidence, prepare the Response and assist you in the conduct of the reference. This will take sometime* [sic]. "

12. Mr. Barker replied to the letter dated 6 March 2002 from Freethcartwright by a letter dated 7 March 2002 addressed to both Simons and Aardvark. His letter included this passage:-

"2. It is noted from Aardvark's letter that, although the Parties have been involved in dialogue, the Adjudication Notice arrived without prior warning or agreement on the "key points".

3. Aardvark therefore appear to be saying that there is at present no dispute, though there clearly is a claim from Simons as evidenced by the Referral Notice.

4. The essential requirements for an adjudication include the existence of an already crystallised dispute, as indicated in previous cases as, for example:-
Sindall Limited v Solland & othrs
Griffin & Tomlinson t/a K & D Contractors v Midas Homes
R.G. Carter Limited v Edmund Nuttall Limited

5. If that is right, and Simons is invited to agree, the Referral Notice is defective in that it does not refer the whole dispute, but only its own position. Aardvark now proposes to rectify this by submitting a Reply on 20th March, at which stage the Referral will be perfected.

6. It therefore follows that the 28 day period allowed for the Adjudicator to decide the Dispute referred to him will commence on 20th March 2002.

7. I would at this stage draw both parties attention to the possibility, indeed the desirability, of agreeing this Dispute between themselves at any stage of the Adjudication procedure and advise that, having decided that I cannot decide this matter from the Referral alone, I will not spend any significant time until I have received a Reply from Aardvark. "

13. Birketts responded to Mr. Barker's letter dated 7 March 2002 in a letter dated 8 March 2002. In that letter it was disputed that there was no crystallised dispute.

14. Having considered Birketts' letter dated 8 March 2002 Mr. Barker replied in a letter to both parties dated 10 March 2002 that it seemed to him that he had understood correctly the position as to whether there was a crystallised dispute at the date of the giving on behalf of Simons of notice of intention to refer a dispute to adjudication. Freethcartwright then wrote a letter dated 11 March 2002 to Mr. Barker in which it contended that the Referral Notice given by Simons was defective because it sought to reserve the position of Simons as to any period of delay in completing the relevant sections of the Project for which Simons itself was responsible. However, Freethcartwright also made suggestions as to a timetable for pursuing an adjudication in respect of Simons's claims for extensions of time. Mr. Barker then sent a letter dated 12 March 2002 to both parties in which he expressed the view that, *"It is now abundantly clear that "The Dispute" has not yet matured to the point where a Party can refer the "whole Dispute", i.e. that the Adjudicator can receive precise details of the issue or issues to be decided."* However, Birketts once more contested that assessment in a letter to Mr. Barker dated 14 March 2002.

15. In a letter dated 21 March 2002 to both parties, written after he had received a further letter, dated 19 March 2002, from Freethcartwright, Mr. Barker restated his view that, *"The dispute has not crystallised and the adjudication has not commenced"*. That prompted Simons, through Birketts, in a letter dated 25 March 2002, to indicate:-

"On the basis that you consider that the Adjudication has not commenced, our client has reluctantly taken the view that as a result of the Adjudication not having "commenced" it will not currently proceed (whilst reserving its right to do so at a later stage) and as a consequence your services as Adjudicator are no longer required."

The Second Reference

16. Aardvark prepared a document called a *"Position Statement"* dated 28 March 2002 by way of response to the Referral Notice served on behalf of Simons in connection with the First Reference. By a letter dated 19 April 2002 addressed to Birketts Freethcartwright gave notice of Aardvark's intention to refer to adjudication the dispute which had arisen between Simons and Aardvark in the light of the *"Position Statement"* as to the entitlement of Simons to extensions of time in respect of the completion of sections of the Project. Mr. Barker was again nominated by the President of the Chartered Institute of Arbitrators as adjudicator and once more indicated his willingness to accept appointment. In a letter dated 24 April 2002 to Mr. Barker Freethcartwright indicated that the *"Position Statement"* could stand as Aardvark's Referral Notice.

17. In a letter to both parties dated 25 April 2002 Mr. Barker indicated that, by reason of his intended absence from work for the period 4 to 20 May 2002, it would not be possible for him to reach a decision on the dispute referred to him within 28 days from receipt of the referral, which was 25 April 2002. He therefore sought the agreement of Aardvark to an extension of the 28 day period. An extension of 14 days was granted in a letter dated 26 April 2002 written on behalf of Aardvark by Freethcartwright. 42 days from 25 April 2002 expired on 6 June 2002. A form of JCT Adjudication Agreement was executed on behalf of Aardvark and Simons, and by Mr. Barker, and dated 5 May 2002.

18. The adjudication following the Second Reference proceeded with Birketts sending a Response to the *"Position Statement"* under cover of a letter dated 3 May 2002. Thereafter nothing effectively happened to progress the adjudication until after Mr. Barker returned from his absence. On 10 June 2002 Mr. Barker raised with the representatives of the parties his wish for the grant of a further extension of time for publication of his decision to 17 June 2002. The representatives of both parties did agree to the grant of such an extension, as Mr. Barker recorded in a letter to both parties dated 10 June 2002:-
"*Both parties having agreed, I now advise that my Decision will be published on or before 17th June 2002. I intend to send it out as a Draft document for the parties' Representatives comments before that date.*"

19. Unhappily Mr. Barker's mother died in the middle of June 2002. It appears that on the morning of 17 June 2002 he explained the situation to the representatives of the parties and requested a further extension of time for publication of his decision, although he indicated that he would be in a position to provide it in draft later that day. After taking instructions Birketts responded to the request in a letter dated 17 June 2002, which was sent by facsimile transmission. The letter was in these terms:-
"*We refer to the telecon this morning. May we first, on behalf of both ourselves and our client company, express our condolences in respect of your sad loss.*
We have had reservations since receiving your letter concerning the issue of "draft" Decision. Our view is that, once an Adjudicator makes a decision it is final and binding upon the parties. We can see issues of jurisdiction etc if a Decision is published in draft and parties are invited to comment thereon.
In the circumstances, our view is that you should publish your Decision and save for your power to amend the same in accordance with the slip rule procedure, such Decision, be it in draft format or otherwise, is final and binding upon the parties."

Mr. Barker acknowledged receipt of that letter in a letter also dated 17 June 2002 which he sent by facsimile transmission to both parties. He said:-
"*I acknowledge receipt of Birkett's letter dated 17th June 2002, and have noted your comment.*
Does this mean that you will agree to a short extension, if required?"

Birketts's letter was copied to Freethcartwright, which also responded to Mr. Barker by a letter dated 17 June 2002 sent by facsimile transmission:-
"*We acknowledge receipt of Birketts fax of this morning.*

As Adjudicator it is within your power and quite proper for you to decide how you will chose [sic] *to publish your Award. As agreed in the telephone conference of this morning we look forward to receiving your draft Award in due course.*
We look forward to hearing from Birketts with confirmation of their client's instructions in respect of the request for a short extension of time."

20. Birketts had not responded to Mr. Barker's enquiry concerning a further extension of time by the time he came to write a further letter dated 17 June 2002 to both parties. That letter was in these terms:-
"*Following a conference discussion with the Parties' Representatives this morning, when the Adjudicator explained that due to personal circumstances, he had lost three days, it is now confirmed that the Parties were aware that the Draft Decision would be issued for comment today. The Claimant, Aardvark, has stated it is flexible and will await the document; the Respondent, Simons has indicated it is not in favour of a Draft, requiring the Final Decision. Simons has not replied to the Adjudicator's reply to its letter, nor to Aardvarks comments.*
The Draft Decision is therefore enclosed with this letter. If there is no comment from either Party within 7 days of the date of this letter, the Decision will be published as the Final Decision."

21. In a letter dated 24 June 2002 to Mr. Barker Freethcartwright indicated that it had no comments on the Draft Decision. Birketts apparently did not reply to Mr. Barker's letter dated 17 June 2002. Under cover of a letter dated 25 June 2002 Mr. Barker sent the Final Decision to both parties. The Draft Decision was not signed or dated, but the Final Decision was both signed by Mr. Barker and dated 25 June 2002. Birketts did respond to Mr. Barker's despatch of the Final Decision in a letter dated 1 July 2002. In that letter Birketts wrote, so far as is presently material:-
"*We acknowledge receipt of your letter of the 25th June. Your decision did not comply with the requirements of Clause 39A.5.3 of the Contract nor the terms of the adjudication agreement in that your decision should have been given by not later than the 17th June.*
You will recall that we raised issues in this regard previously."

Consideration – the Draft Decision

22. Mr. Paul Darling Q.C., who appeared on behalf of Simons, submitted that the Draft Decision was, on its face, not a concluded decision because Mr. Barker indicated that he was prepared to consider altering it in response to any comments which the parties wished to offer. He relied on the marking of the Draft Decision as a *"Draft"* and the statement on the front cover of it that it was *"For the Parties' comment"*. While he eschewed any submission that, to be effective, the decision of an adjudicator needed to be signed and dated, he contended that the fact that the Draft Decision was neither signed nor dated, notwithstanding that it contained spaces for a signature and the completion of a date, reinforced his submission that the views expressed in it were provisional in the sense that Mr. Barker was prepared to reconsider them in the light of any comments of the parties. Mr. Darling further relied on the terms of the letter dated 17 June 2002 under cover of which the Draft Decision was sent to the parties, and in particular the reference to the indication on behalf of Simons that it wanted a final decision, as showing that the election of Mr. Barker to send the Draft Decision as a draft and not as a final decision was deliberate.

23. Mr. Justin Mort, who appeared on behalf of Aardvark, submitted that, notwithstanding that it was marked as a *"Draft"*, the Draft Decision was in fact Mr. Barker's decision on the dispute referred to him by the Second Reference. He relied upon the fact that there was no change of substance between the Draft Decision and the Final Decision. He also sought to rely on an argument to the effect that, if the submissions on behalf of Simons in relation to the validity of the Final Decision were well-founded, it followed, or at least was a permissible conclusion, that the Draft Decision, given in time and not subsequently altered, was an effective decision. He submitted that Mr. Barker's conclusions as to the dispute referred to him by the Second Reference were actually those set out in the Draft Decision, so that the decision had been made in fact no later than 17 June 2002. In his written skeleton argument Mr. Mort made these points in relation to the Draft Decision:-

"*16. The complaint that the decision was not signed or dated (sub-paragraph 28.2.3) can be disregarded. There is no requirement for a decision either to be signed or dated. The fact that Mr. Barker subsequently issued a*

decision (either in this case or for that matter in some unrelated adjudication) which is signed and dated cannot alter the character of the 17 June decision retrospectively. If necessary Mr. Barker can sign and date the decision issued on 17 June now.

17. The complaint that Mr. Barker stated that he intended to publish a final decision (sub-paragraph 28.2.2) can also be dealt with shortly. What Mr. Barker in fact said was that he would publish "the Decision"*, ie the decision that he had issued on 17 June, as a final decision subject to any comments made by the parties (letter, page 217). This is not a situation where the adjudicator has given a preliminary view which he intended to revise once he had had more time to consider the matter. The complaint made at sub-paragraph 28.2.2 of Simons's statement of case therefore adds nothing to the complaint made at 28.2.1.*

18. The material complaint made by Simons is that the decision issued on 17 June invited comment from the parties. The decision thus appeared to permit of the possibility that it might be changed as a result of such comment (sub-paragraph 28.2.1). It is submitted that if and to the extent that that approach was objectionable for any reason, it is the changes made subsequently which would be invalid rather than the decision.

19. In this context it should be kept in mind that:

(1) Simons, by Birketts, had instructed the adjudicator that once he had issued the decision it would be "final and binding" *(letter, 17 June 2002, page 202). In other words the decision once issued would be valid. It is the comments/subsequent changes that would be invalid.*

(2) In the same letter Simons instructed the adjudicator to issue his decision "be it in draft format or otherwise"*. The words* "draft format" *describe the form of the decision issued on 17 June precisely. It is not clear why Simons now seeks to resile from that instruction.*

(3) As acknowledged by Simons in the letter at page 202, the adjudicator has power to make changes to his decision under the slip rule in any event. It is accepted that the words "For the parties' comment" *do not indicate whether the adjudicator had in mind slip rule type errors or more substantive matters. But surely the appropriate approach for the Court to take in such a case is to look at what actually happened to the decision.*

20. Further and in any event Simons waived any opportunity to object to Mr. Barker's approach by putting forward its submission on Thursday 13 June 2002 without objection or reservation of its position (pages 197-199). It thereby implicitly consented to Mr. Barker's proposal made on 10 June (pages 195-196) and affirmed the process. It is not open to Simons to retract such consent subsequently."

24. It seems to me that it is clear that the Draft Decision was not, as such, a decision in respect of the matters the subject of the Second Reference. The Draft Decision was not signed or dated. It was marked on the title page as *"For the Parties' comment"*. That is indicative, in my judgment, of the Draft Decision not being intended as necessarily final. Rather each party was afforded an opportunity to make any observations on the Draft Decision which it wished. It was not like a draft judgment, which is clearly marked to indicate that what is invited is suggested linguistic emendations, rather than alterations of substance. In heralding his intentions, in his letter dated 10 June 2002, Mr. Barker did not indicate that any limitation was envisaged on the *"parties' Representatives' comments"* in respect of the Draft Decision which he would be prepared to receive. Even after receipt of Birketts's letter dated 17 June 2002 in which Birketts suggested that any decision communicated should be final Mr. Barker did not respond that the Draft Decision was for practical purposes final, or final subject only to textual corrections. His initial letter of 17 June 2002 indicated that he would require further time to produce a final decision. In his second letter of 17 June 2002 once again no limitation was indicated on the nature of the comments which Mr. Barker was minded to receive. His statement that, *"If there is no comment from either Party within 7 days of the date of this letter, the Decision will be published as the Final Decision"*, was perfectly general so far as willingness to consider comments was concerned. In my judgment, therefore, the Draft Decision was not a concluded decision on the matters the subject of the Second Reference, but a provisional decision which might have been altered if Mr. Barker thought that the comments of either Simons or Aardvark on the Draft Decision justified that course. I reject the submission of Mr. Mort that Simons waived the opportunity to take that point by not indicating

dissent before 17 June 2002 to the production by Mr. Barker of a draft decision, which course was foreshadowed by his letter dated 10 June 2002. The fact that he was minded to produce a draft decision, and the fact that that course might have been agreeable to, or at least not opposed by, Simons, do not mean, as it seems to me, that Simons was thereby to be taken to have agreed that any final decision need not be produced within whatever period was otherwise required by the operative contractual provisions.

25. It follows that Mr. Barker did not produce a decision in respect of the Second Reference by no later than 17 June 2002.

Consideration – the Final Decision

26. The question, therefore, is, whether the failure to produce a final decision by no later than 17 June 2002 meant, as was contended on behalf of Simons, that the Final Decision, when produced, was not binding on Simons and Aardvark. That could only be so, in my judgment, if the failure of an adjudicator to produce a decision within the timescale prescribed by the contract by which he was appointed adjudicator, as varied by the agreement of the parties, deprived him of jurisdiction to produce a binding decision thereafter. To hold that a person who initially had jurisdiction to make a determination of a dispute binding upon the parties to that dispute lost such jurisdiction simply because he was late in producing his decision would be a surprising conclusion, as it seems to me, but it is necessary to consider whether, that notwithstanding, it is correct. In view of the course which the argument before me took it is also necessary to consider what, in the circumstances of the present case, was the time by which Mr. Barker was bound to produce a final decision in respect of the dispute the subject of the Second Reference.

27. The system of adjudication which is now such an established feature of the construction industry received statutory impetus from the provisions of *Part II* of *Housing Grants, Construction and Regeneration Act 1996* (*"the Act"*). The mechanism adopted by the Act for imposing the regime of adjudication was not the creation of new statutory rights or duties, but rather the implication of appropriate terms in contracts – see *ss. 108(5)* and *114(4)*. *S. 108(2)* provided, so far as is presently material, that a construction contract should:-

"*(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;*

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;"

If a contract did not contain such provisions, *s. 108(5)* provided that the adjudication provisions of the Scheme for Construction Contracts (*"the Scheme"*) should apply. Those provisions are to be found in *Part I* of the *Schedule* to *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 1998 No. 649, (*"the Regulations"*). *Paragraph 19* of the *Schedule* to the Regulations is concerned with the timing of decisions by adjudicators. It is in these terms:-

"*(1) The adjudicator shall reach his decision not later than –*

(a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or

(b) forty two days after the date of the referral notice if the referring party so consents, or

(c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.

(2) Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph (1)

(a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and

(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract."

Part I of the *Schedule* to the Regulations also contains the following provisions which are presently material:-

"23(2). The decision of the adjudicator shall be binding on the parties, and they shall comply with it 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 between the parties….

26. The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability."

28. It is, it seems to me, important in the context of the point presently under consideration to recognise that, while *s. 108(2)* of the Act does prescribe a period of 28 days for the making by an adjudicator of a decision as the starting point, it does not actually prescribe any definite finishing point. Subject to the agreement of the parties made after the dispute has been referred, an adjudicator can take as long as he wishes to reach his decision and it is still binding upon the parties. It is also material to notice, in my judgment, that the effect of the provisions of the Act prescribing the terms as to adjudication to be included in a construction contract, and providing for the implication of terms into a relevant contract if it does not itself include the prescribed terms, is that the adjudication provisions for which the Act makes provision are only directly applicable to the immediate parties to the relevant construction contract. They do not, without more, apply at all to the person appointed as adjudicator. Those terms do, of course, bind the person appointed as adjudicator if he or she agrees by contract to comply with them. That was the position in the present case following the execution by the representatives of the parties and by Mr. Barker of an agreement in the form of the JCT Adjudication Agreement. The Building Contract itself was completely silent as to the consequences of an adjudicator failing to make a decision in relation to a dispute referred to him within whatever period was relevant in the particular case. The consequence contemplated by the JCT Adjudication Agreement, in clauses 5.1 and 5.2, was that the adjudication agreement could be terminated, but only if both of the parties to the dispute agreed, and the adjudicator deprived of any entitlement to fees. That provision reflects, although it is less specific than, *paragraph 19* of the *Schedule* to the Regulations. That paragraph envisages that, if an adjudicator fails to reach his decision within whatever is the relevant time period in the particular case, any of the parties to the dispute may serve a fresh referral notice and a new adjudicator could be appointed. It must be implicit in that provision that the first adjudicator ceases to have jurisdiction in the relation to the dispute upon the giving of a fresh referral notice, but also that until the giving of a fresh referral notice the original adjudicator retains jurisdiction to determine the dispute. The latter conclusion is reinforced by the facts that, both under the Building Contract and the JCT Adjudication Agreement, on the one hand, and under the Scheme, on the other, the adjudicator is not liable, in the absence of bad faith, for any defaults in performing his obligations as adjudicator, including failing to produce a decision by the time he should, and the obligation of the parties to the construction contract to give effect to the decision of an adjudicator concerning a dispute referred to him is unqualified. Certainly there is no express indication that the obligation to comply with a decision depends upon it having been given by some particular date. A consideration of the provisions of the Building Contract, the JCT Adjudication Agreement and the Scheme thus leads to the conclusion that the decision of an adjudicator for the purposes of those provisions is binding upon the parties to the relevant dispute whenever given, provided only that the adjudication agreement, if any, has not been terminated for failure to produce a decision within the relevant timescale before the decision is made and that a fresh notice of referral has not been given by one of the parties before the decision is made. Neither of those things occurred in the present case.

29. A curiosity of the provisions of clause 5 of the JCT Adjudication Agreement is that that clause appears to contemplate that the adjudication agreement can only be terminated if both parties to the dispute which has given rise to the relevant adjudication agree. Otherwise, on the face of the agreement, the agreement continues until a decision is given by the adjudicator, and thus his jurisdiction to reach a decision continues until that time. It would seem that, by agreeing in clause 5 of the JCT Adjudication Agreement, which *a fortiori* would only be entered into after the relevant dispute had been referred, that the adjudication agreement could only be terminated by joint action on the part of both parties to the relevant dispute, it is at least arguable that parties to an agreement in that form had made an agreement after the dispute had been referred to extend the time of the adjudicator for reaching a

decision to such time as might have elapsed before both of them decided to terminate the agreement because of the failure of the adjudicator to *"give his decision on the dispute or difference within the time-scales in the Adjudication Provisions or at all"*. However, that time would never come, if this construction of the agreement were correct, for the timescale would have been extended indefinitely. The way out of this impasse, in my judgment, is to treat the provisions of clause 5 as not prescribing exhaustively the circumstances in which an agreement in the form of the JCT Adjudication Agreement could be brought to an end, but simply as prescribing the steps which the parties to the dispute could take by joint action and the consequences if they did act jointly. On that basis clause 5 would not fall to be construed as an agreement of both parties to extend the time of the adjudicator indefinitely and he or she would still be bound to reach a decision by whichever of the periods of 28 or 42 days, or some agreed extension specific to the particular case, was relevant. Against the background of the intended function of adjudication, I should have thought that time was of the essence in relation to compliance by the adjudicator with whatever was the appropriate time limit. Consequently, if he or she failed to meet that time limit, it would be open to either of the parties to the dispute to treat the failure to produce a decision as a repudiatory breach of the adjudication agreement and to bring it to an end by accepting such repudiation.

30. The conclusions which I have so far expressed have been reached simply by a consideration of the relevant provisions of the Building Contract, the JCT Adjudication Agreement and the Scheme in the light of the submissions of Mr. Darling and those of Mr. Mort. Mr. Darling laid particular emphasis on the provisions of the Scheme and what he contended was the policy underlying *s. 108* of the Act. However, it seems to me that that emphasis was misplaced. Given that the statutory mechanism designed to ensure adjudication provisions in construction contracts is the implication of terms in such contracts, if necessary, rather than the creation of statutory rights or duties, in my judgment the question which I have to decide in relation to the Final Decision is really just one of construction of the relevant contractual provisions, as Mr. Mort contended.

31. My attention has been drawn by both Mr. Darling and Mr. Mort to the decision of Lord Wheatley in the Scottish case of ***St. Andrews Bay Development Ltd. v. HBG Management Ltd***., reported at [2003] CILL 2016. In that case the adjudicator in relation to a dispute between the petitioner and the first respondent was supposed to produce her decision on the dispute by 5 March 2003. It seems that she had made up her mind by that date, but declined to communicate her decision to the parties until her fees were paid. Following an accommodation being reached in respect of the fees she released her decision on 7 March 2003 and supplied the reasons for it on 10 March 2003. It was contended that because the decision was not communicated until after the deadline agreed between the parties and the adjudicator her decision was not binding. Lord Wheatley found that, in the circumstances, the adjudicator had not reached her decision by the agreed date. At paragraph 21 of his opinion he said this which is material to the issue which I have to decide in relation to the Final Decision:-

"*However, the question remains as to what remedy should be available to the petitioner in these circumstances. The petitioner has not taken advantage of the opportunity of submitting the referral to another adjudicator in terms of the scheme. I do not consider that the failure by the adjudicator to observe the time limits in the circumstances must invariably allow the petitioner not to comply with the adjudicator's decision when it is eventually issued. … While the failure of an adjudicator to produce a decision within the time limits is undoubtedly a serious matter, I cannot think that it is of sufficient significance to render the decision a nullity. The production of a decision two days outwith the time limit provided is not such a fundamental error or impropriety that it should vitiate the entire decision. Such a failure is a technical matter, and it is of significance in the present case that no challenge is offered to the merits of the adjudicator's decision. I am somewhat reinforced in that view by the clear nature of the compliance provisions in paras 39B.2 and 39B.3 of the standard contract. While this view of the statutory and contractual provisions may be thought in some respects to be unsatisfactory and, in particular, offers no sanctions against an adjudicator who fails to produce a decision within the time limits, that is not something which alters my opinion. No doubt any adjudicator who fails to comply with time limits is unlikely to find favour with those who are seeking suitable persons to adjudicate on their disputes. However, this is not relevant to my conclusions. In all the circumstances, therefore, I have decided that there is not a good arguable case which might suggest that this petition for judicial review would succeed.*"

32. The decision of Lord Wheatley is not binding upon me. Technically its status is at best persuasive. Mr. Darling urged me not to follow it. He submitted that in that case, as was correct, the adjudicator had actually made up her mind by the critical date. On my findings that was not the position in the present case. Mr. Darling also submitted that in the present case, unlike in ***St. Andrews Bay Development Ltd. v. HBG Management Ltd.,*** there was a challenge to the correctness of the adjudicator's decision. Neither of the points urged upon me by Mr. Darling strikes me as particularly significant. As I am not bound by Lord Wheatley's decision anyway I think that it is enough to say that I draw some comfort from it that the conclusion which I reached independently of any consideration of authority is correct. While Lord Wheatley seems to have contemplated that there might be some circumstances in which the delay on the part of an adjudicator in producing a decision was such as to entitle a party to the adjudication not to comply with the decision when it was eventually forthcoming, I am bound to say that I cannot readily envisage what such circumstances might be for the purposes of the provisions with which I am presently concerned, other than the termination of the appointment of the adjudicator and the giving of a fresh notice of adjudication.

33. In the course of his written skeleton argument Mr. Mort also mentioned a decision of H.H. Judge Humphrey Lloyd Q.C., ***Barnes & Elliott Ltd. v. Taylor Woodrow Holdings Ltd***. Mr. Mort said that he understood that in that case H.H. Judge Lloyd Q.C. had decided the question of the significance of the failure of an adjudicator to produce a decision by the relevant deadline. Mr. Mort went on to say, at paragraph 45 of his skeleton argument:- *"It is understood that in that case Judge Lloyd Q.C. upheld the validity of the adjudicator's decision. Although Judge Lloyd Q.C. has given his decision no reasoned judgment is available at this stage."*

    In the light of the conclusion which I have reached, and the considerations which have led me to it, I am not surprised that H.H. Judge Lloyd Q.C. seems to have reached a similar conclusion. In the circumstances, however, I have not had the comfort of knowing that the route of H.H. Judge Lloyd Q.C. to that conclusion was the same as my own.

Conclusion

34. For the reasons which I have given I find that the Final Decision of Mr. Barker dated 25 June 2002 and signed by him was a decision on the dispute referred to him as the Second Reference which is binding upon Simons and Aardvark until such time as that dispute is finally determined by arbitration or legal proceedings or by an agreement in writing made by Simons and Aardvark after the decision of Mr. Barker was given, and I so declare.

Paul Darling Q.C. (instructed by Birketts for the Part 20 Claimant)

Justin Mort (instructed by Freethcartwright LLP for the Part 20 Defendant)