JUDGMENT : His Honour Judge Havelock-Allan QC (sitting as a Judge of the High Court). TCC Bristol District Registry. 16th November 2006. [14.57]

1. This judgment determines an application and a cross-application relating to the enforcement of an award of an adjudicator.

2, The award was made under a contract dated 1 June 2005 between the defendant as employer and the claimant as contractor. It was a contract for the alteration and enlargement of a nursing home and it was concluded on the JCT IFC 1936 form of contract. The contract sum was £488,695.38.

3. The architect originally appointed under the contract as the contract administrator was Mr Robin Hancock. The contract provided for the contractor to receive interim payments on a monthly basis and it contained, in accordance with the JCT IFC standard form, an arbitration clause and also a provision for adjudication. The provision for adjudication was in Article 8 and provided that either party was at liberty to refer any dispute or difference arising under the contract to adjudication. The arbitration clause in Article 9A of the contract was in a qualified form which provided that all disputes arising under or in connection with the contract were to be referred to arbitration save for disputes in connection with the enforcement of the decision of any adjudicator.

4. The provisions in the JCT form for the appointment of an adjudicator were deleted by the parties, so this was a contract in respect of which the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998, applied. I shall refer to that hereafter as *"the Scheme"*.

5. In April 2006 the contractor served a Notice of Adjudication and in due course Mr Hinchcliffe of the firm of EC Harris was appointed as adjudicator. Objection was taken by the employer to his jurisdiction and I will come back to that issue later. Nevertheless, the employer participated in the adjudication process under reservation of that jurisdictional objection. Mr Hinchcliffe found in his award that he did have jurisdiction and he published his award on 12 June of this year, making a number of findings.

6. The applications before the court are, first, an application under Part 24 brought by the contractor for summary judgment in the amount of the adjudicator's award and, second, a cross-application by the employer to strike out this claim, either under Part 3 or under Part 24 of the Civil Procedure Rules, on the ground that the award was made without jurisdiction. An ancillary application is made by the employer for a stay of the matters that were referred to the adjudicator under section 9 of the Arbitration Act 1996. It is accepted that the contractor's application and the cross-application are the obverse and reverse sides of the same coin.

7. It is necessary to say a little about the matters which gave rise to this adjudication. There is a dispute between the parties as to the date of completion in the contract. The contract form had the date inserted in it in manuscript. It is the contractor's case that that date originally was intended to be 31 March 2006 but that in error when the contract was entered into, the date of *"31 March 2005"* was inserted. Given that the contract was entered into in June of that year, the reference to 2005, if March was the month, must indeed have been a mistake. However, it is apparent from the photocopy of the contract I have seen that the manuscript date was overwritten at some stage so as to read *"31 December 2005"*. As I understated it, the contractor disclaims any responsibility for that amendment.

8. The contract was performed between July 2005 and 15 March 2006 by Mr Hancock issuing interim certificates of payment numbers 1 to 8 in favour of the contractor, all of which were paid by the employer.

9. On 11 January 2006 the contractor, perhaps out of an abundance of caution, applied to the contract administrator for an extension of time of 64.5 days.

10. On 7 February Mr Hancock granted an extension of time, but precisely what extension of time is not clear. At the end of January he appeared to indicate that he would extend the time for two months, but suggested that that was an agreed extension. Then on 7 February he confirmed that there was to be an extension of time of 24 days. However, there is another letter of the same date signed by Mr Hancock which seems to suggest that the extensions allowed was one of 74 days. On none of these occasions did Mr Hancock indicate a view as to the date from which that extension should run, so that there was not only confusion as to the amount of any extension granted but also as to its duration, because of the dispute about the original completion date.

11. On 31 March 2006 a certificate of non-completion was issued by Mr Hancock to the contractor. A few days later, on 4 April, the contractor made application for payment number 9, in which it valued the works which it had completed to date in the sum of £440,531.74. At or about that time the employer appears to have had second thoughts about retaining Mr Hancock as the contract administrator and he was replaced by Miss Carol Bell of the firm of Davis Langdon, On 10 April it was Miss Bell who issued the next interior payment certificate, that is certificate number 9, in which she valued the work completed in the suns of £417,201.

12, The invoice which the contractor raised in the light of that interim payment certificate was in a sum of £ 12,012.68. That invoice was in due course paid, but not before the contractor had indicated that it wished to refer a number of matters to adjudication, The Notice of Adjudication was drafted an behalf of the contractor with the assistance of solicitors and stated in paragraph 12 as follows:

"Dispute have now crystallized between the parties as follows :-

1. The date for completion of the contract;

2. Scope and validity of architect's instructions issued to date;

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3. The issue and non-withdrawal of the notice of non-completion; and

4. The sums of valuation number 9."

These matters were the matters that were referred to Mr Hinchcliffe as adjudicator.

13. In his award of 12 June the adjudicator, in summary, found as follows: first, that the agreed date for completion of the contract (that is the original date) was 1 March 2006. It will be observed that this was neither the date contended for by the claimant nor the date contended for by the defendant. Second, that the contractor had been granted an extension of time of two months up to 1 May 2006. Third, that the certificate of non-completion dated 31 March 2006 was invalid. Fourth, that all certificates and instructions issued by Mr Hancock until his replacement were valid. Fifth, that in respect of valuation number 9 the contractor was entitled to a further sum of £13,579 plus VAT but with no interest. And sixth, that the employer was liable to pay 85 per cent of the adjudicator's costs.

14. As I have already indicated, invoice number 9, which was raised by the claimant following Miss Bell's first certificate of interim payment, was paid at or about the time that the adjudication was commenced. It is a fact that since the adjudication was commenced and since the award, certificates for payments 10 and 11 have been issued and have been paid by the employer and that those certificates, with two possible exceptions cover all the items which were the subject of financial claim by the claimant in the course of the adjudication.

15. The only sums therefore which are said to remain outstanding for payment pursuant to the award are (1) a sum of value added tax on a principal amount of £1,000 and (2) the award against the employer of 85 per cent of the adjudicator's costs. The adjudicator assessed 85 per cent of his costs in the sum of £6,668,25 plus VAT, so this amount of the award amounts to £7,952.69.

16. There is unfortunately a disagreement which persists between. the parties as to whether the value added tax on the sum of £1,000, namely a sum of £117.50, is a sum which has yet to be paid, and therefore remains due and owing under the award if the award is enforceable,

17 MISS LEE: My Lord, I think the claimant conceded that. It has been paid, I believe that is what he conceded.

18. MR MERCER : My Lord, I am certainly not going to interrupt the judgment, first of all. I would point out at the end. May I perhaps just .....

19. JUDGR HAVELOCK-ALLAN: No, perhaps I can pause at this moment to say that I understood you to tell me when I carne into court that you do not drop the point.

20. MR MERCER: Forgive me, my Lord; I thought I said we conceded the point.

21. JUDGE HAVELOCK-ALLAN: I thought you said you did not concede the point.

22. MR MERCER: I apologise.

23. JUDGE HAVELOCK ALLAN: I understand, and it is because of the acoustics in this court that I did not hear Mr Mercer on behalf of the claimant more clearly when I came into court a moment ago, that in fact that issue is now resolved, and I would add,. in my view, quite rightly so, because the explanation that has been given to me of the sums that have been allowed and now paid under valuation number 10 its respect of plumbing and heating actually exceed the amount that was allowed by the adjudicator in his award. It must follow from that that if the Sum allowed under valuation 10 bas been paid plus its value added tax, there is no further value added tax which is outstanding under the award. So the battle over enforcement of this award is now effectively in respect of a proportion of the adjudicator's costs that were awarded against the employer, namely a sum of £7,952.69.

24. Two matters are raised by the employer in seeking to resist enforcement of the award. However, I was told at the outset of today's hearing that one of these matters, which is an objection that the adjudicator purported to determine an issue of rectification of the contract in deciding what was the original contract date, is an issue which is reserved for argument on a subsequent occasion and is not to be pursued today as a ground for resisting enforcement on this application.

25. That leaves, therefore, only one objection taken by the employer to the enforcement of this award, and that is that the adjudicator lacked jurisdiction to make the award because in making the award he determined more than one dispute.

26. It is common ground that the effect of clause 8(1) of the Scheme, which provides: *"the adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract",* is to confine adjudications under the Scheme to single disputes rather than to a multiplicity of disputes. It was held by His Honour Judge Humphrey Lloyd in ***Pring & St Hill Ltd v Hafner*** (in particular I refer to paragraphs 21 to 22 of his judgment) that if an adjudicator were to proceed to embark upon the resolution of more than one dispute in an adjudication governed by the terms of the Scheme, then he would do so without jurisdiction. It seems to me that that must be a logical if harsh result, because if an award were produced under the scheme resolving more than one dispute, it would be impossible, unlike in the case of excess of jurisdiction, to determine by any process of severance which part of the award should be enforced and which, part of the award should be discarded. Given that the consent of the parties is a prerequisite to the determination of more than one dispute, it seems to me it must follow that if in truth more than one dispute has been resolved, the award as a whole is unenforceable.

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27. Miss Lee, who has appeared on behalf of the employer on this application, submits that the real dispute here was the amount payable under valuation number 9, and she took me to the application for payment number 9 to illustrate, as she submitted, that none of the figures for payment claimed in that application by the contractor related to or were in any way affected by the issue of the completion date and extension of time. The extension issue, in her submission, was entirely separate. Although she accepted that the issue of the notice of non-completion, and the refusal to withdraw it, was allied to the question of date for completion of the contract and also had some connection with the issue of scope and validity of the architect's instructions to date, her submission was that of the four matters outlined in the adjudication notice as being referred to Mr Hinchcliffe, the sum of valuation number 9 was discrete and separate. Accordingly, two disputes had been referred to the adjudicator and he had purported to determine them both.

28. Mr Mercer on behalf of the contractor submitted that all of the four matters described as "*disputes*" in the adjudication notice were interconnected and in truth amounted to only one dispute, they were simply sub-issues of a single dispute. He referred in particular to the judgment of His Honour Judge Thornton in the case of ***Fastrack Contractors v Morrison Construction Ltd*** in 2000, and in particular to what the learned judge had to say in paragraph 20 of that judgment about the reference to "*a dispute*" in the 1996 Act under which the Scheme was introduced. Judge Thornton said this:

   "It is to be noted that the 1996 Act refers to 'a dispute' and not 'disputes'. Thus at any one time a referring party must refer a single dispute, albeit that the Scheme allows the disputing parties to agree thereafter to extend the reference to cover more than one dispute under the same contract and related disputes under different contracts. During the course of a construction contract, many claims, heads of claim, issues, contentions and causes of action will arise. Many of these will be collectively or individually disputed. When a dispute arises, it may cover one, several, many or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus the 'dispute' which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference. In other words, the 'dispute' is whatever claims, heads of claim, issues, contentions or causes of action are then in dispute which the referring party has chosen to crystallize into an adjudication reference."

29. I am in no doubt that on this aspect of the application Miss Lee's submission is correct. Any successful challenge to the issue of the certificate of non-completion in the adjudication would have been, and indeed was, of no monetary consequence to the sum awarded under valuation 9. That is to be contrasted with valuation 10 where, based upon the assumed extension of time, the contractor claimed extra preliminaries.

30. Mr Mercer has pointed to the fact that in the application for valuation 9 the heading states that the contract completion date was 31 March 2006. I read that as being an assertion that that was the contractor's case, and to the extent that the employer disagreed with that, that is indicative of there having been a dispute as to the original contract completion date. There is no doubt there was such a dispute. The issue here is whether or not that dispute was a separate dispute from the financial claim under valuation number 9. If the sums claimed under valuation number 9 were liable to alter by reference to either the original completion date or the extension, than I can see the force of the argument that the extension issue and the completion date issue was all part and parcel of the financial claim, the single dispute as to what sum is due to be paid under valuation 9. However, on the facts here, that was not the case, and so in truth there were two independent disputes which Mr Hinchcliffe entertained.

31. Even if I were to apply the definition in the ***Fastrack*** judgment to which I have referred, I would come to the same conclusion, although I observe that there are difficulties with the ambit of that definition, as Lord Macfadyen held in the Scots case of ***Barr Ltd v Law Mining.***

32. The only other point I would make about the ***Fastrack*** decision is that it was possible on the facts in that case for Judge Thornton to take the view that all the claims that had been referred to the adjudicator were part and parcel of the single issue or dispute, namely, *"what was payable under the sub-contracts"*. To that extent, the remarks which I have quoted from his judgment were obiter.

33. Mr Mercer also relied on the judgment of Judge Humphrey Lloyd in ***Sindall v Solland***. That case requires rather more explanation. Sindall was the contractor and Solland was the employer, There was dissatisfaction on the part of Sindall with the length of the extension of time which the administrator under their contract had granted. Nevertheless, in due course, the administrator served a notice of default on Sindall and, consequent upon that notice of default, the employer purported to terminate the contract. It was Sindall's case that the repudiation was wrongful, and further, that it should have been granted and was entitled to be given a further extension of time. The issue which was determined in the judgment of Judge Humphrey Lloyd was whether the claim for a further extension of time represented a dispute which had crystallized at the time of the Notice of Adjudication. The judge held that it had not and therefore that the adjudicator had had no jurisdiction to decide that particular point. However, the rest of his award on the repudiation issue was not invalid because Judge Humphrey Lloyd took the view that the issue of the repudiation was indeed the principal and sole issue in the dispute; the adequacy of the extension which had been granted and the extent to which a further extension was justified was inextricably bound up with the repudiation issue and was simply a sub-head of that particular dispute, That being the explanation of the ***Sindall*** case, I do not believe that that decision assists the claimant on the present applications.

34. One other case which I have seen referred to in a textbook is ***David McLean Housing Contractors v Swansea Housing Association.*** Neither party unfortunately had brought a copy of the report of the judgment in that case to

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court and so I only have the brief summary in the textbook as a point of reference, but I accept Miss Lee's explanation that that case was decided in the way it was because the issues referred to the adjudicator, which included issues as to an extension of time and as to sums payable, were treated as a single dispute because on the facts there, the amount that, was payable, in other words the Financial Outcome in the adjudicator's award, depended in part upon his decision on the extension of time. Therefore, it was possible to construe both the extension issues and the financial issues as sub-issues of a single dispute. That is not, on the facts, the position here.

35. I was at one point concerned as to whether the employer might not-have waived its right to rely upon this objection to the enforce ability of the award, namely that Mr Hinchcliffe had determined more than one dispute. It is well established that the recipient of an adjudication notice is entitled to protest the jurisdiction of the adjudicator and then participate in the adjudication subject to that objection, without being held to have submitted to the jurisdiction of the adjudicator. That was the view which Mr Justice Dyson took in ***The Project Consultancy v The Trustees of The Gray Trust*** and it is consistent with similar authority in the field of arbitration. However, if a party to an adjudication makes a specific protest to the jurisdiction of the adjudicator based upon a particular point which the adjudicator then subsequently determines against him and that party thereafter accepts the adjudicator's decision, it is another question whether he can continue to object to the jurisdiction of the adjudicator on a new ground.

36. Here, Mr Hinchcliffe has recorded in his award that only two specific objections were taken to his jurisdiction on the part of the employer. One challenge was to the legal identity of the contractor; the point taken was that the contractor was not in truth a partnership. The second objection was whether a proper notice of intention to refer to adjudication and referral notice had been served on the employer. The adjudicator found against the employer on both those issues and neither of them is now pursued.

37. Miss Lee referred me to the judgment of His Honour Judge Seymour in ***Durtnall v Kaduna*** and to paragraph 46 of his judgment on the question of waiver, but in that case the allegation was that there had been an excess of jurisdiction not foreseeable before the award was issued. It may be a different matter if a potential objection to the jurisdiction of the adjudicator is available at the outset of the adjudication process but is not raised by the parties seeking to resist enforcement until after the award has been issued. However, I need not in the end decide that question because I am persuaded that the reservation to the jurisdiction of Mr Hinchcliffe that was taken by the employer in the present case was in sufficiently general terms as to cover the two-dispute argument which is now raised. On 5 May of this year the solicitors acting for the employer wrote to Mr Hinchcliffe to warn him that it seemed likely that there would be more than one basis of challenge to his jurisdiction. They expanded on that warning on 12 May in a further letter which enclosed submissions on behalf of the employer to the adjudicator, with this preface:

"The following submissions are made entirely without prejudice to Mayhaven's contention that you have no jurisdiction in this matter and that by making the following submission Mayhaven do not in any way consent to your determining your own jurisdiction. Further, Mayhaven reserve their right to raise any jurisdictional issues and/or any other issues, whether mentioned below or not, in due course, whether within the forum of adjudication proceedings, arbitration proceedings or court proceedings."

38. That was a fairly general reservation of rights, repeated again in similar terms on 25 May, and although the two-dispute argument was not an issue raised in the submissions which then followed, it is in my judgment a sufficient reservation of the position to enable the employer to raise that objection now. So there is no impediment to that objection being advanced, and, for the reasons I have given, I consider that it is well founded.

39. It follows that I find that Mr Hinchcliffe, whose award I might say is in all other respects a model of diligence, erroneously proceeded in this case to entertain and decide two disputes without having the consent of the parties that he could do so. Accordingly, he acted without jurisdiction and I consider that his award is unenforceable.

40. Mr Mercer referred me to the well-known guidance in ***Carillion Construction v Davenport Royal Dockyard*** as to the approach which the counts should adopt to the enforcement of adjudication awards. It was said by Lord Justice Chadwick, in paragraph 85 of his judgment that :

*"The objective which underlies the [1996] Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by [the defendant] in the present case; which … may, indeed, aptly be described as **'simply scrabbling around to find some argument, however tenuous, to resist** payment'."*

41. I have that guidance well in mind but I do not think that the robust approach there advocated can overcome a well founded objection to the jurisdiction of the adjudicator. The conclusion I have reached is the more unfortunate in the present case because the outcome of these applications affects only enforcement of 85 per cent of the adjudicator's fees. Nevertheless, in my judgment this award is unenforceable. Accordingly, I refuse the Claimant's application for summary judgment and I will grant the cross-application and, if necessary, order a stay.

(Discussion regarding subsequent procedure and delivery lip of document regarding completion date)

(Submissions on costs)

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1. The only objection that is pursued and it seems to me the only two points that might be taken in relation to this bill are as to the amount of time taken on documents, which Mr Mercer accepts, and the brief fee of Miss Lee.
2. I note, looking at Mr Mercer's costs, at least those attributable to this hearing which would be encompassed by the brief (namely preparation, drafting the skeleton argument, travel to the hearing and attendance at the hearing), that. The amount charged is somewhat in excess of or, if not in excess of, almost exactly equal to, Miss Lee's fee.

3, In those circumstances, it seems to me that broadly this bill is acceptable. What I will do is summarily assess it in a round figure, inclusive of VAT at £9,000.

Normally payment is in 14 days: is that acceptable or is there to be .arty request for an extension?

MR MERCER: 14 days is fine, my Lord.

JUDGE HAVELOCK-ALLAN: Miss Lee, you have been the successful party so I will ask you to produce a minute of order, if you would?

MISS LEE,: I will, my Lord.

JUDGE HAVELOCK-ALLAN: I have made it clear I am not making any direction about the original contract, that is a matter which will be resolved between the parties. Does that deal with everything? Thank you both very much.

[16:00]

(The court adjourned)