ADJUDICATION CASE SUMMARIES B

LAST UPDATED 11th DECEMBER 2008

Baker & Davies Plc v Leslie Wilks Associates [2005] EWHC 1179 (TCC)

The claimant builder contracted to build a block of residential flats in 1994 with practical completion in 1995. The defendant acted as consulting engineers subject to a warranty. In 1997 cracks appeared. The employers required the contractor to remedy the defects. The defendants recommended stitching – but finally an independent consultant advised underpinning beneath stairwells, which the contractor duly carried out, directing and paying contractors to do the work. The contractor also paid compensation for sums due to tenants arising out of the problems.

The remedial work and allied compensation was funded by the contractor's underwriters, to the tune of £249,179.25. A final settlement between the contractor and the employer followed quantification of sums due for the defects by an adjudicator, the decision being delivered on the 19th January 2004. The settlement deed was dated 4th March 2005 but was signed on the 11th March.

Here the contractor seeks contribution under the Civil Liability (Contribution) Act 1978. The defendant resists liability claiming 1) payment in kind (i.e. remedial works) as opposed to payment in cash does not give rise to a right to contribution (***George Stow & Co. Ltd. v. Walter Lawrence Construction Ltd.*** (1992) 40 Con. L.R. 127) and 2) the claim was time barred under s10 Limitation Act 1980 – which in turn gives rise to the question when was the settlement made and when did time start to run?

The court declined to follow ***Stow v Lawrence***, noting that the object of the CLC was to remove barriers to recovery, not to erect them and determined that payment in kind via remedial works gave rise to a right of contribution. Section 1 CL(C) A 1978 provides :-

1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

1(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

1(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

As to limitation section 10 Limitation Act 1980 provides :-

10.(1) Where under s1 Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.

10(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.

10(3) If the person in question is held liable in respect of that damage—
(a) by a judgment given in any civil proceedings; or
*(b) by an award made on any arbitration; (**QUESTION : Does this extend to adjudication?**)*
the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be)……

10(4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not),

the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.

The court dated the full and final settlement agreement as being concluded on the 11th March 2005 and accordingly the claim for contribution was not time barred. HHJ Richard Havery. 30th June 2005

COMMENT : Whether or not once can conclude that payment of a sum pursuant to a HGCRA adjudication decision satisfies the requirements of the Civil Liability (Contribution) Act 1978 viz a payment to an injured party and gives rise to a right to receive a contribution is debateable. The payment was made in settlement of a claim, partly established by adjudication, so arguable s10(4) LA 1980 applied, not s10(3)(b) which refers to arbitration – not adjudication, in any case. Nonetheless, it would be desirable for the CL(C) A to apply to adjudication decisions. It would not be helpful if a potential contributor was permitted to argue that a sum was not finally due if the applicant had chosen to accept rather than challenge the decision of the adjudicator. The only uncomfortable factor here is that there is no mechanism for the contributor to challenge the decision since unless brought in as a co-defendant, he has no locus. There are circumstances where a contractor may well prefer to accept a decision (using the process merely for the purposes of determining quantum rather than entitlement) in order maintain good commercial relationships with a continuing employer.

BAL (1996) Ltd. v Taylor Woodrow Construction Ltd [2004] 1 BLISS 7

This concerned a dispute as to how much was due for sub-contract glazing works. The sub-contractor billed for sums in excess of an asserted contract capping provision. The adjudicator, in compliance with the adjudication terms requested and received the consent of the parties to seek legal advice on whether or not the cap was enforceable. The parties neither asked nor received any information on the advice provided to the adjudicator. The adjudicator found that the cap did not apply and made a decision in the sub-contractor's favour. TWC resisted enforcement on the grounds of breach of natural justice, in that they had not been afforded an opportunity to address the legal advice.

His Honour Judge Wilcox refused enforcement, applying ***RSL v Stansell*** *[2003] EWHC 1930,* ***Costain v Strathclyde*** *[2003] Scotts CS 316* and ***Try v Eaton*** *[2003] BLR, 286*. There could not be an implied waiver of the duty to provide the information, though the parties could have expressly waived the need for disclosure and the opportunity to address the legal advice. The court also rejected an application to enforce part of the award, distinguishing ***Glencot v Barrat*** on the facts. The whole decision either stood or fell. In the circumstances everything was tainted by the breach of due process. ***Macob v Morrison*** *[1999] BLR 93* considered. His Honour Judge David Wilcox. TCC. 23rd January 2004.

Baldwins Industrial Services Plc v Barr Ltd. [2002] EWHC 2915 (TCC)

Barr hired crane and operator from Baldwins for use in the construction of a football stadium. The operator came under the instructions and direction of the client. Under the standard terms of the hire contract the client undertook responsibility for damage to the plant. The plant was damaged and Baldwins successfully sought to recover through adjudication. The court held in enforcement proceedings that under s1051(e) HGCRA 1996 this was a construction operation within the scope of the HGCRA. If the contract had been for the supply of plant without a driver/operator then the contract would not have been a construction contract. ***McKonkey v Amec*** *27 Constr LR 88.* ***Spalding v Tarmac Civil Eng.*** *[1967] 1 WLR 1509.* ***Thompson v T Lohan (Plant Hire)*** *[1987] 1 WLR 649*. considered. ***Williams v West Wales Plant Hire*** *[1984] I WLR 1311* applied.

Barr then sought to stay enforcement on the grounds of the financial insecurity of Baldwins who had entered into administrative receivership. It was clear that Barr was also in a poor financial state. In the circumstances the court ordered that the monies be paid into court and a provisional stay be granted to one month. Barr were required to apply to the court for a permanent stay and to commence arbitral proceedings or litigation. ***Herschell Engineering v Breen*** ***20****00* considered. ***Rainford House v Cadogan*** *[2001] BLR 416* applied.

Her Honour Judge Frances Kirkham. TCC. 6th December 2002.

Balfour Beatty Construction Ltd v Mayor & Burgess London Borough of Lambeth [2002] EWHC 597 (TCC)
Balfour Beatty undertook refurbishment work to a large property. A range of variation orders were issued and the architect issued a number of extensions of time. The final application for an extension was refused and on completion of works significant deductions were made for late completion. Balfour Beatty successfully challenged these through adjudication and accordingly Lambeth was ordered to make additional payments to Balfour Beatty. ***Balfour Beatty v Chestermount*** *(1993) 62 BLR 12.* ***Henry Boot v Malmaison*** *(1999) 70 Con LR 32.* ***Royal Brompton Hospital v Frederick Alexander Hammond*** *(2000) Lloyd's Rep 643. considered.* Lambeth resisted enforcement on jurisdictional grounds and bias/breach of due process.

The referral notice consisted of two ring binders of an" as built program" and 3 arch lever files. The adjudicator could not determine the projected program of works from the material provided. In the absence of any material identifying the critical stages of the works it was not possible to determine whether or not target dates had been exceeded or who was responsible for overshooting those dates, be it the contractor's delay or delay due to variations imposed by the developer.

The adjudicator highlighted the problem. Balfour Beatty undertook to provide additional material and granted the adjudicator an extension of time. The material subsequently provided failed to fulfil its function. The adjudicator had secured the consent of the parties to engage an assistant. He in fact engaged three assistants and between them they selected an analytical program and constructed a critical path out of the material provided by Balfour Beatty. The Adjudicator called time on the further argumentation and analysis by Lambeth and 15 minutes after receipt of Lambeth's final submission (despite the fact that two further days remained before the decision was due) produced a decision based on the information contained in the critical path analysis that he and his colleagues had produced.

His Honour Judge Humphrey Lloyd refused enforcement. There was a reasonable prospect that Lambeth could demonstrate that the adjudicator had essentially made the case for Balfour Beatty whilst denying Lambeth of the opportunity to comment upon the critical path analysis that he and his colleagues had produced. Balfour Beatty had failed to make their case themselves and in the absence of that there was no requirement for Lambeth to justify the architects decision that no extension be granted.

Whilst there was agreement that assistance could be procured to help deal with the mountain of paperwork submitted, the work of the three assistants went beyond that which had been sanctioned. The chosen method of analysis should have been open to challenge by the parties prior to adoption. The failure to afford comment amounted to a serious breach of due process.

Discain v Opecprime (No 2), *[2001] BLR 205.* ***D.G. Fair Trading v Proprietary Assoc. GB****, [2000] All ER (D) 2425.* ***Glencot v Barrett****, [2001] BLR 207.* ***Fox v Wellfair*** *[1981] 2 Lloyd's Reports 514 .****Interbulk v Aiden (The "Vimeira"),*** *[1984] 2 Lloyd's Reports 66.* ***Gbangbola v Smith & Sherriff****, [1988] 3 All ER 730.* ***Egmatra AG v Marco Trading*** *[1999] 1 Lloyd's Rep 862* ***John Barker v London Portman Hotel*** *(1996) 83 BLR 31* ***Macob v Morrison*** *[1999] BLR 93* considered. His Honour Judge Humphrey Lloyd. TCC. 12th April 2002

Balfour Beatty Construction v Serco Ltd [2004] EWHC 3336 (TCC)
Mr Justice Jackson considered an application for enforcement of an adjudicator's decision. Balfour Beatty contracted to design, supply and install variable electronic road signs. Substantial delay resulted from a change in the law requiring environmental impact assessment reports. Balfour Beatty applied for interim payments and extensions of time. Some elements of their claims were settled through the good faith negotiation procedure in the contract and the remainder were referred to adjudication. The adjudicator awarded a large number of the extensions of time and ordered sums of money to be paid. Serco resisted payment asserting that the limited extensions of time granted resulted in a right to LADs since the contract had not achieved practical completion by the target completion date. Serco asserted that the LAD's exceeded the monies due and sought to set those sums off against the LADs.

On an analysis of the facts and the adjudicator's decision, Jackson J found that the adjudicator had not provided a definitive ruling on all extensions of time. He had dealt with interim applications leaving the way clear for Balfour Beatty to apply for further extensions which if granted would impact upon whether or not any LAD's were due. After a review of the cases on set off, including ***VHE v RBSTB, David McLeans v Swansea HA, Solland v Daraydan, Bovis Lend Lease v Triangle, Parsons Plastics v Purac*** *and* ***Ferson v***

Levolux, he concluded that ,the contract did not provide special set off provision and since the LAD's were yet to be determined, no set off would be permitted. He provided a guidelines on how to approach the question of set off, namely :-

"(1) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).

(2) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case. "

William Verry v North West London Communal Mikvah *[2004] 1 Ll LR 308* distinguished.

His Honour Judge Jackson. TCC. 21st December 2004.

Balfour Beatty Ltd v Gilcomston North Ltd [2006] ScotCS CSOH_81

Contractor held liable to employer at adjudication for cost of demolishing and rebuilding the works following a fire allegedly due to fault of sub-contractor. Contractor trapped like piggy in the middle. Whether contractor should recover against sub-contract - and or whether adjudicated sum recoverable from underwriters under insurance policy.

Cases considered : ***Crosse* v *Bankes*** (1886) 13 R (HL) 40; ***Varney (Scotland) Ltd v Lanark Town Council*** 1974 SC 245, ***Smail v Potts*** (1847) 9D 1043 ; ***NV Devos Gebroeder* v *Sunderland Sportswear Ltd*** 1990 SC 291 ; ***Co-operative Retail Services Ltd v Taylor Young Partnership Ltd*** *[2002] 1 WLR 1419;* ***Special Housing Association v Wimpey Construction Ltd*** 1986 SC (HL) 57; ***Shilliday* v *Smith*** 1998 SC 725, ***Petrofina Ltd v Magnaload Ltd*** [1984] 1 QB 127; ***Castellain* v *Preston*** 11 QBD 380; ***Caledonia North Sea Ltd* v *London Bridge Engineering Ltd*** 2000 SLT 1123; ***Environment Agency v Empress Car Co*** [1999] 2 AC 22, ***Fairchild v Glenhaven Funeral Services Ltd*** [2003] 1 AC 32; ***Smith* v *UMB Chrysler (Scotland) Ltd*** 1978 SC (HL) 1; in ***North of Scotland Hydro-Electric Board* v *D & R Taylor*** 1956 SC 1, ***Alderslade* v *Hendon Laundry*** [1945] KB 189..

Lord Uist. Outerhouse Court of Session. 23rd May 2006

Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd [2008] EWHC 3029 (TCC)

Modus engaged Balfour Beatty to carry out the design and construction of major works at Hounds Hill Shopping Centre in Blackpool. The contract incorporated the terms of the JCT Standard Form of Building Contract with Contracted Design (1998 edition). The contract incorporated standard amendments 1 to 5 plus further homemade amendments related to the amended clauses. Here, balfour sought summary enforcement of an adjudication decision and summary enforcement of a certified payment application against which no withholding notice had been issues.

Modus sought a stay to mediation. The court held that in the circumstances the clause, which required agreement between the parties was merely an agreement to agree to mediation. Accordingly the stay refused. ***Channel Tunnel v Balfour Beatty*** [1993] AC 334. ***Cable & Wireless v IBM*** [2002] EWHC 2059 (Comm) considered. ***Carillion v Devonport*** [2006] BLR 15 noted.

Modus also complained that Balfour had not complied with the requirements of 24PD.2 asserting that this was fatal to the application for enforcement . However the court held that the breach was merely technical and not a substantive failure. No prejudice had been suffered by Modus. Permission to amend was granted.

Whether a reasoned decision provided - Held YES. ***Gillies Ramsay Diamond v PJW Enterprises*** [2003] BLR 48, ***Checkpoint v Strathclyde*** [2003] EWCA (Civ) 84; ***World Trade Corp. Ltd v C Czarnikow Sugar Ltd*** [2004] 2 AER (Comm) considered.

Modus further complained that the adjudicator had failed to consider a secondary defence considered , but the court considered that it had been addressed by the adjudicator.

Modus asserted a right to reply to the response to defence, stating that this right had been denied by the adjudicator. The court held that there was no right to respond given the tight timescale within which the process was conducted. There was no time for this if the adjudicator was to hit the 28 day target. ***Glencot v Barratt*** [2001]. ***Kier v City & General*** [2006] considered. As to breach of natural justice ***London & Amsterdam v Waterman*** [2004]; ***McAlpine v Transco plc*** 2004 considered.

Balfour included the decision sum in the next payment application as a method of application for payment. Did this amount to a waiver of the right to enforce? The court held that it did not.

Regarding the second application, the issue was whether in the absence of a withholding notice payment is due for a certified claim? The court held that it was. ***Rupert Morgan Building Services (LLC) Ltd v David & Harriet Jervis*** [2004] BLR 18 applied.

Modus also sought to set off LADs against any sums due, and particularly against the decision. The court held that set off was not available. ***Balfour Beatty v Serco*** [2004], ***Parsons Plastics v Purac*** [2002], ***Ferson v Levolux*** [2003], ***William Verry v Camden*** [2006].

Modus counterclaimed for summary enforcement of a claim for LADS. The court refused summary enforcement since on some of the grounds for LADS there were arguable applications for EOTs. The LADs claim was however a triable issue that should be settled at a later date by mediation, adjudication or arbitration. ***Reinwood v L Brown & Sons Ltd*** [2008] BLR 219 noted.

Mr Justice Coulson. TCC. 4th December 2008

Balfour Kilpatrick v Glauser International SA [2000] Adj.Soc Salford TCC *(No transcript – summary only)*

The available summaries provide little background detail, but it would appear that a dispute was referred to adjudication subject to the TeCSA Rules (1.3) Balfour Kilpatrick sought enforcement. Glauser resisted on the grounds that, contrary to TeCSA Rule 11, more than one dispute had been referred to the adjudicator.

His Honour Judge Gilliland held that the dispute referred consists of the *"matters identified in the notice."* Those matters are not limited to a single item of claim or issue. Furthermore, he repelled assertions that the number of matters referred and their complexity rendered adjudication an unsuitable process for dealing with them fairly and amounted to a breach of natural justice. He noted that there was a mechanism for extensions of time, to allow further exploration of the matters in the adjudication, which had not been requested.

His Honour Judge Gilliland. TCC. Salford. 27th July 2000.

Ballast Plc v The Burrell Company (Construction Management) Ltd [2001] ScotCS 159

Burrell appointed Ballast under a JCT management contract in respect of a housing development. A payment dispute arose which ballast referred to adjudication. The appointed adjudicator had already presided over two disputes between the parties. He resigned when his request for an extension of time was refused and was finally reappointed to the same dispute. The notice of adjudication referred to failures to evaluate works done and consequent failures to make stage payments. The remedies sought included valuation of works and orders for payment of such sums found to be due.

The adjudicator, noting that the parties had not adhered to JCT contract procedures with regard to variations, considered that there was no legal solution to the problem and advised ADR. He declined to value the works or make any orders for payment.

Ballast successfully sought in this action to have the adjudication decision declared a nullity on the grounds that the adjudicator had not fulfilled his duties. The respondents asserted that the adjudicator had fulfilled his role. Lord Reed held that the adjudicator had not done his job. He had a duty to value the works and had failed to do so. There was no justification for not valuing the works as requested. The decision was a nullity.

Karl Construction v Sweeney *2001 SCLR 95.* ***Watson Building Services*** *13 March 2001.* ***Sherwood & Casson v Mackenzie,*** *30 November 1999:* ***Homer Burgess v Chirex*** *2000.* ***Macob v Morrison*** *[1999] BLR 93).* ***London & Clydeside Estates v Aberdeen D.C.*** *1980 SC (HL) 1).* ***Carruthers v HM Advocate*** *1993 SCCR 825 at p.803:* ***Allied London v Riverbrae*** *[1999] BLR 346;* ***Austin Hall v Buckland*** *11 April 2001.* ***Bouygues v Dahl Jensen*** *[2000] BLR 49,* ***Anisminic Ltd v Foreign Compensation Commission*** *[1969] 2 AC 147* referred to.

Lord Reed. Outer House, Court of Session. 21st June 2001.

Ballast Plc v The Burrell Company Ltd [2002] ScotCS 324

On appeal, Burrell, the appellants asserted that the adjudicator had correctly identified that the works claimed for were not governed by the contract and that in consequence it was not within his jurisdiction under the HGCRA to deal with them as matters arising out of a construction contract.

The court disagreed. The matters arose out of a JCT contract. Whether the value of all, some or none of the works were recoverable under the terms of the JCT contract was something that the adjudicator could and

should have dealt with, having first valued those works. Lord Reed had reached the correct decision in a detailed, considered judgment.

Anisminic v. Foreign Compensation Commission *[1969] 2 A.C. 147* ***Watson Building Services v Harrison*** *2000 S.L.T. 646.* ***King v. East Ayrshire Council*** *1998 SC182* considered.

Lords Johnston, President and Weir. Extra Division. Inner House, Court of Session. 17th December 2002.

Baris Ltd v Kajima Construction Europe (UK) Ltd. [2006] EWHC 31 (TCC)

This concerned an application for interest in respect of the late payment monies pursuant to an adjudication decision. The court held that in consequence of a follow up demand for payment of the sum in final settlement, without prejudice to costs sent by the applicant, compliance with the demand amounted to an accord and satisfaction. Accordingly no interest was due. ***Walker v Wilsher*** *(1889) 23 QBD 335* applied. ***Rush and Tompkins v GLC*** *[1988] 3 WLR 939.* considered.

His Honour Judge Peter Coulson. TCC. 20th January 2006.

Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd [2003] 3100 (TCC)

A dispute arose between the parties to a construction contract on JCT 98 standard form terms with Contractor's Design, clause 39A.5.3. of which allows for a 14 day extension of time. The dispute was referred to adjudication. Clause 39 A.5.3. was invoked, as a consequence of which a decision was due on the 22nd of May. The adjudicator reached his decision on the 20th May and sent the parties a draft for comment. He finalized the decision on the 22nd May and sent it to the parties by DX. The decision was delivered to the parties on the morning of the 23rd May. Enforcement was resisted on the grounds that the decision was invalid because it was delivered one day late.

His Honour Judge Lloyd held that in the circumstances of the case, whilst there was a technical breach of the rules, it would be against the spirit of the legislation to declare that the decision was invalid. Distinguishing ***C & B Scene v Isobars,*** and ***Project Consultancy v The Gray Trust*** the court held that this was not a mere procedural error that could be discounted.

Applying ***Bloor, Ballast v Burrell*** and ***St Andrews Bay v HBG Management Ltd,*** (regarding clause 41A.5.3 of the 1980 JCT standard form, revised April 1998 which is very similar to 39A.5.3.) the court held that both the legislation and the contract required the decision to be made in time and promptly communicated.

Nonetheless, here the failure to communicate was due to an error in transmission. If fax rather than DX had been used there would not have been a problem. The court held that this minor error, which had no adverse consequences for either party, should not be allowed to defeat the primary objective of the legislation. No useful purpose would be achieved by a second reference to adjudication, with all the delay and expense that that would involve. Central to all this was that the decision was made on time.

His Honour Judge Humphry Lloyd. TCC. 20th June 2003.

Barr Ltd v Law Mining Ltd [2001] ScotCS 152

This case involves two separate construction disputes between the parties referred to the same adjudicator. Enforcement of the resulting decisions was resisted. Three issues were raised, concerning 1) the several disputes, 2) the rescission and 3) the certification, issues.

Before considering these issues the court noted the distinctions drawn in ***Homer Burgess v Chirex, Watson Building Services Ltd*** and ***Macob v Morrison (Bouygues v Dahl-Jensen, Karl Construction v Sweeney, Northern Developments v Nichol*** and ***Sherwood v Mackenzie*** also considered) to the effect that whilst a wrong decision in adjudication is nonetheless enforceable pending final determination, a decision may be struck out for want of jurisdiction.

Issue 1) Several Disputes : The defendant asserted that only one dispute at a time can be referred to adjudication, which was not intended to cover complex multiple disputes. The court held that more than one dispute (ie several unrelated matters) can be the subject matter of a reference to adjudication at the same time and further more each dispute may be divisible into distinct but related matters. ***Fastrack v Morrison*** and ***Whiteways v Impresa*** considered.

Issue 2) Recission: Element of the claim related to a works done after the contract had been allegedly rescinded. The adjudicator declined to make a provisional decision as to whether or not the contract had been rescinded. If he had held that the contract had not been determined then he would have had jurisdiction. Clearly, he could not have jurisdiction regarding post termination works because there was no construction contract to which the claim would relate. The court held that in the absence of a clear decision about whether or not the contract had been rescinded he had no jurisdiction and this element of the decision was thus unenforceable.

Issue 3) Certification. Clause 60 of the ICE Conditions of Contract (fifth edition). modified by a letter stating that *"4. Payment for work would be 30 days after certification."* The adjudicator held that the contractual provisions did not comply with the requirement of HGCRA by setting a mechanism for determining certification and payment and that accordingly the Scheme applied. This amounted to a decision that payment could be due I the absence of certification, an issue not addressed by the parties. The court held that whilst the explanation of the adjudicator was not well focused he had addressed the correct question, viz whether or not payment was due. He had jurisdiction to do so and the decision was enforceable. ***Watson Building Services Ltd*** and ***Bouygues*** considered.

Cherry-picking : Can a decision with multiple parts be dissected, whereby the court enforces the valid elements whilst setting aside invalid elements? The parties had accepted that since issue 3 on certification was not related to the other two issues, they could be enforced. The court concurred and so ordered.

Delegation : In the second of the two disputes, the defendant asserted that the adjudicator had delegated his decision to a legal advisor. The court held that the in fact the adjudicator had taken on board and adopted the reasoning of his advisor, applying it to the case himself. There was no unlawful delegation.

Lord MacFadyen. Outer House, Court of Session. 15th June 2001.

Bath & North East Somerset D.C. v Mowlem Plc [2004] EWCA Civ 115

This concerned a JCT LAQ 1998 contract for the refurbishment of the Roman Spa at Bath with a target for completion in 2002. By 2003 problems with the sealing paints in the pools became evident, due either to design faults/inappropriate materials or defective workmanship. The architect issued instruction for removal of paint coatings to open up the works for inspection. Mowlem refused. The Council instructed Warings to do the work. Mowlem refused Warings access to the site. Mowlem offered to do the work *"without prejudice"* whilst referring the validity of the instruction to adjudication. The court applied for a mandatory interlocutory injunction for access to be afforded to Waring. The judge considered Mowlem's proposal to be potential prejudicial to the Council. Mowlem claimed the instruction was used as a device to avoid ordering rectification. Mowlem wished to have the injunction removed, claiming the balance of convenience was with them. Waring would destroy the evidence by removing the paint. The judge at first instance held that if the evidence was destroyed Mowlem would not suffer because the Council's case against Mowlem would also be destroyed. There was a need for work to progress and not for the project to be placed in limbo. The agreed liquidated damages under the contract was set at £12K which the Council asserted was well below their actual daily losses, so that an action in damages would not provide an adequate remedy, thus justifying the granting of an injunction. The court agreed with the Council and confirmed the injunction. Whilst an adjudication may have produced an answer, the adjudicator could not grant an injunction. Stay of injunction pending adjudication denied.

American Cyanamid v Ethicon *[1975] AC 396 and [1979] 1 WLR 1294,* ***Smithkline Beecham v Apotex*** *[2003] EWCA Civ 137.* ***R v S.S. for Transport, ex p. Factortame Ltd.****[1991] 1 AC 603.* ***Lansing Linde v Kerr*** *[1991] 1 WLR 251,* ***N. W. L. Woods v Woods*** **[***1979] 1 WLR 1294.* ***Temloc v. Errill Properties*** *(1987) 39 BLR 30.* ***Polaroid v Eastman Kodak*** *[1977] RPC 379.* ***Peaudouce v Kimberley-Clark*** *[1996] FSR 680* considered.

C.A. before Lord Justice Brooke, Mance and Park. 20th February 2004

Baune v Zduc Ltd [2002] EWHC Civ (TCC) CMS Adjudication Watch. [2002] All ER (D) 55 (Aug)

This concerned a dispute regarding architectural services. The adjudicator sought technical advice from a Quantity Surveyor. The court held that he was allowed to do so and this did not amount to bias or breach of due process. However he then awarded damages for breach of contract before going on to determine the sum due on final account, as requested in the referral notice. His Honour Judge Seymour held that since

there had been no application for damages in the referral notice, this amounted to an excess of jurisdiction. Accordingly enforcement of the adjudicator's award was refused.

His Honour Judge Richard Seymour. TCC. 14th August 2002

Beck Peppiatt Ltd. v Norwest Holst Construction Ltd. [2003] EWHC 822 (TCC)

The defendant main contractors, Norwest Holst, submitted three issues to adjudication, concerning entitlement by the claimant sub-contractor to extensions of time, finalisation of loss and expense accounts and the valuation of the final account. An earlier submission of elements of the same dispute to adjudication had been withdrawn because the first adjudicator had come to the conclusion that at that time no dispute had arisen (though other elements regarding contra-charges went ahead). The applicants here sought a declaration that no dispute had yet crystallised in respect of this second referral. The court, refusing the application held that there was a dispute at the time of referral.

Facts : By the time the second referral was made on the 17th February the applicant had submitted its claims to the defendant (19th December) and the defendant had served 11 arch lever files in response on the 29th January, denying the claims . Thus the claimant had had 2 ½ weeks to consider its position.

The applicants sought to draw a distinction between the approach in ***Halki Shippinq Corporation v Sopex Oils Ltd*** *[1998] 1 W.L.R. 727* in respect of arbitration and the approach of the TCC in London towards adjudication, asserting that for adjudication a further period of time is necessary to allow a responding party to consider claims before a dispute is considered to have crystallised. This was rejected by the court which stated that the word dispute should be accorded its natural meaning. The dicta of Lloyd J to the effect that *"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."* in ***Sindall v Solland*****,** in the view of Mr Justice Forbes, correctly reflects the law on the matter and is in accord with the CA decision in ***The Halki.***

Mr Justice Forbes. TCC. 20th March 2003.

Belgrave v Vaughan [2005] Lawtel AC0109292

Belgrave engaged Parkside Construction to carry out works, but following a dispute about stage payments, declined to pay any further sums until outstanding work was completed, finally giving notice of determination, the engagement of others to complete the works, and then submitted claims to adjudication. Parkside took no part in the adjudications and default awards followed.

Thereafter Belgrave sought enforcement of these adjudication decisions at first instance against the first defendant Mr D K Vaughan as proprietor of Parkside Construction and subsequently by amendment against his live in partner Amanda Vaughan.

At the time the contracts were concluded Mr Vaughan was an undischarged bankrupt and all accounts were channelled through A.V.'s bank account The central issue here was whether or not A.V. was a partner in Parkside Construction. The court concluded that she was not. The court further concluded that even if she had been a partner, for the adjudication decisions to be enforceable against her, she would have had to have been expressly included as a named person in the adjudication. This had not occurred so she was not a party to the dispute and could not be held to account for DV's liabilities arising out of the adjudication.

The court noted that as a default decision, the correctness or otherwise of Belgrave's account had not in fact been tested – during these proceedings the possibility of excessive variations was raised to justify DV's behaviour.

Hudgell Yeates & Co v Watson *(1978] and* ***Wendover Developments Ltd v Fish*** *(Unreported, TCC, HHJ Thornton QC, November 11th 1999),* ***Nationwide Building Society v Lewis*** *(19981 Ch 482* referred to.

Recorder David Blunt. Portsmouth County Court. 30th June 2005

COMMENT : Contracting parties need to be alive to potential problems where funds are made payable not to the contractor but to another party, and take measures to ensure that that other party is contractually linked to the project before continuing. Secondly, where an adjudication is to be commenced against a partnership, all individuals once considers to be involved in the partnership should be named in the reference and brought into the process. It is not enough to rely on the concept of joint and severable liability, since that will not assist if those who one would seek to hold as liable have not been afforded an opportunity to respond.

Benfield Construction Ltd v Trudson (Hatton) Ltd [2008] EWHC 2333 (TCC)

T engaged B on JCT Standard Form of Contract (With Contractor's Design) 1998 edition, the defendant employer to carry out the design and construction of two houses and allied external works, administered by Osbornes, with completion due 29th September 2006 and LADs set at £1,500 / week. The contract overran. On 17th August 2007 Osbornes signed a document prepared by B to the effect that subject to completions of specified remedial work practical completion had been achieved, but then on the 3rd of September Osbornes wrote stating that due to floor screed defects practical completion could not be certified. Practically completion certificate was issued on 14th August 2008. The above gave rise to three adjudications.

Adjudication 1 & 2 dealt with the question whether or not practical completion had been achieved on a documentary and factual basis and if not, liability for LADs. In adjudication 3 the contractor sought to establish that the consequence of partial possession in August 2007 was that practical completion had been achieved and thus the previously awarded LADs were not due.

In these enforcement proceedings regarding adjudication No3 the court held that the adjudicator had no jurisdiction since it was essentially the same dispute as previously determined in adjudication No1. ***HG Construction v Ashwell Homes*** [2007] EWHC 144 applied.

Quietfield v Vascroft [2007] BLR 67; ***VHE v RBSTB*** [2000] BLR 187, ***Mivan v Lighting Technology Projects*** [2001] ADJCS 04/09 (TCC) : ***Skanska v ERDC*** [2003] SCLR 296. ***Emcor Drake & Skull v Costain*** 97 Con. LR 142; ***David McLean Contractors v Albany*** [2005] EWHC B5 (TCC), ***Sherwood & Casson v Mackenzie Engineering*** [2004] TCLR 418. ***KNS v Sindall*** [2000] EWHC 75 (TCC); ***Construction Group v Highland Council*** [2002] BLR 476 considered.

Henderson v. Henderson *(1843) 3 Hare 100,* ***Johnson v. Gore Wood*** *[2002] 2 AC 1* noted regarding issue estoppel. Mr Justice Coulson : TCC. 17th September 2008

Bennett v FMK Construction Ltd. [2005] EWHC 1268 (TCC)

The applicant sought a declaration that a final certificate issued under a JCT Form 1998 P without Q is conclusive evidence of the matters stated in it. The defendant disputed the validity and correctness of the certificate and referred the dispute to adjudication.

Having accepted the appointment, due to a bereavement the adjudicator resigned to avoid any allegations that the contractual timetable for adjudication was not complied with.

Five days later the dispute was referred again to adjudication and the same adjudicator was appointed. The problem was that this second appointment was outside the 28 day period specified under clauses 30 and 41 respectively of the JCT, which effectively precludes the opening up of final certificates by the adjudicator, which in consequence become final and conclusive according to the contract. Does this offend the HGCRA and the Scheme which empowers the adjudicator to open up certificates? Further, was the adjudicator validly re-appointed?

Havery J held that the certificate became conclusive evidence. ***Fastrack Contractors v. Morrison*** [2000] B.L.R. 168 applied. However, he also found that the adjudicator had been validly appointed, since an adjudicator can be appointed at any time. His Honour Judge Richard Havery. TCC. 30th June 2005.

COMMENT : The implication of all this is that whatever else the duly appointed adjudicator might decide, opening up the conclusive certificate would no longer be available to him. The outcome for the defendant was very serious. Tactically, if there was any way that the adjudicator could have kept going, rather than resigning, by seeking at least the minimum 10 day extension, which was the gift of the claimant under the adjudication procedure would have been preferable. Certainly, the risk of allegations of breach of contractual timetable for adjudication were less for the applicant than the outcome of resigning in the circumstances of the tight timetable and specific terms set out in the JCT Form.

Bennett (Electrical) Services Limited v Inviron Limited [2007] EWHC 49 (QB)

The parties to this dispute which was submitted to adjudication proceeded on the basis if a Letter of intent, headed "Subject to Contract", which provided for remuneration on the basis *of "reasonable and substantiated direct costs of complying with this instruction"* in the event that no contract is subsequently concluded.

The first adjudicator appointed expressed a non-binding view that there was no contract. A second adjudicator subsequently determined there was a contract and proceeded to issue a decision. However, a challenge on the grounds of double jeopardy was not addressed by the court.

Nonetheless, in the course of enforcement proceedings the court held that an agreement based on "*request and restitution*" is not a contract and further held that oral agreements regarding "*working hours, mechanisms of payment, variations, insurance and health and safety*" were key provision which if not written precluded HGCRA adjudication by virtue of s107. Accordingly the adjudicator had no jurisdiction and the decision was not enforceable in summary proceedings.

BSC v Cleveland Bridge and Engineering Company Limited 1984 1 All ER 504 and ***RJT Consulting Engineers Ltd v DM Engineering Ltd*** 2002 WLR 2344 CA applied. David Wilcox J : TCC. 19th January 2007.

COMMENT : It is not clear why the court held that an agreement to pay on a remuneration or quantum meruit basis is anything less than a contract. Further more, why would the issues canvassed in the oral agreement be key issues not amenable to quantification via quantum meruit and thus contrary to the HGCRA s107 ?

It is after all the type of function that an adjudicator is well suited to performing and within the spirit both of the CPR and the objectives of Lord Woolfe and the HGCRA draftsmen. How much of a precedent this case however is less clear since the court referred to the following statement from ***Rossiter v Miller*** (1878) 3 App. Cas.1124 where Lord Blackburn said: *"I think the decisions settle that it is a question of construction, whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up."* Thus it may be a mere decision upon the facts of the case and no more.

On the one hand the courts have made strenuous efforts to carve out enforceable elements within letters of intent, recognising the growing role (albeit a role not necessarily popular with the courts) that they play in modern commerce and the need to provide some remedy for the parties to such arrangements where a contract can be determined, yet here the court has severely limited the scope for enforcement, virtually to the extent that terms have to be at such an advanced stage that a final contract might as well have been concluded. It continues to be the case that all Letters of Intent should come complete with a Government Health warning.

Bickerton Construction Ltd v Temple Windows Ltd [2001] BM 1500 27

Bickerton, the main contractor, contracted under Dom/2 form with Temple for the design and installation of windows. Bickerton gave notice of termination, hired another contractor to complete the works and carry out reparations and commenced adjudication to recover the reparation costs. Temple responded firstly by denying that a dispute had yet crystallised, disputed allegations of bad workmanship in design and installation, disputed the financial calculations put forward by Bickerton and invited the adjudicator and Bickerton to broaden out the jurisdiction to embrace determination of the final account. Bickerton refused to broaden out the jurisdiction.

The adjudicator, without determining the final account, sought to fix a sum as a starting point to determine deductions. The applicant's figures were accepted as being accurate. No reasons were required or given for so doing. The adjudicator essentially attempted to limit himself to the terms of reference and furnish a decision limited to what sums could be withheld – but since the applicant wanted a repayment a starting point was needed to determine the balance between what had been already paid, what was due and thus to finally determine what if anything should be repaid. Kirkham J held that this amounted in a round about fashion to determining the final account whilst ignoring the respondent's submissions on what that should be. Accordingly, the adjudicator had exceeded his jurisdiction and the decision was unenforceable.

Her Honour Judge Frances Kirkham. TCC. 26th June 2001.

COMMENT : The central problem here was that Bickerton attempted to limit the scope of the reference to what it wanted and to exclude any potential claims by Temple. Ideally Temple needed to complete the reparations, do the final accounts and then finalise the matter either by agreement or adjudication. No doubt Bickerton was motivated by cash flow. However, whilst inconvenient the only practicable way of resolving this was to deal with how much was due to Temple to establish a starting point from which deductions could be made. It was clearly impracticable for the adjudicator to deal with "***half a dispute.***" Bickerton

would have been well advised to accept the invitation to broaden out the scope of the adjudicator's jurisdiction. The absence of reasons masked the "*roundabout logic*" conundrum, demonstrating why reasons are beneficial.

Birmingham City Council v Paddison Construction Ltd [2008] EWHC 2254 (TCC)

This case concerns an application for a declaration that the subject matter of a 2nd adjudication was the same as a prior adjudication. The 1st adjudication concerned 1) a disputed application for an Extension of Time (EOT), 2) return of LAD's deducted from a stage payment imposed subsequent to the refusal of an application for an EOT and a claim for Loss and Expense arising out of the EOT. Paddison was successful on Points 1 and 2.

The issue here was whether the first adjudicator dealt with the Loss and Expense Claim and if not whether a 2nd adjudicator could deal with it. The first adjudicator's decision was in the following terms : -

"Direct loss and or expense claim

1 *The contractor has submitted a claim in the sum of £294,158.83.*
2 *The sum currently certified amounts to £40,541.59.*
3 *Having considered the submissions by both Parties and particularly File 5 submitted by the Contractor, I consider the claims made to be extravagant and exaggerated.*
4 *I consider the claim made and the information compiled, down to the telephone bills, to be nothing other than an attempt to claim as much as possible on the proviso that they may achieve some success if not all their claim.*
5 *I do not dispute that some claim over and above the £40,541.59 may be due and I would grant the Contractor leave to pursue this claim via a further Adjudication if they so wish.*
6 *For the claim to be analysed in detail, I believe a 3rd Party Quantity Surveyor would need to be appointed to assist the Adjudicator. The tight timescales associated with Adjudication, even considering the extension of time granted to me, would, I believe require a dedicated adjudication to consider the claim within the prescribed time frame.*
7 *I am not prepared therefore, to grant any further monies relating to the Contractors loss and/or expense claim."*

The court determined that the 1st adjudicator had held that nothing due, concluding that it was an extravagant and exaggerated claim. The adjudicator had no right to indicate that the matter might be re-adjudicated. Any challenge had to be by arbitration or litigation. Accordingly the 2nd adjudicator had no jurisdiction. The court noted that the adjudicator had a duty to make a decision and if he intended not to do so to consult the parties. He had not done the latter.

If a further application for extension of time had been made it may well have been granted enabling him to deal with any additional sums that might be due. However, what he could not do was grant permission to go to a third adjudication.

CIB v Birse [2005] BLR 173; ***Balfour Beatty v London Borough of Lambeth*** [2002] EWHC 597 (TCC), ***Cantillon v Urvasco*** [2008] EWHC 282 (TCC). ***VHE Construction v RBSTB*** [2000] BLR 197. ***Sherwood & Casson v McKenzie*** (2000) 2 TCLR 418. ***Holt v Colt*** [2001] EWHC 451 (TCC). ***Quietfield v Vascroft*** [2007] BLR 67 considered. HHJ Frances Kirkham TCC Birmingham Registry. 25th September 2008

COMMENT : It is difficult to reconcile the finding that the claim was dealt with and dismissed by the adjudicator with the first part of para 5 "*I do not dispute that some claim over and above the £40,541.59 may be due."* The notion of granting leave is clearly not available to the adjudicator and thus what was intended by the words "*I would grant the Contractor leave to pursue this claim via a further Adjudication if they so wish"* becomes questionable in consequence. If the intention was to leave this option open clearer words such as *"I make no decision on this aspect of the claim, leaving it open for a subsequent reference to adjudication"* would have worked, but only if this was put to and acceded to by the parties. Otherwise, the adjudicator had a duty to make a decision, though since it is possible that more than one dispute was referred (as permitted by the contract) then the decisions on the first two issues would still stand.

Birse Construction Ltd v HLC Engenharia E Gestäo De Projectos Sa [2006] EWHC 1258 (TCC)

This involved an application for discoveries to facilitate a challenge to an adjudicator's decision. Applications for pre-action disclosures whilst unusual, were in this case acceded to in part. The court determined that the applicant was out of the loop in respect of matters that concerned on going obligations

and further that the information could facilitate settlement and also help to determine issues in respect of lawfulness of determination of contract, thus avoiding further litigation. ***XL London Market Ltd v Zenith Syndicate Management Ltd*** [2004] EWHC 1182 (Comm) : ***Briggs & Forrester Electrical Ltd v The Governors Of Southfield School for Girls*** [2005] BLR 468 : ***First Gulf Bank v Wachovia Bank National Association*** [2005] EWHC 2827 (Comm) considered. Mr Justice Jackson. TCC. 2nd May 2006

Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd [2000] BLR 314

This case considered whether, and if so in what circumstances, an Adjudicator can alter his own decision to correct a clerical mistake or error arising from an accidental slip or omission.

The parties to a construction dispute made submissions to the adjudicator virtually right up to the last moment. Whilst a request by the adjudicator for a 14 day extension in time had been refused the adjudicator had notified the parties that he would make his decision in principle before the end of the 28th day from reference but not issue the decision until two days later, to allow time to do the necessary calculations. Accordingly a 2 day extension was granted. The decision was issued in time. However, once issued the defendant noticed that payments on account had not been taken into account in the calculations as to what was then outstanding and due for payment. The adjudicator, on notification of this mis-calculation, issued a revised decision which took account of the payments on account.

The applicant, whilst accepting that, mistake apart, he would not be entitled to the benefit of what would amount to an over payment, asserted that the adjudicator's decision must be enforced even if it contains errors. ***Macob v Morrison, Sherwood v Mackenzie, VHE v RB STB*** and ***Northern Developments v Nichol.***

Toulmin J held that the Slip rule that operates at common law (***Hanks v. Ace High Productions*** *[1979] IRLR 32* and ***Falilat Akewushola v. SS Home Department*** *[1999] IAR 594*) and in respect of arbitration applies equally to adjudication, so that an adjudicator can correct mere mistakes in a decision to reflect his original intention. This is particularly important since it is clear from ***Bouygues v Dahl-Jensen*** that the court cannot correct errors. Contrary to ***Casella (London) Limited v Banai*** [1990] ICR 215 the adjudicator does not immediately become functus officio on issuing the decision, at least for the purpose of correcting slips, This facility does not however extend to re-opening the hearing and additional argumentation.

His Honour Judge Richard Toulmin. TCC. 5th April 2000.

Bothma D & T t/a DAB Builders v Mayhaven Healthcare Ltd [2006] TCC Bristol 6BS90599

This dispute involved a Scheme Adjudication since the adjudication provisions under the JCT contract had been deleted. ***Pring v Hafner : Fastrack v Morrision : Barr v Law Mining ; Sindall v Solland : David McClean v Swansea HA*** considered regarding the requirement for only one dispute to be referred to adjudication at a time. The court found on the facts that multiple disputes had been referred without consent to jurisdiction. These included progress payment No9, plus a dispute as to the due date for completion under the contract. The disputes were not interrelated, neither being an integral part of the other.

The court held that a general objection to jurisdiction is sufficient to override assertions of waiver - a party can successfully resist enforcement on new jurisdictional grounds not put to the adjudicator. ***Project Consultancy v Gray Trust : Durtnell v Kaduna*** applied. ***Carillion v Devonport*** considered. The two grounds of objection to jurisdiction, namely one on personality and another on whether the notice of adjudication was effective. Both grounds were not pursued as a defence to enforcement. Instead Mayhaven relied on the two dispute issue instead. Havelock-Allan QC. TCC Bristol Registry. 16th November 2006

COMMENT : It is submitted that if this decision is correct it is unhelpful in that a respondent could raise a non-specified objection to adjudication, take part subject to the reservation and if unsuccessful resist enforcement on specific jurisdictional grounds not raised during the course of the adjudication - which if established would prevent enforcement.

Whilst an adjudicator does not (unless specifically granted) have jurisdiction over jurisdiction, the adjudicator and the other party will wish to take on board any objections to jurisdiction, evaluate their validity and make a considered choice as to whether to proceed or not. This decision, if correct, would allow the respondent to hold an unspecified complaint over everyone's head, only revealing his hand latter. Indeed, it would allow a respondent to wait till everything is over, analyse the events and winkle out allegations of jurisdictional errors thereafter. This, it is submitted is not helpful to the adjudication process,

though given the small amount at stake one imagines that an appeal is unlikely, though it would be one way of proceedings. Alternatively, since the matters are no longer subject to an adjudication, it would also be possible to re-adjudicate both matters, as a combined reference, with consent of both parties or alternatively, as two separate adjudications. Unless agreement can be brokered between the parties, there will be a need to finally establish the contract date if questions of LADs arise.

Bothma (t/a DAB Builders) v Mayhaven Healthcare Ltd [2007] EWCA Civ 527

Two points of claim were adjudicated without consent contrary to Clause 8(1) of Scheme : An application to appeal a refusal to enforce failed. During the paper submission the court indicated that it would not support an assertion that a failure to raise this point on jurisdiction during the adjudication resulted in estoppel or waiver. During the hearing an attempt to find a link between the two points on a technicality failed.

CA before Dyson LJ; Waller LJ. 14th May 2007

COMMENT : It seems a regrettable, missed opportunity, that the court did not get to deal in detail with or to explain why it is permissible for a defendant to raise a new jurisdictional point after an adjudication is done and dusted, during enforcement proceedings. It would have been helpful if the CA had taken the time to explain clearly to us all exactly why arguments as to estoppel and waiver do not apply. As it is, it is likely to be very difficult to raise this issue in future cases - but the jurisprudence is far from satisfactory and it would have been helpful if the parameters had been set out in a lucid manner. Given the earlier indication of the court, it is understandable why the issue was not pursued during the hearing.

It is clear that adjudication rules which result in consent to multiple issues can be very beneficial. In the Bothma case what was needed in the light of the Scheme was two separate references - perhaps with a request that the same adjudicator be appointed - something most ANBs would be happy to do. Consent to combining the issues would then have been very easy to arrange. Whilst there may be some merit in limiting disputes to single issues without consent, where the issues are small and or the value at stake is not very large, the requirment for multiple references could be viewed as a tiresome technicality and not really in the spirit of the legislation.

Bouygues UK Ltd v. Dahl-Jenson UK Ltd [1999] EWHC TCC 182

Claims and counter claims in respect of a construction contract were referred to adjudication. The adjudicator made a decision. Whilst the adjudicator did not accept that he had made a miscalculation. Dyson.J found that the adjudicator had clearly made a mistake during his calculations, applying a gross figure at one stage which included sums covered by retension provisions. The outcome was that the retention monies were effectively released prematurely. The adjudicator, having declared after the event that there was no mistake, refused to operate the slip rule and amend his decision, but clearly felt that if required he would be permitted to do so. Bouygues were aggrieved since if the correct figures had been applied they would have been creditors rather than debtors and so they sought declarations or remissions in respect of the decision.

Having reviewed ***Macob, Project Consultancy v Gray Trust, Palmer v ABB Power, Jones v Sherwood, Cambell v Edwards*** and ***Jones v Jones***, Dyson J adopted the general principle applied by Knox J in ***Nikko Hotels v MEPC*** to the effect that *"if he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."* Bouygues asserted that it was not within the adjudicator's jurisdiction to release retension monies. Dyson J held that whilst that may have been the practical result, in reality it was the consequence of a mathematical mistake – not an intentional release of retention monies. He was within his jurisdiction. His Honour Judge Dyson.TCC. 17th December 1999.

Bouygues UK Ltd v Dahl-Jensen UK Ltd [2000] EWCA 2/2000/0181 : [2000] BLR 522

The CA dismissed an appeal against the judgment of Dyson J. confirming that the adjudicator had made an error in his calculation and dismissing the assertion that he had exceeded his jurisdiction by dealing with the release of retentions. Accordingly the decision fell to be enforced. There error could be corrected subsequently during proceedings for final determination, by arbitration or litigation as required by the contract. Dahl-Jensen had meanwhile gone into liquidation. Since all claims and counterclaims merge and the adjudication was not a final determination, the court ordered a stay of execution of the adjudication decision, pending final determination during liquidation proceedings.

Macob v Morrison *[1999] BLR 93.* ***Nikko Hotels v MERPC*** *[1991] 2 EGLR 103.* ***Jones v Sherwood*** *[1992] 1 WLR 287.* ***Stein v Blake*** *[1996] 1 AC 243.* ***Forster v Wilson*** *(1843) 12 M & W. 191* considered.

CA before Lord Justices Peter Gibson, Chadwick and Buxton. 31st July 2000.

Bovis Lend Lease Ltd v Triangle Development Ltd [2003] BLR 31 : HT 02/0375

Bovis entered into a construction management contract with Triangle on JCT Standard Form of Management Contract, 1998 Edition terms for the refurbishment of three schools into luxury apartments. The architect revalued previous interim certificates resulting in a negative figure. This was referred to adjudication by Bovis. The adjudicator reinstated the previous figures and ordered sums payable to Bovis. Triangle disputed its obligation to pay. Bovis commenced this action under Part 8 CPR rather than under the usual Part 24 procedure that is used for adjudication enforcement. At one stage the parties had agreed to mediate the revaluation issue but the mediation did not eventually take place. An assertion that the adjudicator had miscalculated and that the decision should be rectified rendering a negative sum as due failed.

Triangle also referred disputes to adjudication on two separate occasions. The contract was determined and a dispute arose regarding who had determined the contract and whether or not the determination was lawful. Depending upon the outcome of this issue, sums would be due to one or other of the parties. The central issue in this case however centred around whether or not sums potentially due to Triangle arising out of determination by Bovis could be set off against the first adjudicator's decision.

The court considered Dyson J's judgment in ***Macob v Morrison*** and Hicks J's judgement in ***VHE Construction v RBSTB*** **(**which was followed in ***Northern Developments v Nichol*****),** ***Solland v Daraydan*** and ***Levolux v Ferson*****.**

The court was invited to consider Judge Lloyd's judgments in ***KNS v Sindall; Glencot v Barrett*** and ***David McLean v S.H.A*****.** and determine that the adjudication decision is not a distinct enforceable right immune from the broader implications of the contract and consequent rights of set off. His Honour Judge Richard Thornton reviewed the three decisions and determined they are in fact in line with ***Macob*** and ***VHE*** and simply provide illustrations of those general principles in specific situations, relying on the paraphrasing of the ***McClean*** judgement by Seymour J in ***Solland v Daraydan***. Thornton J concluded :- "

1. *The decision of an adjudicator that money must be paid gives rise to a separate contractual obligation on the paying party to comply with that decision within the stipulated period. This obligation will usually preclude the paying party from making withholdings, deductions, set offs or cross-claims against that sum.*
2. *For a withholding to be made against an adjudicator's decision, an effective notice to withhold payment must usually have been given prior to the adjudication notice being given, or possibly the decision being given, and which was ruled upon and made part of the subject-matter of that decision.*
3. *However, where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail.*
4. *Equally, where a paying party is given an entitlement to deduct from or cross-claim against the sum directed to be paid as a result of the same, or another, adjudication decision, the first decision will not be enforced or, alternatively, judgment will be stayed.*

The court then considered whether or not on the basis of the facts as determined by the adjudicator in the second reference – namely that it was Bovis and not Lease Lend who had determined the contract, the operation of contractual provisions related to determination which trumped the adjudicator's decision in that it gave a right to set off claims against the adjudicator's decision. In consequence nothing was due to Bovis under the Part 8 application, though a variety of other issues were left open for determination at a subsequent trial. ***Parsons Plastics v Purac. Northern Developments v Nichol*** and ***Levolux v Ferson*** considered. His Honour Judge Anthony Thornton. TCC. 2nd November 2002.

Bracken v Billinghurst [2003] EWHC 1333 (TCC)

A contractor pulled off site pending settlement of a dispute over the costs of additional temporary structural propping works. In response the client terminated the contract. The matter was referred to adjudication. Whilst the client prevailed in this and a subsequent adjudication whereby £46K + was due to him, a separate issue concerned whether the relevant contractor was Mr Billinghurst or Advanced Building Technology Ltd (ABTL). The adjudicator determined that the contract was with Mr Billinghurst.

Despite this apparent victory Bracken then offered to accept £6,000 (a sum stated to cover the adjudication costs) to put the matter to rest. ABTL responded by sending a cheque for £5,000 in final settlement. Bracken cashed the cheque but then (having retained fresh legal advisors) asserted that the sum was cashed as a down payment and indicated that unless the outstanding balance was paid forthwith an action for enforcement of the adjudication decisions would follow. No payment having been made a Part 24 action was commenced. Realising that there was viable issue as to compromise the court adjourned and reconvened as a trial of the compromise issue. Applying ***Hirachand Punanchand v Temple*** *(1911) 2 KB 330*, Wilcox J held that the claim had been compromised. ABTL had offered £5k in final settlement of the debt of Billinghurst, a 3rd party. By cashing the cheque Bracken was deemed to have accepted the compromise offer. Accordingly the claim was extinguished. His Honour Judge David Wilcox. TCC. 10th June 2003.

Branlow Ltd v Dem-Master Demolition Ltd [2004] ScotSC A904/03

Following oral discussions and exchange of a 15 page fax and an exchange of letters, the parties by common consent entered into a contract. The scope of the contract was ill defined in these two brief documents. A dispute in respect of the impact of subsequent instructions and the valuation of variations arose which was referred to adjudication, The enforceability of the adjudicator's decision was challenged on the basis that in the absence of a construction contract in accordance with s107 HGCRA the adjudicator had no jurisdiction, In particular the lack of specification usual in standard form contracts such as the JCT demonstrated that whilst it was common ground that there was a contract, that contract was oral and not limited to the information in the documents.

The court rejected this argument and held that there was a written construction contract. The two letters, albeit lacking detail, contained the essence of the contract, sufficient to amount to a construction contract for HGCRA adjudication.

RJT Consulting v DM Engineering *2002 BLR 217* ***Ballast v Burrell*** *2002 BLR 279.* ***Debeck Ductwork v T & E Engineering. Carillion v Davenport Royal Dockyard*** *2003 BLR 79.* ***CCG v Highland Council*** *2003 SC464.* ***R G Carter v Edmund Nuttall*** considered.

Sherrifdom of Lothian & Borders at Linlithgow. 26th February 2004

Brenton A.J. v Palmer [2001] TCC 00/436

An adjudicator decided that the client (Palmer) should paya sum of £24K + to Brenton. He also determined that the relevant person under the contract was Brenton as opposed to his company, Lords of Princetown Limited. Resisting an enforcement action Palmer maintained that the relevant person was LPL. Thus the adjudication was unenforceable and further submitted that the adjudicator had no jurisdiction to rule on his own jurisdiction by determining who the relevant contracting party was. His Honour Judge Richard Havery referred to ***The Project Consultancy Group v The Gray Trust***, where Dyson J, quoted himself in the earlier case of ***Macob v Morrison***. He then determined that the adjudicator did have jurisdiction to determine as a fact who the contracting party was. This was an interim binding decision pending final determination. Accordingly the decision was immediately enforceable.

His Honour Judge Richard Havery. TCC. 19th January 2001.

Bridgeway Construction Ltd v Tolent Construction Ltd [2000] TCC : [2000]CILL 1662

A construction dispute was referred to adjudication. The contract incorporated a modified version of the CIC Model Adjudication Procedure. The Model procedure provides inter alia :-

Clause 28: *"The parties shall bear their own costs and expenses incurred in the adjudication."*

Clause 29: *"The parties shall be joint and severally liable for the adjudicator's fees and expenses."*

The modified version provides inter alia :-

Clause 28: *"The party serving the Notice to Adjudicate shall bear all of the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and experts fees."*

Clause 29: *"The party serving the Notice to Adjudicate shall be liable for the adjudicator's fees and expenses."*

The applicant sought a declaration that these provisions were invalid in that they acted as a disincentive to adjudication. The court held that the contract in all ways complied with the HGCRA which was silent on the payment of costs. In consequence the provisions were valid and the successful applicant was liable for the costs. It should be noted that neither party invited the adjudicator to determine what costs, if any were due, simply to determine who was liable for costs, which the adjudicator promptly did on the basis of the terms

of the contract. His Honour Judge Mackay observed that the parties had agreed upon these terms and an aggrieved party could not subsequently complain when the terms of the contract impacted adversely upon them. ***Johnson v Moreton [1980]*** *AC 37* distinguished. His Honour Judge Mackay. TCC. 11th April 2000.

COMMENT : Whilst there was little scope for Mackay J to rule otherwise, the use of such cost provisions has been roundly criticised. Sub-contractors confronted with such a clause in tender documents may lack the bargaining power to have the terms struck out. They certainly do not reflect the balance of fairness envisaged by the drafters of the CIC Model Adjudication Rules. The majority of claims are by sub-contractors against contractors, not the other way round, so that the provisions are generally more favourable to the main contractor. Even more pejorative clauses have been used which state that all costs will be borne by the sub-contractor, whoever makes the reference. Legislation is in the pipeline to outlaw such clauses but the amendments have been a long time coming.

Britcon (Scunthorpe) v Lincolnfields [2001] EWHC (TCC) HT 01/259

Lincolnsfield subcontracted infrastructure works on a highway project to Britcon. After the broad terms of the contract were set out the client introduced a term into the main contract that payments would be deposited into an escrow account with payments being released from the account on the occurrence of escrow events, which under s38 Highways Act included certifications. Lincolnsfield attempted to introduce mirror provisions into the subcontract with Britcon. It is not clear whether these oral provisions formed part of a collateral contract as asserted by Lincolnsfield or were orally incorporated into the initial draft of the contract. Subsequently the parties concluded a final contract which made no mention of escrow.

Brticon successfully submitted a payment dispute to adjudication. Lincolnsfields unsuccessfully asserted that the escrow provisions applied and submitted that because two bell mars had not been installed there had been no certification and hence no monies were due for release from the escrow account. The adjudicator determined that 1) oral contracts and collateral contracts are not subject to the HGCRA and were beyond his jurisdiction 2) that even if the escrow contract had bee agreed and incorporated 3) it had been superseded by the final version of the contract and was not part of it and thus did not apply.

Enforcement was resisted by Lincolnsfield on the grounds that the adjudicator had not considered the escrow issue and acted in excess or jurisdiction. His Honour Judge Thornton held that the adjudicator had considered all the issues. Whilst his decision as to whether or not the oral / collateral contract could have formed part of a HGCRA Construction contract was questionable, since he decided for right or for wrong, as a question of fact, that the escrow issue was not incorporated into the final version of the contract, those decisions had no impact on the outcome. Payment application approved.

His Honour Judge Anthony Thornton. TCC. 29th August 2001.

British Waterways Board [2001] ScotCS 182

Clause 90 of a construction contract provided for a negotiated settlement mechanism. The applicants for judicial review attempted to establish that on a balance of convenience an adjudication should be stayed for one month to allow this procedure to take place. Lord McCluskey, noting that stale mate in negotiations had occurred 5 months previously, concluded that an additional month's delay was unlikely to result in a settlement, refused to impose a stay. He noted that whilst the contract provided for interest at 1% above bank rate, the applicants in the adjudication were subject to borrowing rates of 3-4% above bank rate. There was no justifiable reason for delaying the adjudication, the resolution of the dispute or potentially keeping the contracting party out of funds. Lord McCluskey. Outer House, Court of Session. 5th July 2001.

Brown (L) & Sons v Crosby North West Homes [2005] 47 BLISS 1 (*no transcript - summary only*)

This was an action to enforce the decision of an adjudicator. The parties had contracted under CD 98 standard form. Article 5 related to the "*right to refer disputes arising under the contract*". Article 39(A)(1) as amended referred to disputes "*arising under, out of or in connection with the contract*." Did this cover bonus payments and waiver provisions regarding LADs contained in side agreements which themselves had no dispute provisions? His Honour Judge Ramsey held that Article 39 extended jurisdiction to side agreement and hence the adjudicator's decision was enforceable. ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1 All ER 98 : ***Homburg Houtimport v Agrosin (The Starsin)*** [2003] 2 All ER 785. applied. His Honour Judge Ramsey. 5th December 2005.

Brown (L) & Sons Ltd v Crosby Homes (North West) Ltd [2008] EWHC 817 (TCC)

s68(2)(g) AA 1996 application to serve appeal 66 days late against an arbitration award (No1) that overturned an adjudication decision. Assertion that documents disclosed in a subsequent arbitration (No2) would have resulted in a different result in No1. Held : Disclosure of the documents had not be ordered - and unlikely to change anything. Perjury allegations not sustainable. No good reason for the delay.

Re grounds for s68 challenge ***AOOT Kalmneft v Glencore International AG and Another*** [2002] 1 Lloyd's LR 128, ***Nagusina Naviera v Allied Maritime Inc*** [2002] EWCA Civ 1147, ***Thyssen Canada Ltd v Mariana Maritime S.A & Another*** [2005] EWHC 219 (Comm), ***Profilati Italia S.r.L. v Painewebber Inc and Another*** [2001] 1 Lloyd's LR 715 considered. Mr Justice Akenhead. 23rd April 2008.

Bryen & Langley v Boston [2004] EWHC 2450 TCC

Domestic contract to convert two newly acquired flats into one ready for occupation by the client. The householder invited the adjudicator invited to consider his jurisdiction in respect of a dispute about money. The original contract was for £450K and the client declined to pay more when an application would have taken payments up to £660K. The adjudicator ruled that he had jurisdiction and went on to decide that the application was due. The household resisted enforcement on the grounds that there was no written contract and that the adjudicator had no jurisdiction. The court held that in the absence of an agreement to refer jurisdiction to the adjudicator for a decision or a contract term giving him jurisdiction on jurisdictional matter, questions of jurisdiction fall to be finally determined by the court. The adjudicator merely considers his jurisdiction but does not make a decision as such. Further, whilst the parties had intended to contract on JCT terms, work commenced without the signing of a contract. The adjudicator had no jurisdiction to hear the dispute and had no jurisdiction to rule on his own jurisdiction.

Fastrack v Morrison ***2000.*** ***DG Fair Trading v First National Bank*** *[2002] 1 AC 481,* ***Freiburger Kommunalbauten v Hofstetter. Picardi v. Cuniberti*** *[2003] 1 BLR 487,* ***Lovell Projects v Legg & Carver*** *[2003] 1 BLR 452,* ***Zealander v. Laing Homes. Westminster v Beckingham*** *[2004] 1 BLR 265.* ***Pegram Shopfitters. v Tally Weijl*** *[2004] 1 BLR 65* considered.

His Honour Judge Richard Seymour. TCC. 4th November 2004.

Bryen & Langley Ltd v Boston [2005] EWCA Civ 973

Boston tendered on JCT Standard Form terms for conversion and fit out of two flats into one, which he intended to occupy. The terms retained the adjudication provisions. B&L successfully tendered for the contract and commenced work, even though a number of minor details had yet to be finalised. A dispute on payment arose, which B&L referred to adjudication. The adjudicator found for B&L. Boston successfully resisted enforcement before Seymour J on the basis that there was no contract in JCT Form – no contract having been formally signed by Boston. B&L now successfully appeal that decision. Mr Justice Rimer found on the facts that all the central terms of the contract were confirmed by a letter from Boston to B&L. Outstanding matters were in the nature of variations. The mere fact that the contract would be formalised later did not detract from the fact that at that point of time a contract came into being, or at the very latest did so as soon as B&L started work, on the agreed terms as set out in the tender, subject to agreed variations in respect of time and price and expansion of works to cover preparation work not completed by previous contractors. Mr Justice Rimer relied upon :-

Latham LJ's dicta in ***Harvey v ADI*** *[2003] EWCA 1757 "The recorder was entitled to conclude, as Dyson J had done in [****Stent Foundations Ltd v. Carillion Construction (Contracts) Ltd (formerly Tarmac Construction (Contracts) Ltd*** *(2000) 78 Con LR 188], that the mere fact that the letter giving instructions to proceed envisages the execution of further documentation, does not preclude the court from concluding that a binding contract was none the less entered into, provided that all the necessary ingredients of a valid contract are present. …Having concluded that the parties had agreed to a fixed-sum contract under IFC 84 conditions, it is not surprising that the recorder held that the words in question, construed conjunctively, mean what they say. In other words, the only circumstance in which the appellants were to be entitled to a quantum meruit was if the contract did not proceed and was not finalised. The contract did proceed."*

The dicta of Blackburn J in ***Rossiter v Miller*** *(1878) 3 App Cas 1124 at 1151 "So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract.*

The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." and

The dicta of Parker J in ***Von Hatzfeldt-Wildenburg v Alexander*** [1912] 1 Ch. 284 at 288-9 *"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal contract can be ignored."*

However, Seymour J's decision that adjudication does not amount to an unfair contract term for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999, was upheld. The court referred to similar dicta in respect of the UCTA 1977 in ***Pegram v Tally Weijl, Picardi v Cuiberti, Lovell v Legg*** *and* ***Westminster v Beckingham****.* CA before Lord Justices Clarke, Pill and Mr Justice Rimer. 29th July 2005

BSF Consulting Engineers Ltd v MacDonald Crosbie [2008] All ER (D) 171 (Apr)

Civil and structural engineers submitted a payment dispute to adjudication. The defendants / respondents in this application for summary enforcement countered that the scope of works had not been defined in the contract and payment rates had not been agreed. Accordingly the adjudicator had no jurisdiction and the decision was unenforceable.

The claimant / applicant sought to rely on s15 Supply of Goods & Services Act 1982 to claim a reasonable charge for professional construction services. Whilst the adjudicator found for claimant on this basis, the court held that in the absence of any written agreement as to scope of works or charges, arguably the adjudicator had no jurisdiction under s107 HGCRA. ***RJT Consulting Engineers Ltd v DM Engineering [2002]*** applied. Accordingly leave was granted to defend. The court noted that if there had been an agreement for contractual adjudication, as opposed to reliance on statutory adjudication, it might well be possible to rely upon implied rights under s15 SG&SA 1982. HHJ David Wilcox. TCC. 14th April 2008.

Buxton Building Contractors Ltd v Governors of Durand Primary School [2004] EWHC 733

This concerned the construction of a residential block for a school under JCT IFC 98 Form. Interim, practical completion and expiry of making good defects certificates had been issued. All that remained was final certification and release of 2nd tranch of retention monies. There was a longstanding dispute about door handles, toilet flushes and low water pressure. Buxton failed to deal with the complaints. Outsiders were brought in and amongst other works the drain set out was altered. The school sought to recover the costs of remedying the defects. The school issued a notice of withholding against the 2nd retention sum to recover £16K. An Interim certificate was then issued. The certificate was non compliant with JCT IFC 98 which only allowed for the issue of a final certificate. Buxton commenced adjudication to release of retentions on the basis of the Interim Certificate. The adjudicator dealt with the matter on a paper only basis and concluded that the Interim Certificate was for sums due and in the absence of a valid withholding notice, decided that the sum was due.

It is clear that the adjudicator was wrong to treat the sum as monies earned. It was clearly retention money. Buxton asserted that even if wrong the decision was wrong it was nonetheless enforceable. However since the adjudicator had failed to address the whole dispute, only addressing Buxton's claim whilst ignoring the set-off claim against retention, the decision was unenforceable. Trial not set down pending negotiations / ADR QBD.

His Honour Judge Anthony Thornton Q.C.TCC. 12th March 2004.

CROSS REFERENCE : ***Carillion v Devonport Royal Dockyard*** *[2005] EWCA (Civ) 1358* and ***Kier v City & General*** ***[****2006] EWHC 848* both of which disapproved and refused to follow ***Buxton.***