ADJUDICATION CASE SUMMARIES C

LAST UPDATED 21st DECEMBER 2008

C & B Scene Concept Design Ltd v Isobars Ltd [2002] BLR 93 TCC

The parties contracted on a revised version of the JCT Standard Form of Building Contract with Contractors' Design, 1988 edition *"**Employers' design requirements.**"* Appendix 2 dealt with a choice of payment procedures and this was omitted. The question arose as to whether the payment provisions under Clause 30 (which required election of the options under appendix 2) were workable and if not whether the Scheme applied instead.

A dispute over non payment of interim applications was referred to adjudication. The respondent asserted that the applications were defective. The mechanism for approving variations had not been complied with so no sums beyond the contract sum were due. The adjudicator determined that in the absence of withholding notices by virtue of Clause 30.3 (30.3.5) and 30.5 payment was due on the applications whereas the respondent asserted that the Scheme applied and under that mechanism only sums due under the contract were payable. The court held that the adjudicator erred by apply Clause 30 rather than the Scheme.

The court noted the impact *of **Macob v Morrison, Northern Developments v Nichol, VHE Construction*** and ***Sherwood v Casson,*** but observed that where the adjudicator answers the wrong question, the decision may not be enforced. ***Bouygues*** and ***Nikko Hotels*** (1995) 2 EGLR 103 applied.

However, whilst in the event by the by, Mr Recorder Moxon-Browne QC also considered a belated challenge to the jurisdiction of the adjudicator on the basis that the contract stipulated RIBA not RICs. Applying ***Maymac v Faraday*** this challenge was too late. Equally, an objection that variation provision arose out of compromise agreements outside the main contract and not subject to the HGCRA were raised too late (though he was prepared to accept that if raised on time they may have been effective). However, application No 6 in respect of design did not in the court's view arise under the contract and was not enforceable due to an excess of jurisdiction. Mr Recorder Moxon-Browne QC : TCC. 21st June 2001

C & B Scene Concept Design Ltd v Isobars Ltd [2002] EWCA Civ 46

On appeal C& B Scene asserted that Moxon-Browne's conclusion to point of the defence, 3) namely *"That by failing to appreciate that the contractual provisions of Clause 30 had been superseded by the provisions of the Scheme, the Adjudicator addressed himself to the wrong question and in so doing he exceeded his jurisdiction. "* was incorrect. Rather it was potentially a mistake of law / fact which did not go to jurisdiction.

Sir Murray Stuart-Smith reiterated the dicta of Bowsher J in ***Northern Developments v Nichols*, viz**

"(i) a decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;

(ii) a decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;

(iii) a decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;

(iv) the adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction;

(v) an issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence."

The court then reviewed the dicta of Buxton LJ in ***Bouygues v Dahl-Jensen*** quoted from ***Niko Hotels (UK) Ltd v MEPC plc*** *"If he 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."* and compared this with Moxon-Brown's ruling that the Adjudicator's *"decision is based exclusively on consideration of a contractual provision which did not apply to the*

agreement between parties to the adjudication ….. the Adjudicator's conduct in considering Clause 30.3.5 of the JCT Form rather than Part II of the HGCRA Scheme was in excess of jurisdiction." concluding that this was incorrect. The adjudicator's job under the terms of reference was to decide which contract provision applied. This he did. Even if it was wrong it was nonetheless the job he was required to do and as such the consequences of so deciding were enforceable.

In addition the decision in respect of print and design also arose under the contract and was also enforceable. Appeal allowed. CA before Lord Justice Potter, Rix and Murray Stuart-Smith. 31st January 2002.

Canary Riverside Development v Timtec International [2000] R.Ct .J. 69/2000

This case concerned an appeal against a decision of Mr Registrar Buckley whereby he refused the applicant Canary Riverside Development (CRD) leave pursuant to s.11(3) of the Insolvency Act, 1986 to commence adjudication proceedings against the respondent, Timtec International Ltd. CRD entered into a construction management contract with Bovis for the development of a hotel and residential complex at Canary Wharf. Timtec was retained as one of many specialist contractors. This contract contained monthly stage payments for works done, payable, subject to lawful deduction, 30 + 1 days after submission of application. It also provided for the determination of the contract in the event of the insolvency of the trade contractor and provided for adjudication subject to the ORSA Rules. Timtec was supported by a performance bond.

Timtec submitted applications for payment on 5th January 2000 – though the applications were dated 23rd December 1999. Timtec's workers however did not return to the site after the seasonal vacation. On the 14th January Timtec entered administration (unkown to CRD). A cheque was made out to Timtec on the 17th and presented for clearance on the 18th. Bovis stopped the cheque on the 19th on learning of the insolvency. On the 20th administrators stated that they intended to complete the works but all remaining workers were withdrawn on the 24th and Timtec notified that it would not be in a position to complete works on the 25th. On the 26th CRD gave notice of termination and made a call on the performance bond. CRD then sub-let the works and paid Timtec's administrators £97k for materials on site.

On 17th March Timtec requested that the cheque of the 17th January be honoured and challenged the issue of withholding notices on the basis that they were issued 30 days after the 23rd December and were too late to be effective. On the 14th April CRD requested leave to refer a dispute to adjudication. The hearing was postponed till the 4th of May. Meanwhile Timtec commenced an action to recover the value of the cheque. Leave was refused. CRD could resolve the matter by way of claim and counterclaim in court. The recorder stated that given the temporary nature of an adjudication decision it would not in the circumstances of insolvency be desirable to continue the adjudication.

Deputy Judge DKR Oliver stated that "*It is clear law that a proceeding for adjudication under s.108 of the Housing Grants Act, is a proceeding within the meaning of s.11(3) (d) of the Insolvency Act see* ***A. Straum (UK) Ltd v Bradlaw Developments Ltd …"*** He then concluded that in the circumstances of the case CRD had failed to establish that the recorder had incorrectly exercised his discretion. The court action on the cheque was the most appropriate way for CRD to present its case.

Deputy Judge DKR Oliver. Royal Courts of Justice. London. 9th November 2000.

CONCLUSION : Where a defendant is in administration it is unlikely under s11 Insolvency Act that permission will be granted for an adjudication.

The hurdle to be surmounted is that set out by Nicholls LJ in ***Re: Atlantic Computers Systems PLC*** *[1992] 2CH 545 :-*

"1. It is in every case for the person who seeks leave to make out a case for him to be given leave. "

2 The prohibition on s.11(3) (c) and (d) is intended to assist the company under the management of the administrator, to achieve the purpose for which the administration order was made. " …….

"There is one final matter to which we now turn. In the course of argument we were invited to give, guidance on the principles to be applied on applications for grant of leave under section 11. It is an invitation to which we are reluctant to accede, for several reasons: first, Parliament has left at large the discretion given to the court, and it is not for us to cut down that discretion or, as it was put in argument, confine it within a straight jacket. However much we emphasise that any observations are only guidelines, there is a danger that they may be treated as something more".

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)

This involved an application for enforcement and a challenge to enforcement on the grounds of both jurisdiction and natural justice. The adjudication concerned disputes as to two separate applications for extensions of time with regard to a demolition, piling and ground works contract. With regards to the 2nd application an issue arose as to the relevant period of time that should apply to the EOT, which triggered a further question as to the basis on which damages, if any might be calculated. Urvasco asserted that since the relevant time was different, the adjudicator had no jurisdiction to deal with damages, since that period was not specified in the notice and referral. By dealing with the issue the adjudicator went off on a frolic of his own, essentially making the case for the claimant.

The court disagreed. The way the defence was run – based on an analysis of The Critical Path and deviation from it - resulted in the adjudicator determining a different period to that initially claimed. This however did not deprive the adjudicator of jurisdiction since it was a result of assertions by the defence, which did not deprive the claimants of a right to an EOT and consequently to compensation, the determination of which was the very task entrusted to the adjudicator. ***Edmund Nuttall v R G Carter*** *[2002] CILL 1853 not followed, and* ***Balfour Beatty v Mayor & Burgess of London Borough of Lambeth*** *[2002] BLR 288* considered.

As to the meaning of a dispute, ***Carillion v Devonport Royal Dockyard*** [2006] BLR 15, ***KNS v Sindall Ltd*** [2001] 75 Con LR 71. ***Amec v S.S. for Transport*** [2005] BLR 227 ; ***Collins v Baltic Quay*** [2004] EWCA (Civ) 1757 were referred to, and from these case the court drew the following conclusions :-

(a) an over legalistic analysis of what the dispute between the parties is to be avoided.

(b) one needs to determine in broad terms what the disputed claim or assertion is.

(c) one cannot say that the dispute is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral.

(d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the stated defence.

The court found no breach of the rules of natural justice. ***Discain v Opecprime*** [2001] BLR 285 ; ***Macob v Morrison*** *[1999] BLR 93* considered. Urvasco had the opportunity at all times to address quantum, having been given clear warning by the adjudicator that how he intended to proceed, but they chose not to respond further.

The court also addressed the question of severability of the award, though in the circumstances, merely obiter. ***Amec v Whitefriars*** [2005] BLR 1, ***RSL v Stansell Ltd*** *2003;* ***Griffin v Midas Homes Ltd*** *[2001] 78 Con LR 152.* ***Homer Burgess v Chirex*** [2000] BLR 124. ***Farebrother v Frogmore*** [2001] CILL 1589. ***Shimizu v Automajor*** [2002] BLR 113. ***Durtnell v Kaduna*** [2004] 20 Const LJ considered. Whilst not applicable since no breach of natural justice had occurred, his honour declared that he would have severed the decision, only setting aside variable sums in respect of quantum for the 2nd extension of time, but no more, since any breach would at best have been of a technical nature.

Finally, the court noted that even if, as alleged, the adjudicator had got the law wrong, the decision would still be enforceable. ***Bouygues v Dahl- Jensen*** [2000] BLR 522 applied.

Mr Justice Akenhead. TCC. 27th February 2008

Capital Structures Plc v Time & Tide Construction Ltd [2006] EWHC 591 (TCC)

The claimants were sub-contractors on construction works. A payment dispute arose. The claimants withdrew from site. The defendant's employer threatened to remove it from the works. The parties then concluded a settlement agreement. The agreement provided that any default of the settlement agreement be referred to adjudication. The defendant failed to honour the settlement agreement. The claimant referred the non-payment to adjudication. The defendant's response to the referral was that the settlement was induced by duress and stated that it was electing to set the agreement aside. The adjudicator found for the claimant who on non payment applied to summary judgment. The court held

1) There was no jurisdiction since the contract had been avoided. In the absence of a contract an arbitrator and likewise an adjudicator had no jurisdiction.
2) Fraud, duress, essential error cannot be the subject matter of an adjudication - no jurisdiction.

A distinction is drawn between the concept of separability (the concept of Kompetenze / Komptenze – which is now embodied in s7 Arbitration Act 1996.) whereby even if a contract is repudiated or breached, the arbitration / adjudication provision survives the contract and circumstances where due to avoidance, on the grounds of duress etc, the contract ceases to have existed in the first place. In the absence of a construction contract the adjudicator has no jurisdiction.

Alternatively however, if there was no lawful avoidance, the contract subsists and the adjudicator has jurisdiction. In the circumstances the court declined summary enforcement and the case was put out to trial. The court held that there was a real, albeit small, prospect of success so summary enforcement was not appropriate. The court was prepared to hear application for appeal.

A & D Maintenance v Pagehurst considered. ***Heyman v Darwins*** [1942] 1 All ER 337 applied.

Judge David Wilcox. TCC. 8th March 2006

Captiva Estates Ltd v Rybarn Ltd [2005] EWHC 2744 (TCC)

The applicants successfully sought a declaration that the relevant contract was a development agreement within the meaning of the Construction Contracts Exclusion Order 1998, Statutory Instrument 1998 No. 648 (the Exclusion Order) and thereby excluded from HGCRA adjudication. Consequently the appointment of an adjudicator to a dispute arising out of the contract was invalid. ***Spiro v Glencrown Properties Ltd.*** *[1991] Ch.537*. applied.

His Honour Judge David Wilcox. TCC. 11th November 2005

COMMENT : To what extent construction contracts might be kept out of the HGCRA by including an option by a contractor to acquire / lease a portion (however small) of the subject matter of the development as part of the consideration is a question of degree which is not immediately apparent from this decision - but clearly £1.1M consideration supplemented by an option to lease 7 flats for 10 years was sufficient in the immediate case. Given the cost / speed advantages of adjudication, why might anyone want to try so hard, before rather than after an adverse event, to evade adjudication?

Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2003] HT 02-395 (TCC) : [2003] BLR 79

Carillion contracted on target cost, pain and gain terms to upgrade a dockyard. The target cost was exceeded due to six major variations in the region of £100M. The parties entered into negotiations set up a replacement payment mechanism. Carillion asserted that an oral agreement, subsequently evidenced in writing in communications between the parties. Carillion submitted an application under the "new" agreement. This was not honoured. Carillion submitted the dispute to adjudication. The adjudicator determined that there had been an agreement and that payment was due under the application. Payment was not made and in this action Carillion sought enforcement of the adjudicator's decision.

Devonport resisted enforcement on the grounds that there was no dispute. No contract had been concluded and negotiations were on-going to establish a replacement payment mechanism. Furthermore, if there was an oral contract it was not subject to the HGCRA adjudication provisions. They further argued that by determining that there was a contract, the adjudicator had taken a significant, though not decisive step in determining his own jurisdiction, whereas he had not been granted power to determine his jurisdiction.

His Honour Judge Bowsher determined that if an oral contract had been concluded, it was not one that complied with the HGCRA and summary judgement was not applicable. ***R.J.T. Consulting v. D.M. Engineering , Grovedeck v Capital Demolition Ltd*** and **R.*G. Carter Ltd. v. Edmund Nuttall Ltd.*** considered.

He further concluded that a dispute had not yet crystallised. Carillion had not provided Devonport with sufficient information to make a decision whether to pay the application or not. ***Tradax International S.A. v. Cerrahogullari T.A.S*** *[1981] 2 Lloyds .Rep.169*, ***Ellerine Bros. (Pty.) Ltd. v. Klinger*** *[1982] 1 W.L.R.1375*, ***London & North Western & Great Western Joint Railway Cos. v. J.H. Billington Limited*** *[1899] A.C.79 and* ***Cruden Construction Ltd. v. Commission for the New Towns*** *[1995] 2 Ll.Rep.387* considered.

His Honour Judge Bowsher. TCC. 27th November 2002

Carillion Construction Ltd. v Devonport Royal Dockyard Ltd. [2005] EWHC 778

An application for enforcement of an adjudicator's decision was considered by His Honour Mr Justice Jackson. Enforcement was resisted on the grounds of no-jurisdiction in respect of target costs and interest and breach of the rules of natural justice. The court held that whilst not a central issue, it was necessary to

determine the target cost (albeit that that determination might be rough and ready and might alter in the event of subsequent arbitration or litigation) before the central task could be performed and thus that decision was within jurisdiction.

Jackson J held following ***Macob v Morrison*** and ***Bouygues v Dahl-Jenson*** that an adjudicator has the right to decide whether or not evidence is relevant (he is allowed to get that decision wrong without impugning the enforceability of his decision) and therefore whether or not to expend further time and energy on that evidence. The adjudicator should, following ***Discain*** demonstrate, by reference, that all evidence has been noted and brief reasons provided, but given the large amounts of information (26 arch lever files in the instant case) that an adjudicator often has to deal with. The reasons should be intelligible. Inadequate reasons are not grounds to refuse enforcement, unless it can be demonstrated that a party would suffer substantial prejudice.

A challenge to an award on defects based on ***Wednesbury Unreasonableness*** and a failure to consider the evidence was rejected on the facts. The value of retaining an ***expert civil-engineer*** as adjudicator was noted.

Subject to any express terms in the contract relating to interest, Clause 20(c) of the Scheme empowers an adjudicator to *"decide the circumstances in which, and the rates at which, and the periods for which simple or compounds rates of interest shall be paid."* His Honour Mr Justice Jackson. TCC. 26th April 2005.

Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358

The Court of Appeal held reversing the decision of Jackson J, that there is no inherent power under the Scheme for an adjudicator to award interest. The power to do so must be granted by the parties or be inherently within the scope of the reference. In the circumstances however, the appeal was dismissed since the parties had consented. Accordingly the adjudicator's decision continued to be fully enforceable.

Lord Justice Chadwick sought to distinguish adjudication from arbitration and considered what can be expected of an adjudicator and what does and does not amount to "*due process*" in adjudication.

86. *It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.*

87. *In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.*

The court also held that to the extent that ***Buxton v Durand*** is not consistent with the proposition that *". If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on* ***Wednesbury*** *grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is*

*inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. I reach this conclusion on the basis of the Court of Appeal decisions mentioned earlier "*it is not to be followed.

CA before Lord Justice Chadwick, Master of the Rolls and Lord Justice Moore-Bick. 16th November 2005.

Cartright v Fay [2005] EV300106 Bath C.Ct.

A dispute arose between Fay and a builder under a consumer construction which incorporated an optional adjudication clause. Regarding incorporation ***L'Estrange v Graucob*** *1934 2* KB *394* and ***Parker v. South Eastern Railway Company*** applied.

Fay engaged in adjudication without prejudice to his contention that variations went beyond the adjudication of issues arising out of the works. The court held that this included variations, so the adjudicator had jurisdiction.

Main issues were firstly whether the adjudicator was privy to the agreement. The court held that, by virtue of the Third Parties Act, there was privity.

Secondly, whether the fee arrangement, 50/50 under capped fee of £750 inclusive of VAT was a fair term. The court held that the provision was compatible with the UTCCR 1999 and ordered Fay to pay the adjudicator's fee. ***Gennaro Maurizio Picardi v Paolo Cuniberti*** *[2002] EWHC 2923.* ***Westminster v Beckingham*** *[2004] BLR 163.* ***Lovell Projects v Legg & Carver*** *[2003] BLR 452*. referred to.

District Judge Mark Rutherford. 8th February 2005.

Castle Inns (Stirling) Ltd v. Clark Contracts Ltd [2005] ScotCS CSOH_178

The parties contracted on amended Scottish Building Contract without Quantities, Contractors Design Portion (January 2000 revision) standard form for the redevelopment of licensed premises. The certifying architect deducted liquidated damages for non-completion with the contract period from interim application No9 and deducted sums for defects from application No10. Application No10 was made after final completion and ran concurrently with consideration by the architect of the final certificate. Both deductions were the subject of adjudication challenges, before the same adjudicator.

The adjudicator determined that an extension of time was justified and ordered the architect's certificate of non-completion to be amended, thereby removing the justification for LAD's. He also found that the deductions were not justified. Finally, he determined that his fees should be paid by the employer on a costs follows the event basis. The architect sought in his final certificate to ignore the decisions of the adjudicator and in the final certificate certified that the cost of the works was £200K+ below sums already paid out under interim certificates (pursuant in part to decisions of the adjudicator) and determined that this sum should be reimbursed by the contractor.

The present action was undertaken as a post adjudication litigation for a final determination of the disputes that had been referred to adjudication. The action contained three elements. 1) The pursuer challenged the decision on fees, on the basis of unjust enrichment in that the contract stated that fees would be apportioned equally between the parties. 2) The pursuer attacked both adjudication decisions on the grounds of unjust enrichment. 3) The pursuer sought to enforce the reimbursement said to be due in the final certificate.

1). **Fees :** The court held that the adjudicator's decision on fees is final and not subject to challenge at final determination by arbitration/litigation. The contract only allows final settlement by arbitration or litigation of disputes arising out of the contract that predate the reference to adjudication. The decision on fees does not fall into this category and is not subsequently open to a de nouvo trial. The conduct of that new trial provides no indicator to the conduct of the adjudication and therefore to the apportionment of fees. (*Note that this decision does not relate to what might be available in judicial review – where arguably the fact that the contract required the fees to be shared might form grounds for excess of jurisdiction).*

2). **Unjust enrichment** : Unjust enrichment is not a valid ground to challenge an adjudicator's decision which is based on a contractual right – the quintessential example of just enrichment. Whilst it was open for the decision in respect of interim application No9 to be considered by de novo litigation, unjust enrichment disclosed no grounds for breach of contract. However, the court was prepared to hear a challenge on amended grounds in the future and gave leave to amend. ***Dollar Land (Cumbernauld) Ltd.*** **v** ***CIN Properties Ltd.****, 1998 SC (HL) 90* considered.

3). Revision of adjudicator's decision re application No10 by architect. The amended version of the contract required that any challenge to a decision of an adjudicator in respect of a final application post completion of works was subject to a 28 day time bar. The contract also required the certifier of a final certificate to take notice of any adjudication decision and incorporate its determinations into the certificate. Accordingly, the court found that the architect could not revisit the adjudicator's decision and revise it and furthermore, this action was out of time. ***Diamond v PJW Enterprises Ltd.,*** *2002 SC 340.* ***Northern RHA v Derek*** *[1984] QB 644.* ***Beaufort Developments v Gilbert-Ash*** *[1985] AC 191* considered.

Lord Drummond Young. Outer House, Court of Session. 29th December 2005

Castle Inns (Stirling) Ltd t/a Castle Leisure Group v Clarks Contracts Ltd [2007] CSOH 21

This case raises issues with regard to double jeopardy. The question here is whether a court in proceedings on a separate claim is bound by determinations of fact made by an adjudicator, where challenge to the adjudication is time barred? In the course of determining sums due for rectification worth the adjudicator found remedial works involved only one week's worth of work, not four as asserted by the claimant. Did this decision have implications for a subsequent claim for four weeks lost trading profit? The court held that it did not. The period of time for remedial work was not the same issue as how long was the delay incurred before hand over of premises and thus with regard to lost trading. This latter dispute was not decided by the adjudicator and thus it was not a final determination of fact that affected a separate issue beyond his jurisdiction. Accordingly the judge was not bound by that determination. The issue was therefore to go forward to trial on proof of loss.

Lord Drummond Young. Outer House Ct of Session. 6th February 2007.

COMMENT : It will be interesting to see whether in due course the trial judge arrives at a different conclusion to the adjudicator, which might be possible since other factors might well come into play, though one imagines that give or take a few days, it is quite likely that it may well in the event turn out to be broadly similar. If not, we will have a situation where one might conclude that the adjudicator was in fact incorrect in his assessment – but given the time bar that incorrect decision would no longer be challengeable.

CFW Architects (A Firm) v Cowlin Construction Ltd [2006] EWHC 6 (TCC)

De Nouvo Trial : 3 adjudication decisions and an enforcement action embraced in an all embracing de nouvo trial of all the issues in a claim against architects and counter claim to recover monies from adjudication. Essentially 1st two adjudications substantially upheld : 3rd reversed. Counterclaim failed.

Regarding professional design liability, ***Greaves v Baynam Meikle*** *(1975) 4 BLR 4* considered.

Regarding causation and breach of professional duty, Bernhards v Stockley Park (1997) 82 BLR 39 considered.

Regarding repudiation of contract, ***Heyman v Darwins*** *[1942] AC 356.* ***Photo Production v Securicor*** **[***1989] AC 827.* ***Woodar v Wimpey*** *[1980] 1 WLR 277.* ***Mersey Steel & Iron v Naylor*** *(1884) 9 APP. Cas 434.* ***Rees v Lines*** *(1837) 8 C&P 126.* ***Cornwall v Henson*** *[1900] 2 Ch 298.* ***Peyman v Lanjani*** *[1985] Ch. 457.* ***Roberts v Bury Commissioners*** *(1870) LR 4 CP 755.* considered.

Regarding liquidated damages and penalties, ***Alfred McAlpine v Tilebox*** *[2005] BLR 271.* considered.

His Honour Judge Thornton. TCC. 23rd January 2006.

Chamberlain Carpentry & Joinery Ltd v Alfred McAlpine [2002] EWHC 514 (TCC)

McAlpine sub-scontracted carpentry work to Carpenter on McAlpine standard sub-contract terms, essentially on DOM/2 terms, but with additional McAlpine adjudication rules. Chamberlain submitted a payment dispute to adjudication, which contained 8 points of claim including a reasonable assessment of McAlpines costs incurred in the adjudication. (The point of the latter being that under McAlpine's adjudication rules, the applicant, win or lose, was to be responsible for McAlpine's costs). The adjudicator awarded Chamberlain £55K+. McAlpine did not pay. Chamberlain applied here for enforcement.

McAlpine resisted firstly on the grounds that more than one dispute had been referred to adjudication. The adjudicator did not have jurisdiction over more than one dispute. Even if it was one dispute for non-payment the adjudicator could not have jurisdiction to assess McAlpine's costs.

Secondly, McAlpine asserts that whilst the adjudication refers to sums due pursuant to application No5 this application was nont mentioned in the notice. The notice sought to cross reference the referral documents but according to ***KNS v Sindall*** jurisdiction is limited to those matters covered by the notice. The referral documents cannot subsequently broaden out the scope of jurisdiction. In short, the notice did not sufficiently identify the subject matter of the dispute and accordingly the adjudicator did not have jurisdiction.

Chamberlain, relying on Thornton J's dicta in ***Fastrack v Morrison*** asserted that a dispute *"in the context of adjudication was whatever the referring party chose to identify in a notice of adjudication."* Against this McAlpine relies upon the observation of Lord MacFadyen in ***Barr v Law Mining*** that Thornton's dicta could be viewed as depriving para 8(1) of the Scheme (namely that the parties could consent to jurisdiction over more than one dispute) of any meaning. Seymour J disagreed that this was what Thornton J meant. What is a dispute depends upon the facts and circumstances of each individual case, though the starting point is interpretation of the notice of intention to refer. Lord Hoffinan set out the guiding principles for the interpretation of such a document in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** *[1998] 1 WLR 896* including an objective test and giving words their natural meaning.

Applying these rules, Seymour J held that, viewing the intention notice alone, what was being asked for was one dispute, namely regarding payment of monies withheld. This is exactly what the adjudicator considered. The assessment of costs is part and parcel of any dispute. It arises out of that dispute and is not a separate, distinct dispute. The adjudicator had jurisdiction to do so.

His Honour Judge Richard Seymour. TCC. 25th March 2002.

Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84

An adjudicator's decision was challenged on the basis of the use of personal knowledge which was unleged to be unfair. The court held that an arbiter can use his personal knowledge to evaluate parties assertions but must share his expert opinions with the parties for comment. ***Reg v SS for Home Department, Ex Parte Doody*** *[1994] 1 A.C. 531* ***Fox v Wellfair Ltd. Winchester CC v SS for the Environment*** *(1978) 36 P & CR 455.* ***Top Shop Estates v Danino*** considered

Regarding the test for serious irregularity, ***Egmatra A.G. v Marco Trading Corporation*** *[1999] 1 Lloyds Reports 86* considered.

Regarding allegations of a failure to deal with all issues, ***English v Emery Reimbold & Strick Ltd.*** *[2002] 1 W.L.R. 249.* ***Egil Trust Co. Ltd. v Pigott-Brown*** *[1985] 3 All ER 119.* ***Knight v Clifton*** *[1971] Ch 700.* referred to.

CA before Lord Justices Ward, Mummery and Jonathan Parker. 6th February 2003.

Chorus Group v Berner (BVI) Ltd [2006] EWHC 3622 (TCC)

This concerned a post adjudication settlement agreement, with due date of payment and interest. Cheque from overseas bounced. Employers incorporated off-shore. This hearing was preceded by a successful ex-parte application to Mr Justice Jackson for a freezing order. The present hearing involved a successful application to renew the freezing order and extend its scope together with an application for summary enforcement of the debt arising out of the cheque. The defence unsuccessfully asserted there had been non-disclosure during the original ex part application. ***Brink's Mat v. Elcombe*** [1988] 1 WLR 1350 considered. Regarding the risk of dissipation of funds, an essential ingredient of an application for a freezing order, ***The Niedersachsen*** [1983] 2 Lloyd's Rep. 600 applied. Mr Justice Ramsey. 1st November 2006.

Christiani & Nielsen Ltd v Lowry Centre Dev Co Ltd [2000] EWHC HT 001/59 (TCC)

Christiani contracted under ICE 5th to build a footbridge over the Manchester Ship Canal to a new arts centre. Work commenced subject to the terms of the second of two letters of intent, which pre-dated the HGCRA. Subsequently a formal contract was concluded by deed (after the HGCRA came into force) which was stated to take effect as of the date of the second letter of intent, when work commenced. The Lowry deducted 24 weeks worth LADs in respect late completion. Christiani contested this deduction and submitted the dispute to adjudication, asserting that the Lowry were only entitled to deduct 36 days worth of LADs. The difference amounted to £188,064.36 which the adjudicator decided was due to Christiani.

Prior to the adjudication The Lowry contested the jurisdiction of the adjudicator. Christiani also informed the adjudicator in the referral that this was an issue. The Lowry invited the adjudicator to decide that he had no jurisdiction. He took this to mean that The Lowry had invited him to decide his jurisdiction and he

determined that he had jurisdiction before going on to determine the dispute. Following non payment, Christiani commenced this action for enforcement. ***Westminster Chemicals v Eicholz & Loeser*** *[1954] 1 LlR 99.* ***Project Consultancy Group v Gray Trust*** *[1999] BLR 377* considered.

The Lowry resisted enforcement on the grounds that the adjudicator had no jurisdiction. The court concluded that by inviting him to decide that he had no jurisdiction The Lowry was not giving him jurisdiction but simply inviting him to consider his position and inviting him to resign. Thus The Lowry was not bound by his decision. In consequence it fell to the court to determine whether or not the adjudicator had jurisdiction over the remainder of the dispute. The court found that the contract by deed superseded the letter of intent. Whilst it had retrospective effect, the deed could not have been executed at any other date or time but that when effected. Thus the HGCRA applied. The Lowry tried to assert an estoppel, to the effect that despite the date on the deed, both parties were aware that the objective of the Lowry was to ensure that the relevant contract date would pre-date the HGCRA. The estoppel failed firstly because this was not the effect put forward by The Lowry at the adjudication but more significantly because it is not lawful to contract out of the HGCRA before a dispute occurs.

The Lowry also argued that the adjudicator purported to exercise jurisdiction over rectification, which is not a matter which arises under the contract and therefore he did not have jurisdiction to do this. The rectification issue arose because The Lowry asserted that been 57 weeks, not 81 as stated in the contract. The Lowry asserted the right to rectification. The adjudicator considered the rectification issue and came to the conclusion that since The Lowry prepared and scrutinized the contract, there was little prospect of an application for rectification succeeding. Christiani asserted that 57 referred not to the contract period but to the length of programmed works. There was no evidence that Christiani was aware of any mistake in the documentation and had wrongfully taken advantage of it. Having concluded that rectification was not a real issue the adjudicator went on to reach his decision. He did not attempt rectification or even determine the question of rectification. He did not need to. The Lowry could not make deductions in anticipation of rectification. Thornton J granted enforcement. ***Roberts v Leicestershire C.C.*** *[1961] Ch.555.* ***Heyman v Darwins*** *[1942] A.C. 356, H.L.* ***Ashville Investments v Elmer Contractors*** *(1987) 37 BLR 55, C.A;* ***Overseas Union Insurance v AA Insurance [****1988] 2 Lloyds Rep. 62,* ***Fillite v Aqua-Lift*** *(1989) 45 BLR 32 C.A* refereed to.

His Honour Judge Richard Thornton. TCC. 29th June 2000.

Comment : One issue which Thornton J declined to answer, but which he indicated his views on, is whether a party who has granted the adjudicator jurisdiction over his jurisdiction is able to challenge that decision. He was inclined to the view that it would not be a decision arising out of the contract, and hence not governed by the HGCRA. Consequently it would be challengeable. However, the courts have since held that the question is an integral aspect of the contract – and if the power is granted it the decision is of the same nature as other adjudication decision – binding until finally determined by litigation or arbitration – and is hence whether correctly decided or not, cannot be challenged at enforcement hearings on the basis of ultra vires.

CIB Properties Ltd v Birse Construction [2004] EWHC 2365 TCC

Birse contracted to build the Riverdale Data Centre for CIB. CIB terminated the contract. Birse submitted a final account and loss of profit for wrongful termination. CIB asserted to recover the additional cost of employing alternative contractors to complete the job. Two adjudication followed, the first held that the termination was lawful and the second held that on balance CIB was entitled to £2M+ compensation to cover alternative completion costs. Birse resisted enforcement on the grounds that 1) the dispute was too complicated to be decided by adjudication and 2) no dispute had crystallised 3) the adjudication was not fair or impartial because of a) ambush b) time constraints c) a slip that turned victory into a loss and 4) either the adjudicator should correct the slip or the court should instruct him to do so. The court upheld the decision.

By statute any dispute can be referred to adjudication. The adjudicator can request the parties agree sufficient time to do justice to the dispute. If the request is refused the adjudicator can resign. In the event sufficient extension was given by the parties.

However, ***CIB v Birse*** is authority for the view that if insufficient time is granted for the adjudicator to reach an informed decision, the adjudicator should resign. The decision would be susceptible to a successful challenge for a failure to resign in such circumstances.

Birse had itself been the perpetrator of an ambush in the 1st adjudication but was given 14 weeks before notice was served, so no ambush, even though the files were extensive. Birse attempted to prevent a dispute from arising by pushing for more information and a continuous stream of negotiations – which CIB took part in without prejudice to their asserted claims. Birse at all times were aware that a notice might be served and that whilst negotiations might stave off litigation, nonetheless a dispute had arises – evident from the fact that they had engaged in a failed mediation. Continued post mediation discussions did not change the fact that there was a dispute.

Whilst the time constraints mean that the extent of the settlement process is proscribed, the adjudicator had sufficient time to reach a decision and the parties had sufficient time to put their cases and to counter the assertions of the other side.

There was in fact no slip, rather the adjudicator reached a valuation taking all matters into account setting off aspects of claims from counter-claims, so no issue of correction arose.

Regarding the adjudication process and what is a dispute, ***Macob v Morrison*** *[1999] CLR 1 6*: ***Halki Shipping v Sopex Oils*** *[1998] 1 WLR 726.* ***Sindall v Solland*** *[2001.* ***Beck Peppiatt v Norwest Holst*** *[2003] EWHC 822.* referred to. ***Amec Projects v Whitefriars City Estates*** [2004] EWCA CIV 1418 noted.

Regarding fairness within the process, ***Glencot v Barrett*** *[2001] BLR 207*, ***Discain Project Services v Opecprime*** *[2000] BLR 402.* ***McAlpine PPS Pipeline Systems Joint Venture v Transco*** *[2004]* considered.

Regarding suitability of adjudication for complex cases, ***London &Amsterdam Properties v Waterman Partnership*** *[2004] 1 BLR 179.* ***AWG v Rockingham Speedway*** *[2004] EWHC 888.* ***Bouygues v Dahl-Jensen*** *[2000] 1 WLR 525.* ***Bloor v Bowmer &Kirkland*** *[2001] BLR 314.* ***R v Cripps and Muldoon*** *[1984] QB 686:* ***Edmund Nuttall v Sevenoaks DC*** *[2000]* considered.

His Honour Judge Toulmin. TCC. 19th October 2004.

Citex Professional Services v Kenmore Developments [2004] ScotCS 20

Employer indicted to the contractor that insurance was in place. This was not the case and the contractor claimed for breach of contract and indemnity against the employer. He succeeded and the employer sought to establish that the adjudicator did not have jurisdiction; that the contractor had to prove his case and that the employer had been negligent by not taking out his own insurance and has thus contributed to his loss.

The court agreed that an adjudicator cannot reverse the burden of proof, ***City Inn v Shepherd Construction*** *2002 SLT 781* considered, but this does not apply to questions of law and contract construction. Both parties argue their case and the adjudicator decides. Since there was an arguable case that the contractor had not discharged his burden of proof in respect of the counter-claim this portion of the case was held over, though the court felt that the contractor was likely to discharge that burden.

The courted noted the distinction between contract and tort pleadings in England and Scotland and having referred to ***Forsikrings Vesta v Butcher*** *1988 2 AER 43* concluded that a contributory negligence claim in respect of allocation of responsibility for breach of contract is viable in Scotland.

T.G.Coutts. Outer House, Court of Session. 28th January 2004.

City Inn Ltd v Shepherd Construction Ltd [2001] ScotCS 187

This case concerned an application for an Extension of time. The contractor failed to comply with contract requirements for an extension of time. In consequence this gave rise to late completion. An adjudicator had already found for an EOT. This was a de-nouvo retrial in an attempt to reverse that decision.

Regarding the construction of standard form contracts, ***Capital Land Holdings v SS for the Environment*** *1997 SC 109.* ***Muir Construction v Hambly*** *1990 SLT 830.* ***Bravo Maritime v Alsayed Abdullah Mohamed Baroom (The "Athinoula")*** [1980] 2 Lloyd's Rep. 481 referred to.

Regarding penalty clauses, ***E.F.T. v Security Change*** *1992 SC 414.* ***Gilbert-Ash v Modern Engineering*** *[1974] AC 689.* ***C.V.G. v London Steamship Owners' Mutual Insurance (The "Vainqueur José")*** *[1979] 1 Lloyd's Rep. 557.* ***Philips Hong Kong v AG Hong Kong*** *(1993) 61 BLR 41.* ***Dunlop v New Garage*** *[1915] AC 79,* ***Clydebank Engineering v Don José Ramos Yzquierdo y Castaneda*** *[(1904).* ***AMEV UDC Finance v Austin*** *(1986) 162 CLR 170.* ***Esanda v Plessing*** *[1989] ALJ 238.* ***Elsey v Collins*** *(1978) 83 DLR at 15:* ***Export Credits Guarantee Department v Universal Oil*** *[1983] 1 WLR 399* considered before concluding that the provision was not a penalty clause.

Finally, it was asserted that since the adjudicator had found for an EOT the burden of proof was shifted to the defence to displace the EOT. This was rejected by the court. The parties start all over again in litigation and the burden of proof remains with the claimant to establish his case.

Lord MacFadyen. Outer House Court of Session. 17th July 2001.

City Inn v. Shepherd Construction Ltd [2003] ScotCS 146

Upholding and applying ***Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd,*** *[19151 AC 79,* the court dismissed a challenge against the finding at first instance that the provision was not a penalty clause.

Lord Justices Clerk, Lords Kirkwood and McCluskey. Second Division, Inner House, Court of Session. 20th May 2003.

City Inn Ltd v Shepherd Construction Ltd [2006] CSOH 94

The questions temporarily settled by the adjudicators in the above two reports are here brought to trial for final determination. This was an interim hearing so the case is on-going.

Lord Drummond Young. Outer House Court of Session. 20th June 2006.

City Inn Ltd v Shepherd Construction Ltd [2007] ScotCS CSOH_190

Entitlement to extension of time under a construction contract.

Percy Bilton v GLC [1982] 1 WLR 794; ***Peak Construction Ltd v McKinney Foundations Ltd,*** [1970] BLR 111; ***Balfour Beatty Building Ltd v Chestermount Properties Ltd,*** 1993, 62 BLR 1; ***Henry Boot v Malmaison*** 1999, 70 Con LR 32; ***Royal Brompton Hospital v Hammond (No 7),*** **(2001)** 76 Con LR 148, ***Wells v Army & Navy Co-op,*** 1903, 86 LT 764. ***S.M.K. Cabinets v Hili Modern Electrics Pty Ltd,*** [1984] VR 391, ***Chas. I. Cunningham Co.,*** IBCA 60, 57-2 BCA P1541 (1957), ***John Doyle v Laing*** 2004 SC 73. ***Leyland Shipping v Norwich Union Fire Insurance*** [1918] AC 350. ***Neodox Ltd v Borough of Swinton and Pendlebury,*** (1958) 5 BLR 38, ***Armia Ltd v Daejan Developments Ltd,*** 1979 SC(HL) 56, ***E & J Glasgow Ltd v UGC Estates Ltd,*** [2005] CSOH 63, ***Toepfer v Warinco AG,*** [1978] Ll Rep 569, ***Charles Rickards Ltd v Oppenhaim,*** [1950] 1 KB 616, ***Evans v Argus Healthcare (Glenesk) Ltd,*** 2001 SCLR 117, at paragraph [11]; ***Oak Mall Greenock Ltd v McDonald's Restaurants Ltd,*** 9 May 2003. ***Gatty v Maclaine,*** 1921 SC (HL) 1; ***Grant & Sons Ltd v Glen Catrine Ltd,*** 2001 SC 901; ***Grundt v Great Boulder Pty Gold Mines Ltd,*** (39) 59 CLR 641 referred to.

Lord Dummond Young. Outer House Court of Session. 30th November 2007

CJP Builders Ltd v William Verry Ltd [2008] EWHC 2025 (TCC)

In this action for summary enforcement the applicant put in an application for a stage payment on the 25th January 2008 and gave notice of adjudication on the 25th April. Referral was made on the 2nd May 2008. Following both standard practice and the terms of DOM/2 the respondent was advised that a response was due by the 9th May but the respondent's requested an extension to the 19th May to enable the respondents to detail extensive defects and over-valuation. On the basis that the contract required a defence within 7 days the applicants initially refused an extension but progressively gave way, resulting in an agreement for submission by mid day on the 14th May. The defence was eventually emailed at 5:30 that day, i.e. 5 ½ hours late. The adjudicator concluded that he could not consider the defence and went on to determine the application in the absence of any defence.

In the meantime a 2nd adjudication was commenced this time by Verry in respect of defects. The same adjudicator was appointed – but some way through the process, having received an intimation from the adjudicator that things were not going their way, Verry withdrew from the adjudication. The adjudicator then determined this dispute also in CJP's favour.

After some preliminary jousting as to which contract applied and whether the right adjudicator had been appointed, whether he had jurisdiction and whether he decided the right dispute in the first adjudication the central issue revolved around whether or not Clause 38A,5.1.2. DOM/2 "[the respondent] *MAY ... send to the Adjudicator within 7 days of the date of a referral ... a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider"*- place a final date for submission of defence?

The court held that it did not and went on to decide that in addition since Clause 38.A. 5.15 "[the adjudicator] … SHALL … set his own procedure and at his absolute discretion may, take the initiative in ascertaining the facts and the law as he considers necessary…." the adjudicator had the power to extend time and had breached the rules of natural justice by not doing so. Accordingly the decision was not enforceable.

Buxton Building Contractors Ltd v Governors of Duran Primary School [2004] EWHC 733 distinguished. ***Thomas Frederic's (Construction) Ltd v Keith Wilson*** [2004] BLR 23 and ***The Project Consultancy Group v The Trustees of the Grey Trust*** [1999] BLR 377 referred to regarding objections to jurisdiction. ***Cantillon Ltd v Urvasco Ltd*** [2008] BLR 250; ***Balfour Beatty Construction Company Ltd v The London Borough of Lambeth*** noted regarding breach of natural justice.

Mr Justice Akenhead : TCC. 15th August 2008.

COMMENT :

Arguably, the word MAY is not prescriptive, though the adjudicator was probably caught between a cleft stick. If he had allowed the defense and it had prevailed, it was equally likely that the applicant might have sought to have the decision set aside, particularly if sums of money had been found due to Verry and enforcement proceedings had followed, on the grounds that the defense should not have been admitted. It was equally arguable that the clause meant that the respondent MAY serve a defense any time up to 7 days but not thereafter, thought that is not what the court ultimately decided.

Assuming that this is a correct interpretation of the contract, some question marks still remain. If the adjudicator has to grant an extension of time for service of response, how much time is reasonable? After all the adjudicator has a timetable of 28 days which in the absence of extension of time by the respondent, has to be adhered to. The applicant was against an extension. The respondent graciously offered to extend time, but the extension was not in his gift in the first place. If a refusal to entertain a defense if a breach of natural justice does this mean that the respondent can force the applicant to give an extension against his will, particularly if the applicant needs time to respond to the defense? This cannot be right. Therefore, the matter must be about reasonable extensions of time and no more. Verry had already got an extension from the 9th to mid-day on the 14th, though admittedly that was less than the 10 days to the 19th they had set out to get in the first place. Arguably, a time must arrive when it is appropriate to conclude that rather than a denial of justice by an adjudicator, the defense will have by its own actions denied itself the opportunity to respond. It should be noted that here there was no question of ambush. Verry knew about the payment claim way back in January. They should arguably have anticipated this action and had plenty of time to construct a defense.

Let us go further. What if the contract had clearly stated that there was a 7 day limit. Would natural justice require that the contract be overridden? Would the contract be non-HGCRA compliant and be displaced by the Scheme?

Finally, there is unfinished business here. What became of the abandoned adjudication? Is it right for an applicant to withdraw if things do not appear to be going their way or does the adjudicator remain seized of the dispute? This brings to mind ***Midland Expressway Ltd v Carillion Construction Ltd [2006] EWHC 1505 (TCC)*** where an adjudicator allowed a party to withdraw after they realized that a claim was not sustainable. However here the correct issue had been submitted to adjudication, which is quite another matter. It appears that the adjudicator kept on going and the Verry claim failed. An argument, sustainable in arbitration under s69 that no injustice flowed from the first decision, in the light of the second adjudication was not accepted by the court, which relied first on the bare fact that the defense was not received, together with a reservation that had Verry stuck with the second adjudication, the result might have been different, which is a very tentative conclusion given that things were not going Verry's way second time around.

Presumably this affair is not over yet. Whether the parties negotiate a settlement, a new round of adjudication takes place, or the scene is set for further litigation is in the hands of the parties. All we can do for not is await further development and see whether further light is cast on these outstanding matters.

Clark Contracts v Burrell Ltd No1 [2002] ScotCS A 70 38/00 Glasgow Sheriff

This case concerned the amount of detail required in a notice to refer. Is it sufficient to claim a sum due under an architect's certificate without providing further details? The court held "Yes" were a sum is due under the terms of the contract. ***Millers Specialist Joiner Co Ltd v Nobles Construction Ltd*** *2001* conceded.

Regarding the status of an achitect's decision the court considered ***Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd*** *[1998] 2 All ER 778.* ***W & J R Watson Ltd v Lothian Health Board*** *1986 SLT 292.*

Regarding the relationship between architect's certificates and withholding notice and whether or not an architect's certificate might amount to a withholding requiring the issue of a withholding notice the court noted ***SL Timber Systems Ltd v Carillion Construction Ltd*** *[2001].*

Sheriff James A Taylor. 31st January 2002.

Clark Contracts v Burrell Ltd No 2 [2002] ScotCS A7038/00

This concerned an attempt to recover on behalf of a third party. Following on from enforcement of the adjudication decision in favour of the claimant, the court considered a counterclaim, which was essentially for the benefit of a subsidiary company. The court held that there could be no recovery. The subsidiary should claim in its own right.

The court considered ***McAlpine v Panatown*** *[2000] 3 WLR 946.* ***Dunlop v Lambert*** *1837 15 S 884 and* ***St Martin's v McAlpine*** *[1994] 1 AC 85.* ***The Albazero*** *1977 AC 774.* ***Clydebank v Don Jose Ramos Yzquierdo y Castaneda*** *1904 7 F (HL) 77.* ***Darlington BC v Wiltshier*** *1995 1 WLR 68.*

Sheriff James A Taylor. 31st January 2002.

Claymore Services Ltd v Nautilus Properties Ltd [2007] EWHC 805 (TCC)

A dispute regarding the final account of a hotel refurbishment submitted to adjudication. The adjudicator held that there was no written contract, the work having been carried out in furtherance of a letter or intent that required the formal signing off of a JCT contract, which never occurred. However the adjudicator found that he had jurisdiction to determine the final account and did so. It was held not surprisingly that the decision was unenforceable since in the absence of a written contract the adjudicator lacked jurisdiction.

A subsequent quantum meruit claim was settled, with the question of interest alone proceeding to trial. The court held that interest at bank rate + 2%. ***Pinnock v Wilkins*** TLR 1990: ***Watts v Morrow*** [1991] 1 WLR 1421. ***Tate & Lyle v GLCl*** [1982] 1 WLR 149; ***Shearson Lehman Hutton v MacClaine Watson Co. Ltd.*** [1990] 3 All ER 723 : ***Way v Latilla*** [1937] 3 All ER 759 considered regarding the appropriate interest rate.

Interestingly the court imposed a 50% downward adjustment in respect of 1 years interest due to failure to prosecute promptly by pursuing enforcement of an obviously unenforceable decision. However, the initial submission to adjudication was deemed to be reasonable and thus not to be taken into account.

The court also held that the claim was founded in restitution - not unjust enrichment – and accordingly interest was to run from the date of final account + reasonable time (3 months) to consider account. ***BP Exploration v Hunt (No.2)*** [1979] 1 WLR 783: ***Birkett v Hayes*** [1982] 1WLR 816: ***Metal Box Co Ltd v Currys Ltd*** [1988] 1 WLR 175: ***Allen v McAlpine*** *[1968] 2 QB 229 :* ***Wright v BRB*** *[1983] 2 AC 773;* ***La Pintada v President of India*** *[1983] 1 Lloyds Rep 37;* ***Athenian Harmony (No. 2)*** [1998] 2 LL.R 425, ***Kuwait Airways v Kuwait Insurance*** (2000): ***Quorum v Shramm*** (2001) 19 CLJ 224, ***Adcock v Co-operative*** *[2000] LIRLR* 657 considered re restitution & quantum meruit.

Mr Justice Jackson. TCC. 20th March 2007

Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd [2007] EWCA Civ 443

Unsuccessful appeal against the 1st instance decision of Jackson J that an oral agreement was not implied into an "entire agreement" between contractor and sub-contractor.

CA : before May, Dyson; Smith LJJ. 27th April 2007

Collins v Baltic Quay [2004] EWCA Civ 1757

Collins, the contractor, carried out works under a JCT Minor works. With payment outstanding on the last interim certificate which effectively represented the last certificate, in the absence of a holding certificate, Collins served notice of termination and then commenced legal action for non-payment. Baltic applied for a s9 Arbitration Act 1996 stay of action on the grounds that the dispute resolution clause provided for optional adjudication and or arbitration. The stay was granted.

Collins unsuccessfully appealed the stay on the grounds that once money became due under the contract, there was no dispute and thus no basis for arbitration. Upholding ***The Halki,*** the CA held that there was a dispute as to whether or not monies were due which had under the Arbitration Act 1996 to be stayed to arbitration at the behest of an applicant.

The principle cases on "W***hat is a dispute"*** are reviewed by Lord Justice Clarke, including ***Rupert Morgan v Jervis*** *[2003] EWCA Civ 1563.* ***Tradax v Cerrahogullari*** *[1981] 3 All ER 344.* ***Ellerine v Klinger*** *[1982] 1 WLR*

1375. ***Hayter v Nelson*** *[1990] 2 Lloyd's Rep 265.* ***Clark Contracts v Burrell*** *[2002] SLT (ShCt) 103.* ***Monmouthshire CC v Costelloe & Kemple*** *[1977] 5 BLR 83.* ***Fastrack v Morrison*** *[2000] 1 BLR 168,* ***Ken Griffin v John Tomlinson*** *2000,* ***Sindall v Solland*** *2001.* ***Edmund Nuttall v Carter Ltd*** *[2002] 1 BLR 312.* ***Beck Peppiatt v Norwest Holst*** *[2003] 1 BLR 316.* ***Cruden v Commission for the New Towns*** *[1995] 2 Lloyd's Rep 387.* ***Carillion v Devonport Royal Dockyard*** *[2003] 1 BLR 79.* ***Orange v ABB*** *[2003] 1 BLR 323.* ***Amec v SS for Transport.***

CA before Lord Justices Brooke, Clarke and Neuberger. 7th December 2004.

Comsite Projects Ltd. v Andritz AG [2003] EWHC 958 (TCC)

This concerned a construction dispute arising out of a contract for the construction of a new waste water treatment works and sewage sludge recycling centre. The contract contained a foreign arbitration and jurisdiction clause.

The court held that the Brussels Convention does not oust the jurisdiction of adjudicator in respect of disputes arising out of construction operations in UK, since the outcome is not the final determination of the dispute. ***Absolute Rentals v Gencor*** *17* Con LJ 322, ***CCG v Highland Council*** [2002] CILL 1906 and ***Macob v Morrison*** [1999] BLR 93. considered.

An attempt to establish that the operation was exempt under s105 HGCRA 1996 also failed. ***Homer Burgess v Chirex*** *[2000]* BLR *124.* ***ABB Power v Norwest Holst*** *(2001) 17* Const U *246.* ***ABB Zantingh v Zedal*** *[2001]* BLR 66. considered.

Her Honour Judge Frances Kirkham. TCC. 30th April 2003.

Concrete & Coating (UK) Ltd v Cornelius Moloney (t/a Rus Hall Construction) **[2004] EWHC TCC**

This concerned an application for enforcement of an adjudicator's decision that sums were due under a construction contract. The defendant successfully resisted enforcement on the grounds that :-

1 The adjudicator did not have jurisdiction because the contract was not a contract in writing as required by s107 HGCRA 1996 because the initially oral terms were not sufficiently identified and settled by subsequent communications – and a dispute continued as to what those terms contained.

2 Whilst the award was made against Rus Hall Construction, t/a Cornelius Maloney the notice of adjudication named additional persons (Maloney, Pearce and Cousins) as trading as Rus Hall Construction. Hence the award was against the wrong person(s) and accordingly unenforceable.

His Honour Judge MacKay : TCC. 6th December 2004.

COMMENT : This is no doubt yet another example of a situation where, assuming the claimant had the wherewithal to continue the action in court he would presumably prevail, assuming that his assertions in respect of monies due were to be upheld, particularly since Moloney conceded that he was the sole party to the contract. It would be for the court to determine the terms of the contract and hence what was or was not due under it. Final resolution, a settlement not forthcoming, would involve further expenditure and personal commitment from both sides. Whilst, having got so far with the adjudication, this might seem unnecessary, it should be remembered that adjudication was reserved in the HGCRA to written contracts for a reason. Adjudication was not deemed an appropriate forum to settle disputes about what is contained in oral contracts and accordingly jurisdiction was reserved to the courts.

An adjudicator who has to determine whether or not on the facts a contract is sufficiently identified has a 50/50 chance of second guessing what the court will ultimately conclude. The adjudicator's decision is governed by the material put to him. The claimant must prove a written contract and clearly establish its principal terms. Sometimes this is likely to be a finely balanced question that could arguably go either way.

The question as to personality has echoes of ***Nolan Davis v Catton***, the difference here being that the adjudicator was not given jurisdiction by the parties to determine the question.

Since jurisdiction is governed by the notice, the decision had to be against the person(s) identified in the notice. Since during the course of the adjudication it became clear that Pearce and Cousins were merely employees and not parties to the contract the adjudicator had a problem, particularly since the claimant declined to amend the notice. (*Why is not immediately apparent*). An award against the named defendant would fail and likewise any other formulation or extract was problematical. A pragmatic approach could not legally provide a fix. This principle has been applied in similar situations in respect of arbitral awards. The

defendant named in the award must be accurate. It is important therefore for the claimant to correctly identify the defendant from the outset.

If both parties had agreed, the question of identify could have been referred to the court and the adjudication stayed pending the outcome. Similarly a declaration could have been sought as to whether or not there was a contract sufficiently in writing for the purposes of s107 HGCRA. Procuring such agreements to seek declarations and stay proceedings might have been another matter. Jurisdictional issues are often more difficult for the adjudicator to deal with because the defence comes out of the blue. The claimant is often not prepared for it. The issue and argumentation grows incrementally. In open court there is a skeleton in advance and the issue is fully aired and developed simultaneously and spontaneously, plus opposing counsel has the benefit of knowing why the defence initially failed.

The moral of the story must be, before mobilisation, if at all possible tie your contract down, in writing and make sure you know the legal identity of your trading partner. All perhaps easier said than done in the hurly burly of commercial life – and hind sight is a great thing.

Connex South Eastern Ltd v MJ Building Services Group [2004] EWHC 1518 TCC

The joint management team of the distinct companies running Connex Kent and Connex Sussex put CCTV work of 20/30 or its stations respectively out to tender. MJ was the successful bidder. After a stop start negotiation period work started on the project with Condes acting as project management. No written orders were made and no contract was ever signed. 11 months into the project Connex Kent was taken over by Govia Ltd and Condes ceased to act for Sussex. Govia changed its mind about the scope of works and negoations were conducted through Condes to complete some works and to carry out alternate work. In any event the number of stations was eventually changed, the global number being reduced but with 13 different stations being added to the list. The Sussex account was determined by a repudiation which was accepted by MJ. MJ commenced action to recover of Sussex/Kent for the losses sustained from the repudiation of the Sussex portion of the contract. Connex raised issues of jurisdiction. By mutual agreement the adjudication was stayed by the adjudicator pending the outcome of this application for declaration – submitted by Connex who sought declarations that

1) There was no contract between the parties
2) There was no written contract within scope of HGCRA
3) There was no statutory right to adjudicate

The issues were agreed to be

1) Are the claimant and defendant subject to a written agreement within s107 HGCRA?
2) If YES did the defendant still have the right to refer if the agreement had been discharged by acceptance of a notice of repudiation ?
3) If YES, did the right to submit to adjudication survive an agreement with Sussex?
4) If YES TO 1-3 : a) is the notice to adjudicate an abuse of process (so late in the day)? And if so b) what is the consequence?

His Honour Havery J answered YES to 1-3 : No to 4 and hence declined to issue the three declarations.

First there was a contract, ***RJT Consulting v DM Engineering*** *[2002] 1 WLR 2344* applied. There was no need for a signed contract. It was a single joint contract, but by conduct it emerged that Kent and Sussex became responsible for their agreed portions and instructions. The repudiation of a contract expunges neither the right to arbitrate nor the right to adjudicate. The agreement ended by mutual consent, certain elements of the works but the rest of the reciprocal rights and duties survived. There is no limit to the right to refer to adjudication arising out of the passage of time. The aim may be quick references but also embraces resolution of all relevant construction disputes. ***Hershel v Breen*** *[2000] BLR 272* applied.

His Honour Judge Richard Havery. TCC. 26th June 2004.

Connex South Eastern Ltd v M J Building Services Group Plc [2005] EWCA Civ 193

Connex appealed the decision of Havery J on the grounds that since Sussex and Kent were joint contractors, the accord and satisfaction agreement with Kent released Sussex from its obligations. Lord Justice Dyson held that the Kent and Sussex were not joint contractors. There were two separate agreements with two sets of contracting parties, albeit that as sister companies the personnel involved were the same individuals.

Consequently, the renegotiations of terms of contract with the Kent were limited in effect to that contract alone. There was no accord and satisfaction of a joint contract and therefore the issue of releasing Sussex from its obligations does not apply – so the appeal succeeded on that ground though this did the appellant no good in the end. The court agreed there had been no abuse of process. Appeal dismissed.

CA before Lord Justices Ward and Carnwath. 1st March 2005

Conor Engineering Ltd v Constructions Industrielles de la Mèditerranèe (CNIM) [2004] EWHC 899

CNIM, the main contractor in a waste development/power generation complex sub-contracted boiler making and pipework to CEL. The sub-contract incorporated adjudication provisions. CEL prevailed in an adjudication in respect of asserted LADs. Ten days after the date of the decision CNIM sought to assert a set off for cross claims.

CNIM sought to establish that the contract concerned Power Generation and was outside the HGCRA. The court disagreed. The primary purpose was waste disposal which involved some power generation and thus it was within s105 HGCRA.

CNIM also sought to show that if HGCRA applied, nonetheless the adjudicator's dates for payments do not act as the final date to submit LADs under the scheme and further that the due date for payment runs from the date of communication of decision, not the date the decision is made. In addition, the invoices for payment of the decision extended the final date for due payment a further 30 days under the scheme. The court rejected each of these arguments. The due date was as ordered by the adjudicator. No extension arose out of a letter requesting compliance. The notice of withholding against the decision was ineffective.

ABB Zantingh Limited v. Zedal Business Services Limited [2001] BLR 66 and ***ABB Power Construction Ltd v. Norwest Holst Engineering*** *77 Con.L.20*. referred to. Recorder David Blunt QC. 5th April 2004

Construction Centre Group Ltd v Highland Council [2002] BLR 476CA

Liquidated damages formed the subject matter of a withholding notice issued after an adjudicator's decision. This was an action for enforcement of the adjudicator's decision. Clause 66 ICE 5th ed applied to the contract. An attempt was unsuccessfully made to demonstrate that the enforcement of the adjudicator's decision negated the scope of an arbitrator to consider the dispute ***"de- nouvo."***

Further more, an attempt to introduce a set off against the decision on grounds not argued at the adjudication and in the absence of a valid withholding notice was repelled. The defendants were ordered to pay the sum due in compliance with the decision.

Cases referred to included :-

Mackays Stores Ltd v City Wall (Holdings) Ltd *1989 SLT 835*, on the circumstances where a summary decree may be awarded

City Inn Ltd v Shepherd Construction Ltd *2002 SLT 781* : ***Farebrother Building Services Ltd v Frogmore Investments Ltd*** *2001:* ***A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd*** *[2000] 16 Const LJ 199* : ***Absolute Rentals Ltd v Gencor Enterprises Ltd*** *[2001] Const LJ 322.* ***Watson Building Services Ltd v Harrison*** *2001* : ***Macob Civil Engineering Ltd v Morrison Construction Ltd*** *[1999] BLR 93* on immediate summary enforcement of adjudication decisions pending final determination elsewhere.

KNS Industrial Services (Birmingham) Ltd v Sindall Ltd *[2001] 17 Const LJ 170* : ***Fastrack Contractors Ltd v Morrison Construction Ltd*** *[2000] BLR 168* : in relation to set off

Solland International Ltd v Daraydan Holdings Ltd *(15 February 2002,* ***David McLean Housing Contractors Ltd v Swansea Housing Association Ltd*** *[2002] BLR 125* in relation to the validity of a withholding notice after a dispute has been defined by the notice and referral documents.

Lord MacFadyen. Outer House, Court of Session. 23rd August 2002.

Construction Centre Group Ltd v. Highland Council [2003] ScotCS 114

This appeal against the decision of Lord Macfadyen [2002] CA127/02 was conducted on the same grounds as previously but in addition because the contractor had appointed a receiver and by virtue of Clause 63 once the contractor was expelled from the site no further sums are payable on account pending expiration of the Period of Maintenance and ascertainment of costs of completion etc. The court rejected the appeal and

further held that clause 63 did not cancel out the requirement to pay out on the decision, which was immediately enforceable.

The defence was as follows *"The defender, being entitled to exercise its right to compensation in terms of the Compensation Act 1592, is entitled to withhold payment from the pursuer of the sum sued for"* supported by **A v. B**, *2003* SLT *242: **Redpath Dorman Long Ltd v Cummings Engine Co**. 1981 S.C. 37 : **McEwan v. Middleton*** (1866) 5 Macph. 159 and ***Parsons Plastics Ltd v Purac Ltd*** [2002] EWCA Civ 459. However, the court rejected these submissions relying upon ***KNS Industrial Services Ltd v Sindall Ltd*** *[2001] Construction Law Journal 170:* ***Rainford House Limited v. Cadogan*** *[2001] BLR 416;* ***S.I. Timber Systems Ltd v Carillion Construction Ltd*** *2002 SLT 997:* ***Ferson Contractors Ltd v Levolux A.T. Ltd*** *[2002] E.W.C.A. Civ. 11.* to the effect that the dispute is defined by the notice of referral.

Lords Osborne, Hamilton and Carloway. Extra Division, Inner House, Court of Session. 11th April 2003

Costain Ltd v Bechtel Ltd [2005] EWHC 1018

Here Jackson J. considered an application for an Interim Injunction against a construction contract certifier, on the grounds of partiality and bad faith. The application arose out of a Gain and Pain (NEC derivative) contract for the Channel Tunnel High-Speed Rail link project, and specifically regarding extension work to St Pancras station, between Costain as contractors; Bechtel as project managers and Union Rails North Ltd as employer. Bechtel's profit was geared to a management fee plus a percentage (+ or -) of the difference between the target cost and the delivered cost. The Project Manager was tasked with certifying allowed and disallowed costs payable to the contractor. Between the 47th and 48th interim payment disallowed costs rose from £1.4M to £5.8M following a briefing by Mr Bassilly, the project manager and Bechtel staff about the need to stay within the target cost of the project. Costain came to the conclusion that Bassilly was acting partially and in bad faith in his contract administration duties. Hence the application for an injunction to abandon the asserted "new" policy.

The court came to the conclusion (it was not trying the facts) that Mr Bassilly was acting in a partial manner to protect the interests of Bechtel, but was not acting unlawfully or in bad faith. The central issue therefore was whether there is a duty on the administrator to act impartially and correspondingly whether it is permissible for him to act in the interests of Bechtel? Furthermore, if there was a duty to act impartially was it appropriate to injunct Bechtel?

The dispute resolution procedure involved the parties meeting to discuss dissatisfactions about certifications which if unsuccessful would give rise to applications for adjudication by either party. The court felt that in the light of this procedure, an injunction would be inappropriate. However, whilst the court was not in a position to give a definitive ruling on the legal rule as to whether or not there was a duty to be impartial, the court felt that there was nothing in the terms of the contract to the effect that the traditional role of certifier, set out in ***Sutcliffe v Thackrah*** did not apply. If this were not the case, the number of disputes referred to adjudicators as a consequence of partiality would be considerable, which would be illogical. There was an arguable (but difficult) case that Bechtel had acted partially and by implication URNL may have been induced to breach of contract. The parties might chose to refer this matter to a full trial.

His Honour Mr Justice Jackson. 20th May 2005.

Costain Limited v Strathclyde Builders Limited [2003] ScotCS 316

The adjudicator requested a four day extension from the referring party, in order to consult with his appointed legal advisor. Neither party objected and the adjudicator subsequently issued his decision. Neither party objected. However, when the prevailing referring party commenced enforcement proceedings the respondent objected that he had not been given any details of the advice given by the legal advisor and had not been afforded an opportunity to address that advice and therefore resisted the enforcement action on the grounds of natural justice. Lord Drummond concurred. He likened adjudication to arbitration in that the construction industry, despite the facility to refer to another forum for final binding settlement, tended to treat the adjudication decision as final and binding. The court cited the Scottish equivalents of the major English cases on the right to be heard. All elements of the case that go to the root of the decision must be disclosed.

Cases regarding natural justice cited included ***Discain Project Services Ltd v Opecprime Development Ltd,*** *[2001] BLR 285,* ***Inland Revenue v Barrs****, 1961 SC (HL) 22,* ***Barrs v British Wool Marketing Board,*** *1957 SC*

*72, **Black v John Williams & Co (Wishaw)**, 1923 SC 510; 1924 SC (HL) 22. **Balfour Beatty Construction Ltd v L.B. Lambeth**, [2002] BLR 288, **Try Construction Ltd v Eton Town House Group Ltd,** [2003] BLR 286, and **RSL (South West) Ltd v Stansell Ltd**, [2003] EWHC 1390; **Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd,** 2002 SCLR 766.* In favour of a less rigorous approach to natural justice the applicant unsuccessfully relied upon ***Try v Eton: Mitchell v Cable**, 1848, 10 D 1297, **Karl Construction: Stanley Cole (Wainfleet) Ltd v Sheridan**, [2003] EWCA Civ 1046* and ***Discain* v *Opecprime*.**

Lord Drummond laid down nine general (but not absolute or universal) principles underpinning the application of audi alteram partem in adjudication. 1) a fair opportunity to present case to all; 2) adjudicator controls procedure; 3) fairness is subject to time constraints; 4) simplicity and informality overrides attempts to impose grievous burdens on others; 5) equal opportunity to make written contentions and reciprocal opportunities to review the others contents 6) the adjudicator can use his knowledge and experience to decide questions of law and fact but must if using it to advance and apply propositions of fact or law not canvassed by the parties, afford them an opportunity, albeit short in time, to comment. 7) Where the adjudicator has to power to require additional information or the conducting of tests, the results must be made known to all; 8) Where the adjudicator has the power to seek outside advice the advice must be made known to all; 9) In the context of adjudication no distinction should be drawn between issues of fact or law – the adjudicator is often not a lawyer – and thus relies on the parties to adduce both.

Lord Drummond Young. Outer House, Court of Session. 17th December 2003.

Costain Ltd. v Wescol Steel Ltd. [2003] EWHC 312 (TCC)

This concerned a Part 8 application for a declaration that a reference to adjudication was not valid. The claimant was a contractor, the defendant a sub-contractor, for steelwork under a JCT standard form contract. There was a dispute as to whether the works were completed. The defendant went into administrative receivership. It was asserted that payment was not due under the final account because the defects liability period under the main contract has not yet expired. A disputed claim under the final account was referred to adjudication.

The court was therefore called to determine whether or not a dispute has arisen under Clauses 38 of the contract and the meaning of a dispute (***Fastrack Contractors v Morrison** [2000] BLR 168, **Halki Shipping Corporation v Sopex Oils Ltd** [1998] 1 WLR, CA 727* referred to), whether or not the notice / reference to adjudication had been served in a manner that complied with contract requirements and whether or not two disputes could be embraced within a single reference.

The court held that simply because payment pursuant to a final account was not yet due did not prevent a dispute about valuation of the final account crystallising.

His Honour Judge Richard Havery. TCC. 24th January 2003.

Cowlin Construction Ltd. v CFW Architects (a firm) [2002] EWHC 2914 (TCC)

Cowlin were employed as design and build contractor for the rebuilding of MOD property. CFW acted as architects for the project. Cowlin applied for summary judgment to enforce an adjudicator's decision. It was common ground that if the adjudicator had jurisdiction the claimant was entitled to summary judgment. CFW asserted that the adjudicator did not have jurisdiction because there was no construction contract between the parties and because there was no dispute capable of being referred to adjudication.

As is frequently the case, formal contracting dragged on over a period of time and a question mark hung over whether or not a construction contract had eventually been concluded, and if so on what terms, namely RIBA or SFA/99 Design and Build. This impacted both on whether HGCRA adjudication applied and on who was the appropriate nominating body. A dispute was referred via RIBA to an adjudicator who determined that there was an SFA/99 contract. Accordingly the adjudicator then resigned. Initially both parties acceded to jurisdiction but late in the day CFW challenged his jurisdiction. The adjudicator proceeded on the basis that once jurisdiction was accorded it could not be withdrawn. The court agreed. ***Project Consultancy Group v Trustees of the Gray Trust** 1999 : **Westminster Chemicals & Produce Ltd v Eichholz & Loeser** [1954] 1 Lloyds Rep 99 and **Sea Calm Shipping Co S.A. v Chantiers Navals de L'Esterel S.A.** [1986] 2 Lloyds Rep. 294* applied.

Regarding whether or not a dispute had crystallised the court was referred to ***Monmouthshire C.C. v Costelloe and Kemple Ltd*** *(1965) 5 BLR 83;* ***Halki Shipping Corporation v Sopex Oils Ltd*** *[1998] 1WLR727;* ***Ellerine Bros Pty Ltd v Klinger*** *[1982] 1 WLR;* ***Fastrack v Morrison*** *[2000] BLR 168;* ***Ken Griffin & John Tomlinson v Midas Homes Ltd*** *[2000] EWHC] TCC : [2001] 78 Con LR;* ***Sindall v Solland*** *2001;* ***Edmund Nuttall v R G Carter Ltd*** *[2002] BLR312.* The ***Halki*** approach was applied. The court held that eight weeks notice does not constitute ambush and that accordingly a dispute had crystallised.

Her Honour Judge Frances Kirkham. TCC. 15th November 2002.

CPL Contracting Limited v Cadenza Residential Limited [2005] EWHC (TCC) : TCLR 1.

CPL, the contractor to Cadenza under the JCT Form 1998, had submitted 13 interim applications, the last on 11th September 2003. Certificates were issued in due course, but certificate 13 was issued subject to £39Ks worth of deductions. CPL invoice the agreed amount on 13th October. On the 15th October Cadenza served a withholding notice for liquidated damages and paid the invoice. On the 11th May 2004 CPL issued a notice of adjudication in respect of the balance of the sums in Certificate 13. The adjudicator subsequently found for CPL. In this action Cadenza opposed enforcement of the adjudicator's decision.

CPL asserted that under clause 30 JCT a withholding notice was required for any deductions. In the absence of such a notice according to ***Watkin Jones v Lidl*** the entire sum covered by the application becomes due. CPL further asserted that a dispute crystallised when the certificate rejected part of the application.

Kirkham J disagreed on both points. Applying ***Halki*** and ***Beck Peppiatt,*** the court held that no dispute arose because CPL accepted what was stated in Cadenza's certificate. ***Watkin Jones v Lidl*** can be distinguished because the certificate was promptly disputed. Her Honour Judge Frances Kirkham. TCC. 1st January 2005.

CSC Braehead Leisure Ltd v Laing O'Rourke Scotland Ltd [2008] ScotCS CSOH_119

This dispute was about whether or not the defenders had, by defective work amounting to breach of contract, caused or materially contributed to either or both of a collapse of the ceiling in Auditorium 7 of the Odeon Cinema in the development, and the condition of the ceilings in the other auditoria in that cinema, and, if so, to what damages the pursuers were entitled from the defenders. The contract was under the Scottish Building Contract with Contractors Design Sectional Completion Edition May 1999 in its January 2002 Revision with minor amendments. For further factual background see ***CSC Braehead Leisure v Laing O'Rourke [2008] ScotCS CSOH_93.*** The adjudicator was not concerned with contribution.

The adjudicator submitted his decision 4 minutes before his deadline followed by a hard copy by post. The court held that email is an effective method of delivering a decision in time – subsequent postal delivery does not make the decision out of time. ***St Andrews*** **v** ***HBG*** 2003; ***Barnes & Elliot*** **v** ***Taylor Woodrow*** [2003]; ***Treasure & Son*** **v** ***Dawes*** [2007] considered.

The decision stated that it was an interim decision, though the court concluded that this was an unfortunate choice of words in the circumstances. The decision was issued subject to a request for additional time for the parties to make further submissions with a view to considering potential grounds for revaluation downwards of a deduction from the award for LADs. It is hardly surprising that the defendant refused permission since he had nothing to gain and everything to lose from this. The court held that contrary to the title interim decision, in the event that no extension was granted – which proved to be the case, this was a final decision. The fact that if both parties gave additional time & further submissions a different outcome might be reached did not change anything since he had sufficient information to reach a decision.

The court noted that the defendant was not prejudiced. To the contrary he got the benefit of the doubt in all this – if anything it was the applicant who could if he chose to complain that he had lost the opportunity to limit the deduction from his claim. ***Black*** **v** ***John Williams & Co (Wishaw) Ltd*** [1923] S.C.510, [1924] S.C.(H.L.) 22, ***Barrs*** **v** ***British Wool Marketing Board*** 1957 S.C.72, ***Inland Revenue*** **v** ***Barrs*** 1961 S.C.(H.L.) 22 and ***Costain*** **v** ***Strathclyde*** 2004 regarding mere possibility of injustice distinguished.

Adequacy of reasons : Clearly the adjudicator was rushed at the end to meet the time bar. The last four paragraphs were not in flowing prose. The court noted that whilst telegraphic, the award showed all the issues had been addressed and there was a clear decision. As to the standard of proof required the court noted that amendments to contract did not remove adjudicator's inquisitorial role or alter the standard of proof required to reach a decision. ***Diamond*** **v** ***PJW Enterprises*** 2004 SC430; ***Ritchie*** **v** ***David Philp*** 2005,

Ballast* v *Burrell [2002] SLT 1039 ; [2003] SC 279, ***RSL* v *Stansell*** [2003]; ***Carillion* v *Devonport*** [2005], ***KNS* v *Sindall***; ***CIB* v *Birse*** [2004] considered. ***South Bucks BC* v *Porter (No 2)*** [2004] UK HL 33, ***Wordie Property Co Ltd* v *SS for Scotland*** 1984 SLT 345, ***Albyn Properties Ltd* v *Knox*** 1977 SC 108, ***Safeway Stores plc* v *National Appeal Panel*** 1996 SC 37; ***Chief Constable Lothian & Borders Police* v *Lothian & Borders Police Board*** 2005 SLT 315 referred to

Dispute or disputes : ***Homer Burgess* v *Chirex*** 2000; ***Cantillon* v *Urvasco***[2008]; ***Ardmore* v *Taylor Woodrow*** [2006] considered : Held : This was one dispute, though it had several aspect to it.

Lord Menzies, Outer House, Court of Session. 19th August 2008

COMMENT : The problems encountered here are yet another example of the difficulties that arise when a dispute becomes more complex than it appeared from the referral, due to issues introduced by the defence. Following ***Urvasco*** the fact that these issues had not crystallised before reference is not now considered relevant. However, it puts pressure on the adjudicator who has to deliver the decision within 28 days of referral or within any extension (up to 10 days unilaterally by referring party) agreed by the parties. The 10 day provision makes sense in that the referring party is the one prejudiced by delay and if he wants additional time to respond to the defence, then that is his choice. The problem thereafter is that the party most likely to lose out by any further deliberations is likely to refuse further extensions as occurred here. The adjudicator has a choice. Providing sufficient information is available to make a decision, albeit rough and ready he must do so. If not he must resign if a request for additional time is rejected.

There are two messages here, one for the referring party the other for the adjudicator. First, the tighter the terms of the referral the less likely it is that the defence can expand the scope of the dispute exponentially. Secondly, an adjudicator should keep requests for additional time separate and distinct from the award so that when issued it is completely clear that it is final and issue the request and the award sequentially.

Cubitt Building & Interiors Ltd v Fleetglade Ltd [2006] EWHC 3413 (TCC)

This concerned an adjudication subject to JCT 1998 and the application of clauses 30 and 41A. The adjudicator was nominated at the end of the working day on day 7 after the request to nominate and the notice had been made. In consequence the referral was made on day 8 which on the face of it is a late referral and a potential breach of s108 HGCRA. The court held that in the circumstances it was nonetheless a valid referral and not out of time. The court was reluctant to visit the tardiness of the appointing body on the referring body, since this was a matter beyond his control.

The defendant also resisted enforcement on the grounds that the decision was both made late and furthermore delivered outside the agreed extension time and was thus late and invalid on both grounds. The decision was finalised late in the evening of the final date provided by an agreed extension or time and emailed to the parties 12 1/2 hours later. These delays arose out of two separate factors :

a) The adjudicator asserted that he had "reached his decision" a day earlier but had not committed the reasons to paper and was not ready to release the decision until put into a polished state and proof read, and
b) The adjudicator sought to exercise a contractual lien over the decision that he had introduced as a term of accepting the appointment (without demure by the parties at the time), but following subsequent adverse comments from the parties decided to release the decision.

The court determined

1) The decision was made on the final day (albeit after working hours) and was thus lawful. Attempts to establish that the decision was made a day earlier were brushed aside without comment.
2) After making a decision it must be issued forthwith. In the circumstances, the court found that what occurred was just within the meaning of delivery "*forthwith*" and hence the decision was validly made and issued and accordingly enforceable.
3) The court made it clear that in its view any attempt to exercise a lien over a decision was against the contractual regime that applied by virtue of the JCT Contract and contrary to the legal regime established by the HGCRA.

Ritchie v David Philp [2005] 1 BLR 384: ***Hart v Fidler*** [2006] EWHC 2857 TCC. ***William Verry v North West London Communal Mikva*** (2004) BLR 3008. ***Carter v Nuttall*** [2004] BLR 308. ***Palmac v Park Lane*** [2005]

BLR 30. ***Bloor v Bowmer*** [2000] TCC 764. ***St Andrew's Bay v HBG Management*** [2003] Scot CS 103. ***Barnes & Elliott v Taylor Woodrow*** [2004] 1 BLR 111, ***Simons v Aardvaark*** [2004] 1 BLR 117 considered.

His Honour Judge Peter Coulson Q.C.. TCC. 21st December 2006.

Comment : Amongst other things it would appear that we have entered the realm of 24/7 construction adjudication – like the Grantham shopkeeper, the adjudicator is *"open all hours."* Technology and the electronic age is wonderful, n'est pas? Contrast ***Epping v Briggs*** where Havery J was less accommodating.

The court also served a warning to adjudicators that they may not be protected by the good faith exemption within the HGCRA if they breached their contractual obligations to deliver a decision in time. In this case, the adjudication concerned an otherwise time barred opportunity to challenge an evaluation. The adjudicator could have been subject to an action to recover damages for the lost opportunity to challenge that evaluation and in addition his entitlement to fees was also put in jeopardy by his last minute brinksmanship. The moral of the story here is secure a further extension of time, if only for another 24 hours if there is a danger of not meeting the deadline. Otherwise, prioritise!

Cubitt Building & Interiors Ltd v Richardson Roofing (Industrial) Ltd [2008] EWHC 1020 (TCC)

Stay : arbitration to adjudication : Cubitt seeks declaratory relief that its terms and conditions were incorporated into the sub-contract between the parties and injunctions that Richardson should be restrained from continuing with an arbitration and that adjudication should proceed before any further proceedings. Application refused.

Richardson seeks a declaration that the DOM/1 Sub-Contract Conditions were incorporated into the sub-contract and that Cubitt's application that the arbitration should be stayed pending adjudication should itself be stayed under S9 Arbitration Act 1996. Application granted.

As to letters of intent : battle of the forms, ***British Steel Corporation v. Cleveland Bridge & Engineering Co.*** [1981] 24 BLR 94 considered. As to precedence of hand written terms over printed terms in a standard form contract ***Robertson v French*** *(1803) 4 East, 130 cited. As to non-incorporation of standard terms referred to but not attached to documents,* ***Poseidon Freight Forwarding Ltd. v. Davies Turner Southern Ltd.*** [1996] 2 Lloyds Rep 388 considered.

There is a right to refer, but not a default obligation to refer, disputes to adjudication. ***DGT Steel & Cladding Ltd v. Cubitt Building & Interiors Ltd*** [2007] EWHC 1584 (TCC) considered. Clear words in a contract are required to make adjudication a prerequisite to arbitration or litigation.

Mr Justice.Akenhead. TCC. 9th May 2008

Curot Contracts Ltd (t/a Dimension) v Castle Inns Ltd (t/a Castle Leisure) [2008] ScotCS CSOH_179

Here, an application for summary enforcement was unsuccessfully resisted on the grounds that not only had the adjudicator erred in law but that he had effectively ignored the contract and decided the case on the basis of what he perceived to be just and reasonable.

The court noted that whilst a failure to understand the law might in other circumstances amount to an excess of jurisdiction as in ***West v Secretary of State for Scotland*** 1992 SC 385 this wass not the case in adjudication. Provided that the adjudicator had asked himself the right question, his decision was not to be regarded as *ultra vires* on the ground merely that he gave the wrong answer: ***Gillies Ramsay Diamond v PJW Enterprises*** 2004; ***C&B Scene v Isobars*** [2002]; ***Carillion v Devonport Royal*** [2006].

The adjudicator had rejected the defendant's interpretation of the contract as too literal and as one that produced an unreasonable / uncommercial result. He did not ignore the contract – he interpreted it – whether correctly or not is not at issue and hence the decision was applied.

As to interpretation of contracts - ***L. Schuler A.G. v Wickman Machine Tool Sales Ltd.*** [1974] AC 235 noted.

Lord Glennie. Outer House, Court of Session. 16th December 2008

Cygnet Healthcare plc v Higgins City Ltd [2000] EWHC (TCC) : 16 Const LJ 394

A payment dispute arose in respect of a construction project. This was referred to adjudication and ultimately the adjudicator found for the Cygnet. However, there was a question mark over whether or not there was in fact a contract in the first place and this matter was referred to arbitration for determination. Before the fast track arbitral proceedings had concluded Cygnet applied for enforcement of the adjudicator's

decision ***Herschel Engineering v Breen Property Ltd*** *2000 B.L.R. 272* referred to. His Honour Judge Thornton chose, in the circumstances, to stay the hearing pending the outcome of the arbitration. Whilst the court would normally determine whether or not there was a contract to enforce, in the circumstances it was appropriate to allow the mechanism adopted by the parties to run its course.

His Honour Judge Anthony Thornton. TCC. 7th September 2000.