

ADJUDICATION CASE SUMMARIES D



LAST UPDATED 23rd JULY 2008

Danielson Development Ltd v Courtney [2004] C.L.Y. 940; 2002 WL 32093102

This involved a JCT contract to build 4 houses. On non-payment of progress payments the contractor suspended works and commenced adjudication. Having received threats of violence from the employer notified the police, moved out of the area and apart from requesting via his solicitor for an extension of time for the adjudication did not take part in the process. The adjudicator produced a default decision and here applied for enforcement. One of the contractor's directors was charged with conspiracy to cause GBH. The court declined to enforce the adjudication since the threats affected the employer's ability to take part in the adjudication. Judge Mackay. 28th March 2002.

Daraydan Holdings Ltd v Solland International Ltd [2004] EWHC 622 (Ch)

Whilst the proceedings before an adjudicator and the determinations of an adjudicator are admissible as evidence in court and are given due consideration in an action for enforcement or alternatively where a decision is challenged by way of judicial review, the proceedings and determination are not relevant to a de novo trial post adjudication whether by way of arbitration or litigation. The only relevance that the determination has to the subsequent trial is in relation to apportionment of costs following the general rule that costs follow the event.

However, there is an exception to this general rule where allegations of fraud are involved. The central allegations here were that bribery had taken place during the contract procurement process and applications were inflated by 10%, the additional amounts being channelled to an agent. The court held that false statements made in the course of adjudication proceedings are admissible a subsequent fraud trial.

On the seriousness with which the courts regard secret bribes *AG for Hong Kong v Reid* [1994] 1 AC 324 referred to. Whether *Lister v Stubbs* (1890) 45 Ch D 1 is still good law in the light of *Reid* and *Bribes and Secret Commissions* [1993] Restitution LR 7 discussed. *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289; *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643. *A.G. v Blake* [1997] Ch 84; *Halifax Building Society v Thomas* [1996] Ch 217 considered. *Mercedes Benz AG v Leiduck* [1996] AC 284 applied.

Regarding the fiduciary duties of an agent, *Panama & South Pacific Telegraph v India Rubber* (1875) LR 10 Ch App 515; *Hovenden v Millhoff* (1900) 83 LT 41; *Reading v R* [1949] 2 KB 232; *Mahesan v Malaysia Government Officers' Co-operative Housing Society* [1979] AC 374; *Logicrose v Southend United Football Club* [1988] 1 WLR 1256; *Powell & Thomas v Evans Jones* [1905] 1 KB 1; *Bristol & West Building Society v Mothew* [1998] Ch 11 considered.

Mr Justice Lawrence Collins. Chancery Division. 26th March 2004.

David McClean Contractors Ltd v The Albany Building Ltd [2005] TCC 101/05

An adjudicator ruled on a dispute. The first ground of resistance of enforcement of the adjudicator's decision was that there was a dispute as to which contract applied, which accordingly deprived the adjudicator of jurisdiction. The court found that there was a dispute as to whether a supplemental JCT contract applied. However, that supplemental contract had no impact upon the adjudication provisions of the main JCT contract and had no impact upon the issues upon which the adjudicator had ruled.

The second line of defence was that the subject matter of an adjudication had already been disposed of at a previous adjudication involving the same adjudicator and hence under the double jeopardy rule the adjudicator lacked jurisdiction. At the first adjudication it had been held that there had been a valid withholding notice in respect of deductions for liquidated and ascertained damages. Thus the defendant had effectively won at that particular adjudication on the question of whether the issuing of the notice was valid.

In the second adjudication, the adjudicator dealt with the question of how much, if anything at all could be deducted as liquidated and ascertained damages. The answer here was nothing because the notice followed seven invalid notices of non-completion. In consequence £1.3M was due to the claimant.

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The court held that whilst both actions had involved discussion of liquidated and ascertained damages, the issues were distinct and separate. Thus the adjudicator had jurisdiction. On the other hand, whilst there were unsettled claims for liquidated damages that would be dealt with at a subsequent hearing, this cross claim could not be set off against the sums due under the second adjudication.

Regarding set off for future claims, *M J Gleeson plc v Devonshire Green Holdings Limited* considered to the effect that an equitable set off as per *Hanak v Green* had been contracted out of. *Levolux v Ferson ; KNS Industrial Services ; David McLean ; Bovis Lend Lease* considered.

His Honour Judge Gilliland QC : 10th November 2005

David McLean v Swansea Housing Association Ltd [2001] EWHC HT 01/00115 (TCC) [2002] BLR 125

6 heads referred, excluding Liquidated damages. The adjudicator awarded damages less Liquidated Damages pursuant to a counterclaim. The court held that the liquidated damages award was an integral part of the EOT claim. In the circumstances the award was not enforceable in full and since the Liquidated damages exceeded the sum awarded to the applicant, a balance was due to the respondent.

Regarding jurisdiction and the nature of notice to refer *Fastrack v Morrison 2000] BLR 168* considered.

Regarding the nature of the adjudication decision *VHE Construction plc v. RBSTB Trust Co. Ltd.* (2000) 70 Con LR 51; *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd [2000] BLR 207. Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 522.* referred to.

His Honour Judge Humphrey Lloyd. TCC. 27th July 2001.

David Wilson Homes Ltd v Survey Services Ltd [2001] EWCA Civ 34

Dispute resolution clause required a dispute to be referred to a QC but did not say for what purpose (whether ADR, adjudication or arbitration). CA. held that it was implied that it was for determination of the dispute ? so it was an arbitration clause, pursuant to s6 Arbitration Act 1996. *Re Carus-Wilson v Green* (1887) 18 QBD 7 considered

Simon Brown LJ : Longmore LJ. 18th January 2001

Dean & Dyball v Kenneth Grubb Associates [2003] EWHC 2465 TCC

This concerned a dispute between sub-contractor and sub-sub contractor for consulting engineering services. The defendants sought to resist enforcement of an adjudication decision on the following grounds, namely

- (a) The claim referred to adjudication was not the same claim as the claim rejected by Grubb and the subject of correspondence between the parties (ie the dispute had not crystallised).
- (b) The contract was not "in writing" and thus outside the HGCRA.
- (c) The dispute was not validly referred for adjudication under the contractual provisions.
- (d) The Adjudicator made an error of law by answering the wrong question.
- (e) The procedure lacked fairness."

Transparency : CIC adjudication procedure – parties to be interviewed separately and given summary of interview : Held – parties had waived right to be present.

His Honour Judge Richard Seymour. TCC. 28th October 2003.

Debeck Ductworth v T&E Engineering Ltd [2002] EWHC BM250063 (TCC)

This concerned an application for summary enforcement of an adjudication decision in relation to a labour only construction contract. The guidance provided by *Swain v Hillman* is to the effect that "by CPR24.2 the court may give summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim and I also remind myself that it is not appropriate for the court to be conducting a mini trial."

As to whether there was a contract in writing sufficient to satisfy s107 HGCRA, *RJT Consulting Engineers Ltd v DM Engineering Northern Ireland Ltd*, 2002 EWCA, CIV 270, referred to and applied. On the facts of the case the court found that there were insufficient written terms to constitute a construction contract under s107 HGCRA 1996, so payment provisions s111, 112 were not applicable. Summary enforcement refused.

Her Honour Judge Frances Kirkham. TCC. 14th October 2002.

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Deko Scotland v. Edinburgh Royal Joint Venture & Anor [2003] ScotCS 113

A construction dispute was referred to adjudication. As part of that decision the adjudicator made an award as to costs of representation in respect of the adjudication. Clause 21 Orsa appendix 8, which was incorporated into the contract gave adjudicator power to award legal costs.

“Counsel for the defenders’ attacked the pursuers’ claim for the expenses of the adjudication on two grounds. In the first place, he submitted that any award of expenses by the adjudicator must be based on Rule 21A of the amended ORSA Rules. While that rule clearly gave the adjudicator power to award the costs of the adjudication, the power so conferred was confined to legal costs, in the sense of costs analogous to judicial expenses; no power was conferred to require a party to pay any other expenses”

The court agreed and further held that that power included a requirement for the adjudicator to carry out taxation before costs become due. *Younger v Caledonian Railway Company*, 1847, 10 D. 133 applied. The court allowed that part of the claim related to the fees of the adjudicator.

Lord Drummond Young, Outer House, Court of Session. 11th April 2003.

DGT Steel & Cladding Ltd v Cubbitt Building & Interiors Ltd [2007] EWHC 1584 (TCC)

This is a novel case where the terms of a contract mandated adjudication as a prerequisite to litigation. The court was required to determine whether the current dispute was the same dispute as had been previously adjudicated thereby giving rise to right to litigate. The court held that this was a distinct and separate dispute : Accordingly, a stay to adjudication was granted. The court noted that the HGCRA optional scheme was not applicable in this case.

Re jurisdiction to grant a stay *Channel Tunnel. v Balfour Beatty* [1993] AC 334; *Cott UK Ltd. v. FE Barber Ltd.* [1997] 3 All ER 540. *Cape Durasteel Ltd. v Rosser & Russell Building Services Ltd.* [1995] 46 Con LR 75, *Herschel v Breen* [2000], *Wireless PLC v. IBM UK Ltd.* [2002] EWHC 2059 (Comm) referred to.

Regarding binding adjudication *Cape* referred to.

As to distinct disputes *Mivan v Lighting Technology* [2001]; *Holt v Colt* [2001], *Skansa v EDRC* [2003] ; *Halki Shipping Corp v. Sopex Oils Ltd.* [1998] 1WLR 726). *Edmund Nuttall v RG Carter Ltd* [2002] .; *Fast Track v Morrison* [2000] referred to. HHJ Peter Coulson . TCC. . 4th July 2007

Diamond (Gillies Ramsay) v. PJW Enterprises [2002] Scotcs 340

This concerned an application for judicial review of an adjudicator’s decision. The application contained several counts, namely

- 1) Error of law on face of record : The court held that an adjudicator may be wrong, but that decision cannot be challenged by way of judicial review subject to the caveat that an adjudicator must ask himself the right question.
- 2) Assertion that contracts for surveying are not within the scope of the HGCRA. The court held that surveying is covered by HGCRA.
- 3) An assertion that an adjudicator has no power to award damages for breach of contract. The court held that an adjudicator can award damages :

As to severance of elements of a contract and whether or not surveying work, as a quasi judicial function amounted under s104 to a construction contract, *Homer Burgess Ltd. v. Chirex (Annan) Ltd.*, 2000 S.L.T. 277 ; *Fence Gate Ltd. v James Knowles Ltd.* 2001) (obiter): referred to.

Regarding the power to award damages under Scottish law : *Aberdeen Ry. Co. v Blaikie Bros.* (1853) 15D. (H.L.) 20; *McAlpine v Lanarkshire & Ayrshire Ry. Co.* (1889) 17 R. 113. referred to but subsequently contrasted with the power of an adjudication under the HGCRA, *Macob Civil Engineering Ltd. v Morrison Construction Ltd.* [1999] B.L.R. 93, : *Karl Construction (Scotland) Ltd. v Sweeney Civil Engineering (Scotland) Ltd.*, 2001 S.C.L.R. 95 considered.

As to distinctions between English and Scottish law *Heyman v Darwins Ltd.* [1942] A.C. 356 : *Bouygues (UK) Ltd. v Dahl Jensen (UK) Ltd.*, C.A. [2000] B.L.R. 522 *Photo Production Ltd. v Securicor Transport Ltd.* [1980] A.C. 827 ; *Lloyds Bank plc v Bamberger*, 1993 S.C. 570 ; *Compagnie Commercial Andre S.A. v Artibell Shipping Co. Ltd.*, 1999 S.L.T. 1051, referred to.

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As to whether an adjudicator has the power to make a provisional award of damages **Stevenson v Pontifex & Wood** (1887) 15R. 125 considered.

Regarding whether a notice requesting an extension of time even after the date of practical completion is permissible **Hunter v Hanley**, 1955 S.C. 200; **Maynard v West Midlands Regional Health Authority** [1984] 1 W.L.R. 634; **Royal Brompton Hospital NHS Trust v Hammond** 2001 76 Con.L.R. 148; **Watt v Lord Advocate** 1979 S.C. 120; **Homer Burgess Ltd v Chirex (Annan) Ltd** [2002] B.L.R. 124 referred to.

Regarding whether the adjudicator had considered all the issues, **Ballast plc v The Burrell Company (Construction Management) Ltd.**, 2001 S.L.T. 1039; **Anisminic Ltd. v Foreign Compensation Commission** [1969] 2 A.C. 147 : **R. v Hull University Visitor, ex parte Page** [1993] A.C. 682 : **London Borough of Merton v Stanley Hugh Leach Ltd** referred to.

Diamond asserted that they were “entitled to have the adjudicator’s decision reduced:

- (1) *The adjudicator had made no reference to the authorities referred to at the oral hearing, or to what these authorities seemed to establish.*
- (2) *He appeared to have left out of account the material considerations raised by the authorities: otherwise he could not have reached the view that it must be professionally negligent for a surveyor to accept and grant a request for an extension of time after the date of practical completion. He had thus failed to take into account material considerations.*
- (3) *In any event the adjudicator appeared not to have addressed the correct questions for professional negligence, namely (i) was there an established practice, (ii) had Diamond departed from that practice; (iii) would no ordinarily competent surveyor acting with reasonable care and skill have done what Diamond did.*
- (4) *Further, even if the adjudicator had taken all material considerations into account and had asked himself the right questions, his reasons (as expressed in the decision and reasons numbers 6/1 and 6/2 of process) were obscure and did not satisfy the test in **Wordie Property Co. Ltd. v Secretary of State for Scotland**, 1984 S.L.T. 345.”*

As to enforcement in the light of errors by an adjudicator **Ballast plc v The Burrell Company (Construction Management) Ltd.**, 2001 S.L.T. 1039 : **Macob Civil Engineering Ltd v Morrison Construction Ltd.** [1999] B.L.R. 93; **Bouygues (UK) Ltd. v Dahl Jensen (UK) Ltd.** [2000] B.L.R. 522; **Sherwood & Casson Ltd v Mackenzie** (2000) 2 T.C.L.R. 418. **Homer Burgess Ltd. v Chirex (Annan) Ltd.**, 2000 S.L.T. 277. **Hunter v Hanley** 1955 S.C. 200 : **SL Timber Systems Ltd. v Carillion Construction Limited** [2001] B.L.R. 516 : **Regina v Hull University Visitor, ex parte Page** [1993] A.C. 682 : **Watson Building Services Ltd. v Harrison**, 2001 S.L.T. 846 considered.
Lady Paton. Outer House Court of Session. 27th June 2002.

Diamond (Gillies Ramsay) v. PJW Enterprises Ltd [2003] ScotCS 343 (double posted at 354)

The petitioners are a firm of surveyors. They entered into contract with the respondents, to provide design and contract administration services on the respondent’s property in Glasgow. The respondent subsequently incurred additional liabilities resulting from five adjudications with the builder undertaking the construction works. The respondent then successfully claimed damages in respect of these liabilities from the petitioner in adjudication, in respect of their failure to exercise sufficient care and skill that would be expected from a competent surveyor.

The petitioner sought a reduction in the adjudicator’s decision in judicial review. The Lord Ordinary found against all four points which the petitioners raised. The petitioners renewed their submissions in a reclaiming motion.

The first point questioned whether the contract was a construction contract. This was rejected as surveying services provided constituted a construction contract **s.104(1)(b)**; cf **Fence Gate Ltd v Jas R Knowles Ltd**, [2001] 84 Con LR 206.

Secondly the petitioner argued that adjudication is a specialized form of arbitration **Deko Scotland Ltd v Edinburgh Royal Joint Venture Ltd** 2003 SLT 727. Unlike an arbitrator in England **Heymans v Darwins Ltd** [1942] AC356, a Scottish arbitrator has no power to award damages unless empowered to do so in the contract or by statute **Aberdeen Rly Co v Blaikie Bros** (1853) 15 D (HL)20; **Mackay v Barry Parochial Board** (1883) 10R 1046. Lord Justice Clerk did not agree with the observation in **Deko Scotland Ltd v Edinburgh Royal Joint Venture Ltd** (*supra*) that adjudication was a form of arbitration. Due to the provisional nature of

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adjudication the Lord Justice Clerk did not consider that an adjudicator was subject to the common law limitations of an arbitrator. Also statutory reference to adjudicating any dispute must comprehend a claim for actual breach of contract and therefore the power to adjudicate such a dispute implies a power to award damages if the breach is proved.

Thirdly counsel submitted that damages awarded by the adjudicator were not recognized by Scottish law as the decision was a temporary one *Stevenson v Pontifex & Wood (1887) 15 R 125*, *Duncan's Trs v A & P Steven (1897) 24 R 880*. Rejected, an adjudicator's decision was immediately enforceable and binding until the award was overturned in litigation or an arbitration or an agreement between the parties.

Fourthly, counsel questioned a number of elements with regards the adjudicator's decision, which were all rejected by the court. Failure to take account of relevant material *London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51*. Unintelligibility of reasons *Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345*. *Save Britain's Heritage v No 1 Poultry Ltd : Hunter v Hanley* : In the circumstances the court held that the reasons were intelligible. Error of law, the court did not consider that the decision in *Anisminic v Foreign Compensation Commission [1969] 2 AC 682* allowed a judicial review of an adjudicator's intra vires error of law.

Reclaiming motion against the judgement of Lady Paton refused. *Summary by Nick Turner*.

Lord Justice Clerk, Lord Macfadyen and Lord Caplan. Second Division, Inner House Court of Session.
24th December 2003.

Discairn Project Services v Opecprime Developments Ltd No1 [2000] BLR 402 (TCC) ¹

A dispute arose between the contracted designer, manufacture and erector of structural steelwork to balconies on a block of flats. The dispute was referred to adjudication. The adjudicator found that £55,552.50 + VAT was due to the contractor.

This case discusses allegations of bias by the adjudicator and breach of the rules of Natural Justice. This albeit short extempore summary judgement and its addendum are significant in that they represent the first of a series of cases that firmly established that whilst an error of fact committed by an adjudicator would not prevent enforcement, as established by *Macob v Morrison*, the enforcing court will enforce minimum standards of due process and natural justice. Bowsher J makes it clear that minor complaints about an essentially rough and ready process will not be entertained by the court, but that significant breaches of the Rules of Natural Justice will result in a refusal to enforce. In the circumstances, namely that one of the parties had a number of telephone conversations with the adjudicator, the contents and occurrence of which were not disclosed to the other party, meant that it appeared a first blush to the court that there had been significant breaches of the Rules of Natural Justice and accordingly the summary application for enforcement was refused. Leave to defend was granted.

His Honour Judge Peter Bowsher. TCC. 9th August 2000

Discairn Project Services Ltd v. Opecprime Developments Ltd No2 [2001] EWHC TCC 435

Bowsher J explored in considerably more detail than was possible during the summary hearing, whether or not the "private" telephone conversations amounted to a serious breach of the rules of natural justice. The review further reinforced His Honour Judge Peter Bowsher's view that there had indeed been a serious / significant breach of the rules and again refused to enforce the adjudicator's decision.

His Honour Judge Peter Bowsher. TCC. 11th April 2001.

Discairn Project Services Ltd v. Opecprime Developments Ltd No3 [2001] EWHC TCC 450

Repudiation : value of works done : Claim and counterclaim : Retrial of the merits.

His Honour Judge Richard Seymour. TCC. 11th December 2001.

Comment : On balance the final award to Discairn was £50,201.09. One is left to wonder whether or not the difference between the first and final decision and award was sufficient to justify the cost of an adjudication and three court appearances. Whether or not adjudication produced in this instance the fast results intended by Parliament is far from evident, though it is understandable that the process would receive scrutiny.

¹ Note that in *Discairn No2* Bowsher J observes that the transcript of *Discairn No1* posted up in the BLR is inaccurate in that it does not reflect important amendments that he had made to the judgement. See also (2000) CILL 1676 : QBD Judge Bowsher (QC) 9th August 2000.

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Domsalla (t/a Domsalla Building Services) v Dyason [2007] EWHC 1174 (TCC)

Following destruction by fire of the assured's property, an insurance company contracted with Domsalla for the demolition and restatement of Dyason's home, subject to JCT Minor Works. Dyason signed as agent of the underwriters. Delays followed and the quality of work was disputed by Dyason. Domsalla terminated the contract for non-payment of stage payments. The underwriters purported to avoid the policy at about the same time but ultimately brokered a settlement with Dyason, who was left to sort out outstanding construction matters. Domsalla submitted the payment dispute to adjudication. Dyason took part subject to two reservations regarding jurisdiction, with specific reference to the compliance with the UCCTA of withholding notice provisions within the JCT contract. The adjudicator held that the provisions did not offend the UCCTA and determined that in the absence of withholding notices payment became due on the certified stage payments. Domsalla here sought summary enforcement of that decision.

Thornton J held that the adjudication provisions complied with the UCCTA and there had been a valid reference of the dispute to adjudication. He further held that as a non-HGCRA adjudication, the adjudicator's decision was amendable to review for errors. In the circumstances, at the relevant times contract administration was exclusively in the hands of the underwriter. Dyason had had no say in the terms of the contract. He was unaware of the withholding provisions and had no power to issue withholding notices at the relevant time. These factors were contrary to the requirements of the UCCTA and thus the withholding notice provisions were not enforceable. Whilst under the HGCRA errors of law will not prevent an adjudicator's decision from being enforceable, this is not the case in non-HGCRA adjudication. The adjudicator could not by error override the statutory rights of a consumer under the UCCTA. Accordingly summary enforcement was refused and the case would proceed to trial.

Director General of Fair Trading v First National Bank plc [2002] 1 AC 481; *Bryen & Langley v Boston* [2005] EWCA Civ 973 considered. Other cases cited included *Picardi v Cuniberti* [2003] BLR 487, Judge Toulmin QC; *Lovell Projects Ltd v Legg & Carver* [2003] BLR 452, Judge Moseley QC; *Westminster Building Co Ltd v Beckingham* [2004] BLR 163, Judge Thornton QC; *Allen Wilson Shopfitters v Buckingham* [2005] EWHC 1165 (TCC), Judge Coulson QC. *Rupert Morgan Building Services Ltd v Jervis* [2004] 1 BLR 18; *Gilbert-Ash (Northern) Ltd v Modern Engineering* [1974] AC 689 considered.

HHJ Thornton. Q.C. TCC. 4th May 2007

Donal Pugh v Harris Calman Construction Ltd & Stanners Design Ltd [2003] CLDC

Mr Pugh presided over an adjudication between Calman and Stanners. This action was brought by the adjudicator to recover an outstanding balance of £1,849.05. Calman paid his portion promptly, Stanners did not until just before a Part 24 hearing for recovery of the fees was due to take place. This left the question of the costs to date of the enforcement action. Even though the costs were disproportionate to the amount at issue, District Judge Trent awarded enforcement costs of £2,600 on an indemnity basis – exercising the discretion under CPR 44.3 rather than the fixed costs normally due under CPR 45.4. There was no prospect of resisting the matter at small claims. An assertion by Stanner that there was a jurisdiction issue was dismissed out of hand as delay tactics and nothing more. City of London Court. There is no transcript of this case available.
His Honour District Judge Trent. 30th June 2003.

Dumarc Building Services Ltd v Mr Salvador Rico [2003] KT203081Epsom C.C

Subject to a JCT Minor Works 1988 Form with amendment MW11 Dumarc carried out work on the respondent's residence. The contract contained private adjudication provisions, independent of the HGCRA and the Scheme. The architect certified £13K+ as being due to the contractor on the 10th September followed by a withholding notice on the 14th for defective work, non-performance and liquidated damages. The contractor submitted the dispute to adjudication. The adjudicator found, subject to reductions for over-certification, for the contractor. The employer did not pay, asserting a right of set off, under Clause 2.3. against sums due (this states that an employer may withhold against certified sums, if a withholding notice is issued 5 days before the due date for payment), including an adjudication decision, *Bovis v Triangle* being offered in support. The contractor, relying upon *Levolux v Ferson* asserted that there could be no set-off.

His Honour Judge Hull, found that the adjudicator had not determined the question as to whether or not the employer was entitled to deduct liquidated sums from the certificated sums. Furthermore he held, following *Levolux* that Clause 2.3 did not provide a right to set-off liquidated damages against an adjudicator's

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decision. A withholding notice issued after a decision has been delivered does not provide a right to a set off against the decision sum. Summary judgement granted. There is no transcript for this case.

His Honour Judge Hull. Epsom County Court. 1st February 2003.

COMMENT : The moral of the story is, if an employer has any claims against the contractor, they should be asserted as soon as possible and if necessary an adjudication commenced promptly.

Dunn v Glass Systems (UK) Ltd [2007] EWHC B2 (QB)

Abuse of process : Application to strike out post adjudication trial of construction dispute : ground that particulars of claim are prolix ; unintelligible ; no clear case ; failure to comply with CPR. Held : *"I regret that I also have serious reservations about the competence of Mr Dunn. The criticisms of Mr Grant show that he has no idea how to draft a pleading. The nature of his submissions seriously leads me to doubt his judgment. My provisional view is that this is a matter where all the papers ought to be referred to the Bar Standards Board for the protection of the public. However before I take that step I shall hear submissions both from Mr Grant and Mr Dunn at the resumed hearing."*

McPhilemy v Times Newspapers [1999] 3 All ER 775; *Mahon v Rahn* [2000] 1 WLR 2150; *Barnes v Handf Acceptance* [2004] EWHC 1095 (Ch); *O'Neill v Clarke* [2005] EWHC 178 cited regarding particulars of claim

John Behrens : 11th July 2007.

Durabella Ltd v Jarvis.J & Sons Ltd [2001] EWHC 1998 ORB 33 (TCC)

"Pay when paid clause": Pre HGCRA contract with "pay when paid" provision. Held : Insufficient evidenced adduced to establish non-payment : Accordingly since they were paid, they had to pay up.

Durabella were Jarvis's sub contractors for the provision of hardwood flooring in 36 flats which Jarvis were constructing for Gilliard Homes Ltd. Gilliard terminated Jarvis's contract due to defective workmanship.

When Durabella sued Jarvis, Jarvis sought to rely on a 'pay when paid' clause in their conditions as a defence. The court held that the specific clause in the contract between Durabella and Jarvis was not unreasonable. However during proceedings it was found that the evidence of some of Jarvis's key defence were misleading and as such Jarvis could not rely on its pay when paid clause.

At the time there were several safeguards in law regulating the pay when paid clauses, one being that 'pay when paid' could only be effective so long as the main contract machinery of payment was capable of being operated. This safeguard applied in this instance. Termination of the contractor's employment with the Employer prevented further payment. The contractor had failed to pursue its remedy promptly and effectively. It was held that the contractor could not rely on the 'pay when paid' clause.

Regarding public interest challenges, cases referred to included *Prudential Assurance Co Ltd v McBains Cooper* [2000] 1WLR 2000.

Regarding the section 113 of HGCRA, cases referred to included *ABB Power v Norwest Holst Construction* [2000] BLR 426 (TCC). *Palmers Ltd v ABB Power Construction Ltd* [1999] BLR 426 (TCC).

Summary by Rachel Ewin.

His Honour Judge Humphrey Lloyd QC TCC 19th September 2001

Durtnell (R) & Sons Ltd. v Kaduna Ltd. [2003] EWHC 517 (TCC)

Meaning of Dispute : Extension of Time (EOT) subject to architect's determination under JCT : Since time for determination had not elapsed no dispute had arisen.

The parties entered into a contract in the Standard Form of Building Contract, 1980 Edition Private with Quantities as amended to carry out construction works at Laverstoke House in Hampshire.

In September 2002, an extension of time was applied for by Durtnell, and under the terms of the contract the architect was obligated to determine the application within 12 weeks. The application should therefore have been determined by 2 December 2002.

Durtnell referred several disputes to adjudication on 14 November 2002, which questioned whether the works had reached practical completion or in the alternative whether Durtnell was entitled to a further extension of time. Aside from these, there were also claims in relation to loss and expense and additional works.

The adjudicator made a decision that Kaduna was to pay £1.2million. Kaduna paid half of this sum and refused to pay the other, stating that the adjudicator had acted outside of his jurisdiction. Durtnell took the outstanding sum to summary judgement.

After in depth consideration, the judge in the case held that there was no dispute as to the entitlement to an extension of time and as such no loss and expense could follow.

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The court held that as the matters were referred to adjudication before the Architects time to determine the extension of time had elapsed, there was nothing to argue about and as such, no dispute. The court further held that under the doctrine of approbation and reprobation that part of the adjudicator's decision, which had previously assessed the extension of time and subsequent loss and expense in the adjudication of 14 November 2002 was invalid and made in excess of jurisdiction. As such Durnell failed in its bid to secure enforcement of the balance of the adjudicator's decision which Kaduna had refused to accept.

Regarding the adjudicators jurisdiction, cases referred to included *Maymack Environmental Services Ltd v Faraday Building Services Ltd* [2000] 75 Con LR 101 and *Furness Withy (Australia) Ltd v Metal Distributor's (UK) Ltd* [1990] 1 Lloyd's Rep 236. *Edmund Nuttall v R G Carter* [2002].

Regarding approbation and reprobation, cases referred to included *Shimizu Europe Ltd v Automajor Ltd* [2002] BLR 113. *Lissenden v CAV Bosch Ltd* [1940] AC 412.. *Banque des Marchands de Mosco v Kindersley* [1951] Ch. 112.

Summary by Rachel Ewin.

His Honour Judge Richard Seymour. TCC. 19th March 2003.