

# ADJUDICATION CASE SUMMARIES E



LAST UPDATED 21<sup>st</sup> DECEMBER 2008

## **Earls Terrace Properties Ltd v Waterloo Investments Ltd [2002] EWHC HT 02/237 (TCC)**

Construction Contract : A minor variation in respect of fees did not turn a pre-HGCRA contract into a relevant Construction Contract.

Waterloo undertook to manage the development of properties at Earls Terrace for Earl in an agreement set out dated 4<sup>th</sup> December 1996. The parties subsequently varied this agreement by entering into a variation agreement by deed on 20<sup>th</sup> July 1998.

Waterloo served a Notice of Adjudication on 28<sup>th</sup> January 2002 under the Housing, Grants, Construction and Regeneration Act. Earl sought that the adjudicator did not have jurisdiction to act.

It was not argued that the original Deed Agreement constituted a construction contract under the Act. One of the main issues was whether the variations in the 2<sup>nd</sup> Deed Agreement constituted a construction contract under the Act.

The Court held that if the variation agreement had altered the original agreement, that it may have brought the original agreement and the alterations thereto in line with a construction contract as defined in the Act, but that as the variations in the Deed Agreement only altered sums of money with no change in services or performance, it was not a construction contract.

Further that on the basis that the contracts were not covered by the Act, the Adjudication was void and of no effect and that the appointed person had no jurisdiction to act as an adjudicator.

*Summary by Rachel Ewin.*

His Honour Judge Richard Seymour. TCC. 14<sup>th</sup> February 2002.

## **Edenbooth Ltd v Cre8 Developments Ltd [2008] EWHC 570 (TCC)**

Residential exception to HGCRA. Action to enforce adjudication decision: No defence available.

The Defendant was a development company who had engaged the Claimant to carry out ground works at two adjacent properties. The properties were owned and occupied by a director of the Defendant. Various disputes were referred to adjudication and an award was made. The Claimant brought enforcement proceedings. The Defendant claimed that he was, in effect, a residential occupier. If this were found to be correct, then the contract would be exempt from the application of the Housing, Grants, Construction and Regeneration Act 1996.

The court rejected this assertion on the basis that (i) a company cannot be a residential occupier and (ii) the Defendant was engaged in the business of property development which negated the suggestion that the work was being carried out on or behalf of a residential occupier.

The Defendant further alleged that the adjudicator had acted unfairly and in breach of the rules of natural justice by (i) forcing him to put in a defence in a short space of time (ii) that there were communication problems with the adjudicator

The Court held on these points that there had been some communication issues, but that these were self inflicted and that the adjudicator had granted the Defendant further time to put in its submissions and it did so having had the benefit of advice from solicitors. As to the production of documents within a short space of time, the court held that this was an inevitable consequence of the adjudication process. As such the adjudicator did have the jurisdiction to decide the matters put to him and the decision stood.

Regarding the adjudicators jurisdiction, cases referred to included *Bouyges (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522 and *Carillion Construction Ltd v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358.

*Summary by Rachel Ewin.*

Mr Justice Coulson. 13th March 2008

## **Edinburg Royal Joint Venture (Petition of) [2002] ScottCs P762/02**

Enforcement of decision : Contract purported to postpone judicial review to end of contract and subject to consent of all parties. Held : This did not prevent enforcement.

T.G.Coutts QC. Outer House, Court of Session. 2<sup>nd</sup> August 2002.

## NADR ADJUDICATION CASES SUMMARIES

### **Edmund Nuttall Ltd v R G Carter Ltd. [2002] EWHC 400 (TCC)**

The dispute as set out in the notice and as set out in the referral were on quite different grounds. In the event no dispute had in respect of the issue dealt with by the adjudicator. Accordingly, enforcement was denied. **Fastrack Contractors Ltd. v. Morrison Construction Ltd.** [2000] BLR 168 considered.

Regarding the applicable principles of contract construction, the dicta of enunciated by Lord Hoffman in **Investors Compensation Scheme Ltd. v. West Bromwich Building Society** [1998] 1 WLR 896 established :-

- (1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
- (2) *The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
- (3) *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
- (4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars: the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see **Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.** [1997] AC 749.*
- (5) *The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **Antaios Compania Naviera SA v. Salen Rederierna AB** [1985] AC 191,201:*

*“if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”*

Regarding what is a dispute and the meaning of “dispute”, the dicta of Lord Denning MR in **Monmouthshire County Council v. Costelloe & Kemple Ltd.** (1965) 5 BLR 83 at page 8 viz *“The first point is this: was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractors. Until that claim is rejected you cannot say that there is a dispute or difference. There must be a claim and a rejection in order to constitute a dispute or difference.”* **Cruden Construction Ltd. v. Commission for the New Towns** [1995] 2 Lloyd’s Rep 387 : **Halki Shipping Corporation v. Sopex Oils Ltd.** [1998] 1 WLR 726 : **Sindall Ltd. v. Solland.** 2001 : **K & D Construction v. Midas Homes Ltd** 2001 : **West Wake Price & Co. v. Ching** [1956] 3 All ER 821 referred to.

His Honour Judge Richard Seymour. TCC. 21<sup>st</sup> March 2002.

### **Edmund Nuttall Ltd v Sevenoaks District Council [2000] EWHC HT 00/119 (TCC)**

An adjudicator can correct minor slips if he moves quickly. **Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd** [2000] BLR. 49 distinguished on the facts. **Bloor Construction (UK) Limited and Bowman and Kirkland (London) Limited**, referred to.

The court further held that if liquidated damages are not claimed at adjudication, there is no right to set off against the adjudicator’s decision which is immediately enforceable in full.

His Honour Judge Dyson. TCC. 14<sup>th</sup> April 2000.

## NADR ADJUDICATION CASES SUMMARIES

### **Elanay Contracts Ltd v The Vestry [2000] EWHC (TCC) : [2001] BLR 33**

The question to be answered here was whether or not adjudication enforcement proceedings give rise to an issue estoppel (ie the matter becomes subject to the double jeopardy rule) preventing the issue being raised again elsewhere and thus making the adjudication decision final and binding or not. *Fords, Arnold v Nat. West. Bank Plc* [1991] 2 A.C. 93 and *Thoday v Thoday* considered. The court held that pleadings at enforcement hearings do not prevent a subsequent full trial.

The defendant's ability to engage in the adjudication process was restricted because he had to visit a sick relative in hospital. He therefore asserted that the parties did not engage in the process on an equal footing and this was contrary to Art VI Human Rights Act. *Donbowbeher BV v. Netherlands* considered. Havery J concluded "*In my judgment, Article 6 of the European Convention on Human Rights does not apply to an adjudicator's award or to proceedings before an adjudicator and that is because, although they are the decision or determination of a question of civil rights, they are not in any sense a final determination. When I say that, I am not talking about first instance or appeals, but merely that the determination is itself provisional in the sense that the matter can be re-opened*".

His Honour Judge Richard Havery. TCC. 30<sup>th</sup> August 2000.

### **Emcor Drake v Costain [2004] EWHC 2439**

Under the Dom/2 1981 standard contract form EDS contracted to do refurbishment works to the Great Western Royal Hotel, Paddington. EDS made three applications for extensions of time. CSJV acceded to a short extension. EDS unsuccessfully submitted an extension of time dispute to adjudication and the adjudicator found that EDS had not discharged the burden of proof required to establish such an entitlement. Ultimately time ran out for EDS. The contract required CSJV to either grant extensions or deduct works. It did neither. EDS submitted a second dispute to adjudication in respect of a latter application for extension of time. Part of the documentation was common to both submissions. The adjudicator found partly for EDS and partly for CSJV. EDS in this action seeks enforcement of that decision.

CSJV contended that the adjudicator had no jurisdiction / the adjudicator acted in excess of jurisdiction / there was an abuse of process :- under the double jeopardy rule the issue had already been settled. Finally the re-submission of documents from the first adjudication swamped the adjudicator and the respondent and was an abuse. The court found that the subsequent application for extension was a distinct and separate dispute – and plainly rejected the notion that under DOM/2 Clause 11 only one extension of time could be granted. Whilst there was a need to research the background of the first dispute, in order to separate it from the second, the adjudicator had taken pains to ring-fence and not intrude upon the earlier decision. Bulky documentation and short periods of time are part and parcel of the adjudication process, not an abuse. Decision enforced.

His Honour Judge Havery. TCC. 29<sup>th</sup> October 2004.

### **Enterprise Managed Services Ltd v East Midland Contracting Ltd [2008] EWHC 727 (TCC)**

Application to strike out action to enforce an adjudication decision on the grounds that the contract stated that any litigation of disputes should be delayed till after final completion. On the facts that application failed. *Investors Compensation Scheme v. West Bromwich Building Society* [1997] UKHL 28 considered regarding contract construction.

HHJ Stephen Davies. Manchester District Registry. 27<sup>th</sup> March 2008

### **Epping Electrical Company Ltd v Briggs & Forrester (Plumbing Services) Ltd [2007] EWHC 4 (TCC)**

This case involved an application for summary enforcement of an adjudicator's decision. The parties had agreed an extension of time. However, having apparently made the decision in time (though this was doubted by one of the parties), the adjudicator declined to issue the decision pending payment of fees. The adjudicator had not contracted on pre-payment terms but subsequently notified the parties of this intention to assert a lien. He released the decision two days later following adverse comment by the parties, despite not having been paid, in an unsuccessful attempt to avoid further problems and complications.

The court held that an adjudication decision had to be released before expiry of the statutory deadline or any extended deadline, as the case might be. On the facts it was not released on time. Accordingly the adjudicator was out of jurisdiction and the decision was unenforceable. *Ritchie Brothers (PWC) Ltd. v. David Philp (Commercials) Ltd.* [2005] BLR 384.: *St. Andrew's Bay Development Ltd. v. HBG Management*

## NADR ADJUDICATION CASES SUMMARIES

*Ltd.* [2003] Scot CS 103. *Barnes & Elliot Ltd. v. Taylor Woodrow Holdings Ltd.* [2004] BLR 111, 113. considered. The HGCRA deadline is not advisory, it is mandatory. A term in a contract that seeks to remedy a breach renders the contract non-compliant and the scheme will apply instead.

HHJ Richard Havery. TCC. 19th January 2007.

**COMMENT :** This decision puts the entire contractual adjudication mechanism governed by the CIC Rules, and Paragraph 25 in particular, which is incorporated into many standard form contracts, in jeopardy and is likely to result in a rapid redrafting of the rules. As currently drafted the rules state :

25 *If the Adjudicator fails to reach his decision within the time permitted by this procedure, his decision shall nonetheless be effective if reached before the referral of the dispute to any replacement adjudicator under paragraph 11 but not otherwise. If he fails to reach such an effective decision, he shall not be entitled to any fees and expenses (save for the cost of any legal or technical advice subject to the Parties having received such advice).*

It should be noted that the rules have on a number of occasions met with judicial approval and prior to this had been considered to be HGCRA compliant.

### **Euro Construction Scaffolding Ltd v SLLB Construction Ltd [2008] EWHC 3160 (TCC)**

In the application for summary enforcement the issues was whether the adjudicator was given jurisdiction to decide that he had jurisdiction and if not whether he did have in fact have jurisdiction in any case.

The court found that the defendant had consistently reserved right to challenge jurisdiction under the first submission as to a variation of the original contract and under an amended submission on the basis of a contract contained in the contract order. *RJT Consulting v DM Engineering* [2002] : *Lloyd Projects Limited v John Malnick ; Grovedeck v Capital Demolition* [2000]; *Trustees Stratfield Saye Estate v AHL Construction* [2004] considered. Accordingly the adjudicator had not been given expressly or impliedly the power to determine jurisdiction and in the event he had not purported to exercise that power.

As to summary enforcement requirements, *Jacobs UK v Skidmore* [2008] EWHC 2847 (TCC) cited.

As to whether the contract was wholly in writing, the court held that an oral conversation after the event regarding fitness for a specified purpose, was not an oral term – so the contract was on the order terms only. That being the case the adjudicator had jurisdiction over the dispute and the decision was enforced.

Mr Justice Akenhead. 19<sup>th</sup> December 2008.