

ADJUDICATION CASE SUMMARIES F



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Fab-Tek Engineering Ltd v Carillion Construction Ltd [2002] ScotCS a873-01

This Scottish decision limits the circumstances in which pre-judgement arrestments would be allowed. A pre-judgement arrestment provides security for the sum claimed in a payment action.

The Claimant raised an action for payment under a building sub contract in terms of which they had been instructed by Carillion to manufacture and install equipment at a Leisure Centre in Edinburgh. During the course of the action, the Claimant obtained a warrant and served arrestments which Carillion sought to have recalled.

The Court held that the arrestments on the dependence of a court action were incompatible with Article 1 of the European Convention of Human Rights for the following reasons:

- There was no requirement upon a claimant to establish a prima facie case on the merits of the action.
- There was no requirement to establish a specific need for the interim remedy, such as defenders insolvency or an attempt by the defender to conceal or dissipate assets.
- There was no requirement for the hearing to take place before a judge at which the last two matters could be considered
- If protective attachment is used and the claimant is unsuccessful then there should be some entitlement to damages for any loss suffered as a consequence of its use.

The Court held that the warrant to arrest should not be granted without cause shown. As such the arrestments were recalled.

In regard to the procedure for granting inhibitions the case of *Karl Construction Limited v Palisade Properties plc* 2002 SLT 312 was referred to.

Regarding irregularity *Wolthekker v Northern Agricultural Company* 1862 1M.211 : *Grant v The Magistrates of Airdrie* 1939 SC 738 referred to.

Summary by Rachel Ewin.

Dunfermline Sheriff's Court. 22nd March 2002.

Faithful & Gould Ltd v Arcal Ltd [2001] Case No: E190023 TCC

Costs of adjudication : An adjudicator must act in person, but where employed, his fees can be recovered by his employer or firm.

Regarding whether there was authority to act as an agent *Lawson v Hosemaster Co Ltd* (1965) J WLR p1399 applied. If the question of express authority was in doubt, then there was implied authority. *Brodgen v Metropolitan Railway* (1877) LAC 666 applied.

Newcastle Upon Tyne District Registry. TCC. 25th May 2001.

Farebrother B.S. Ltd v Frogmore Investments Ltd [2001] CILL 1762

Counter-claim; jurisdiction : Adjudicator limited his decision to matters in the notice, treating a counterclaim as outside his jurisdiction.

Bouygues (UK) Limited v Dahl Jensen (UK) Ltd [2000] BLR 49 considered regarding non-enforceability of a decision not referred to the adjudicator.

Regarding the enforcement of decisions and the undesirability of trying to dissect them and disregard parts *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* considered.

His Honour Judge Gilliland. TCC. Salford. 20th April 2001.

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Fastrack Contractors Ltd v Morrison Construction Ltd [2000] EWHC HT 99/76 (TCC) ; [2000] BLR 168

This concerned a sub-contract for brickwork. The work fell behind schedule. The parties disagreed about who was responsible – the main contractor for bad project /site management or the sub-contractor for failing to get on with the work. Preliminary supervisory notices followed by notice of to transfer work to others and a withdrawal from site by the sub-contractor as acceptance of repudiation followed in short order. The sub-contractor issued to application payments, No12 & No13. The main contractor countered with a set off which exceeded the sums covered by the applications. Fastrack referred application No12 to adjudication and were successful in part.

Fastrack then successfully referred a further dispute to adjudication and recovered a sum greater than that covered by application No13. Morrison denied jurisdiction, participated under protest and here resisted enforcement proceedings. Morrison maintained that the only matter that had ripened into a dispute was quantification of the sum due under Application 13. The dispute should be capped to the sum applied for. Morrison further disputed the jurisdiction of the adjudicator or his power to determine jurisdiction.

As to whether or not the adjudicator had jurisdiction over jurisdiction, *Sherwood & Casson Ltd v Mackenzie* 1999; *The Project Consultancy Group v The Trustees of the Gray Trust* 1999 : *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] *Building Law Reports* 93 considered. The court held that unless the parties accord jurisdiction over jurisdiction to the adjudicator he cannot determine his jurisdiction.

Regarding what is a dispute, *Halki Shipping Corporation v Spex Oils Ltd.* [1998] 1 W.L.R. 726: *Monmouthshire County Council v Costelloe & Kemple Ltd* 5 BLR 83 considered. A dispute can consist of an unsatisfied application for payment. It is the sum of disputed issues extant at the time of referral. His Honour held that a dispute may be referred to in specific or in general terms. Whilst a notice cannot be limited to part of a dispute, excluding integral elements of that dispute (*though a party may chose not to pursue further elements of a claim*), nonetheless a notice can be couched in general terms including “*How much money is due?*” In this instance the parties were in dispute as to the final reckoning between the parties. The lawfulness of the determination was at issue, and who had to account to whom. Fine tuning had taken place regarding the exact sums due between the parties. To limit the dispute to that which had been applied for earlier was to limit the dispute to a prior point at time, when the dispute had moved on. The dispute as referred was not substantially different to the dispute that had ripened between the parties. Accordingly the adjudicator had jurisdiction and his decision was enforceable.

His Honour Judge Thornton. TCC. 4th January 2000.

Fence Gate Ltd v James R Knowles Ltd [2001] CILL 1757

Jurisdiction - threshold : Giving evidence of fact or opinion about construction works at an arbitration is not construction work under the HGCRA. S104 HGCRA considered.

Christiani & Neilson Limited v The Lowry Centre Development Company Limited 2000 referred to.

Whiteways Contractors (Sussex) Limited v Impresa Castelli Construction UK Limited distinguished.

Regarding whether a dispute arose in connection with a construction contract *Ashville Investments v Elmer Contractors* [1989] QB 488 : *Joseph Finney plc v Vickers* referred to.

His Honour Judge Gilliland. TCC. 31st May 2001.

Ferson Contractors Ltd. v Levolux A.T. Ltd. [2003] EWCA Civ 11

Enforcement of decision : Contract provided that on termination of contract no further sums payable : Could a post adjudication termination defeat decision ? NO.

Macob Civil Engineering Ltd v Morrison Construction Ltd [1991] BLR 93 : *Bouygues v Dahl-Jensen* 2000 BLR 522 : *C B Scene Concept Design Ltd v Isobars Ltd* 2002 EWCA Civ 46. *Nikko Hotels(UK) Ltd v MEPC Plc* 1991 2 EGLR 103 : *K & S Industrial Services v Sindall Ltd* (2001) 75 Con. LR 71.: *Bovis Lend Lease v Triangle Developments Ltd* 2002, *Parsons Plastics Ltd v Purac Ltd* (2002) BLR 33. considered.

CA before Lord Justices Ward, Mantell and Longmore. 22nd January 2003.

Compare Bovis Lend Lease v Triangle Developments Ltd 2002

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Flannery Construction Ltd v M Holleran (2007) Ltd [2007] EWHC 825 (TCC)

The court determined that there was an arguable case that no contract had been concluded at all and certainly there was no contract for the purposes of s107. The contract failed to identify with certainty the scope of the works or how that scope might be varied in the future. In addition it appears from the documentary evidence that whilst one party wanted an overall framework agreement to cover all the various sites where work was to be performed the other wanted discrete contracts. This issue was in dispute and had never been resolved. HHJ Wilcox. TCC. 2007

Fleming Builders Ltd v. Forrest or Hives [2008] ScotCS CSOH_103

Domestic adjudication : This dispute concerned a non-HGCRA domestic house-build contract under the SBCC Scottish Building Contract Contractors designed portion with quantities standard form. In an unsuccessful attempt to resist summary enforcement the defendants questioned whether a contract existed and if so who were the parties to it – viz Mr & Mrs Forrest, or a company that they were directors of. The court found that they had contracted in a personal capacity.

A secondary defence questioned whether the adjudicator had been in breach of natural justice for failing to conference call a witness. The court held that since the adjudicator was in charge of process, he was entitled to decide whether or not to call a witness (it should be noted that the defendants had not asked for the witness to be called) in order to clarify any aspect of the case that had been put to him and accordingly there had been no breach.

A further question as to whether a non-HGCRA adjudication is akin to arbitration and subject to different rules of judicial review to HGCRA adjudication was answered in the negative. The treatment is the same for both.

In May 2001 the Defenders purchased a property in Bothwell to live. The couple decided to build an extension which was defectively erected and the defenders decided to demolish the property and build a new home from scratch. Initially the Defenders went out to tender as individuals, but upon receipt of the completed tenders they found they could not afford the project. The scheme was revised and re-tendered as individuals, but the contract was in the name of their development company.

The Defenders sought to argue that there was no contract between the parties in an adjudication. The Adjudicator found to the contrary. The Defenders then sought to nullify the Adjudicator's Decision via legal proceedings, by claiming that the Adjudicator did not have jurisdiction. They also pleaded retention and set off on the basis of an unspecified claim for damages.

The Court held that the adjudicator did have jurisdiction in this matter and did not breach the rules of natural justice and as such the Decision stood. It also held that there were not grounds on which the Defenders could seek to retain or set off sums against the Adjudicator's Decision.

Regarding the contractual effectiveness, the case of *John Stirling v Westminster Properties Scotland Ltd* [2007] BLR 537 was referred to.

With regard to natural justice, the case referred to was *Diamond v PJW Enterprises Ltd* 2004 SC 430.

The case of *Rupert Morgan Building Services (LLC) v David Jervis* [2004] BLR 18 was referred to with regard to payment and retention.

With regard to the adjudicator acting as arbiter, the cases of *Domsalla v Dyason* [2007] EWHC 1174 and *Costain Ltd v Strathclyde Builders Ltd* 2004 SLT 102 were referred to.

Summary by Rachel Ewin.

Lord Menzies. Outer House Court of Session. 15th July 2008

Full Metal Jacket Ltd v Gowlain Building Group Ltd [2005] CA. Lawtel AC9400559

Gowlain had a contract to perform building work at a school which in part involved re-roofing a boiler house. Gowlain sub-contracted the roofing work to FMJ. Gowlain provided a detailed drawing of the roof and specifications for the job in order to obtain a quote from FMJ. The drawing specified an Anderson built up felt system. The bill of quantities provided that the roof was to be an '*Anderson built up felt system ... cut to falls*'.

FMJ completed the work inadequately, ignoring the drawing. Gowlain refused to pay. FMJ successfully referred the payment dispute to adjudication. Gowlain was ordered by the adjudicator to pay for the work, but Gowlain refused to do so.

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FMJ then sought enforcement. The defendant counterclaimed for the cost of removing the roof and replacing it with a different design.

His Honour Judge Mackay, at Liverpool County Court, 10th May 2005, refused to enforce the adjudicator's decision. The contract specified the roof design in a drawing supplied pre-tender. The contractor had ignored the design. The roof as built appears to have satisfied the description in the contract namely '*Anderson built up felt system ... cut to falls*'. but did not conform to the drawing which indicated that the roof should be "*be cut to mitred falls, and not just to uniform falls.*" HHJ Mackay held that the diagram was part of the contract. The roof was non-compliant and the counterclaim succeeded.

On appeal, FMJ argued that the judge had misinterpreted the contract, asserting that the words '*cut to falls*' should have been given their natural and ordinary meaning which was not the same as '*cut to mitred falls*'.

The court agreed with HHJ Mackay's judgment. The diagram preceded the quote. It clearly related to the job. It showed the type of roof required and the bill of quantities was to be taken as referring to the type of roof indicated in the diagram. The drawing was a clear instruction which had to be complied with. It had not been. The appeal was dismissed.

Schuler v Wickman Machine Tool Sales [1974] AC 235. *BCCI v Ali* [2002] 1AC 251). Considered.

Before the Court of Appeal. May LJ, Arden LJ, Sir Peter Gibson. 9th December 2005.

F W Cook Ltd v. Shimizu (UK) Ltd [2000] EWHC TCC 152

This dispute concerned negative and positive elements of a Final Account. No sum was demanded and none was ordered. Rather, the adjudicator settled some outstanding issues, the decided sums to be incorporated into any calculation of the final account. Cook sought to tot up the sums and have them paid up immediately. The court rejected this view. The final account mechanism and retainer provisions etc were not up for decision in this reference.

Disputes arose on a subcontract for mechanical works at the Telehouse 2000 building in London Docklands and were referred to adjudication. Prior to the referral to adjudication several on account payment were made, so the dispute arose out of discussions about the Claimants Final Account. The Claimants notice of intention to adjudicate was held by the judge to only refer some matters described in the letter to adjudication, but left others to be resolved by the parties once the Adjudicator's decision was given. Further it was held that the notice did not seek to obtain a decision as to how much the next interim payment should be.

The Adjudicator's decision dealt with a number of the issues but was not totalled in any way. He concluded by directing "all sums payable pursuant to this decision shall be paid by the respondent to the referring party within seven days of the date hereof.."

The Defendant interpreted the decision as indicating that the Adjudicator had decided some of the items were to be treated in a particular way in the final account which was still under negotiation between the parties. The Defendant made a further payment of £22,246.26. Contrarily the Claimant read the decision as entitling it to a payment of over £200,000 treating the word "payable" as meaning they were to be paid in full.

The court held that the Defendants interpretation was correct, stating that the Adjudicator was well aware that the dispute was about the final valuation and not about a particular amount due for interim payment. As such the sums that were "payable" were payable pursuant not just to the decision but also to the contract.

Cases referred to in relation to the Adjudicators interpretation of the issues put before him included *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 and *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 49 distinguished.

Summary by Rachel Ewin.

His Honour Judge Humphrey Lloyd. TCC. 4th February 2000.