ADJUDICATION CASE SUMMARIES G

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Galliford Northern Ltd v Markel UK Ltd [2003] Leeds District Registry QBD

Underwriter guarantors : To enforce a claim against a losing defendant's insurers the claimant must first secure enforcement against the assured then move against the insurers.

Regarding s30 Insurance Act 1930, ***Post Office v Norwich Union*** *[1967] 1 AER 577 :* ***Bradley v Eagle Star.*** *[19891 1 AER 961 :* ***West Wake Price & Co. v. Ching*** *([1956] 3 All ER 821* considered.

Regarding the nature of HGCRA adjudication, ***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* considered.

Regarding answering the right or wrong question rightly or wrongly ***Bouygues v. Dahl-Jensen*** *2000 BLR 522 and* ***Nikko Hotels Ltd v. UEPC Plc*** *19912 EGLR 103* applied.

John Behrens. QBD. 12th May 2003.

Galliford Try Construction Ltd v Michael Heal Associates Ltd [2003] EWHC 2886 TCC

An adjudication winner, whilst claiming enforcement subsequently denied there was a contract. This was a big tactical mistake, since in the absence of a contract the adjudication became invalid.

Regarding the test to determine whether or not a contract was concluded, ***Pagnan SpA v. Feed Products Ltd.*** *[1987] 2 Lloyd's Rep 601* applied. ***G. Percy Trentham Ltd. v. Archital Luxfer Ltd.*** *[1993] 1 Lloyd's Rep 25 :* ***Brogden v. Metropolitan Railway*** *(1877) 2 AC 666;* ***New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co.*** *Ltd. [1974] 1 Lloyd's Rep. 534;* ***Gibson v. Manchester City Council*** *[1979] 1 WLR 294. : British* ***Bank for Foreign Trade Ltd. v. Novinex*** *[1949] 1 KB 628 :* ***Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.*** *[1963] 1 WLR 333* referred to.

British Steel Corporation v. Cleveland Bridge and Engineering Co. Ltd. [1984] 1 All ER 504. regarding mere enquiries applied.

Where a contract is not concluded, as opposed to when a contract is concluded but certain terms need clarification, *"It is the terms, and not merely the existence, of a construction contract which must be evidenced in writing"* as per ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd.*** [2002] BLR 217 applied.

Joinery Plus Ltd. v. Laing Ltd. [2003] BLR 184 distinguished on the facts contained in the referral notice. ***C&B Concept Design Ltd. v. Isobars Ltd.*** [2002] BLR 93 considered.

His Honour Judge Richard Seymour. TCC. 1st December 2003.

Gennario Maurizio Picardi v Paolo Cuniberti [2002] EWHC 2923 (TCC)

Jurisdiction : Fees of architect : Adjudicator held a RIBA contract concluded : Court found no evidence of such a contract so adjudicator had no jurisdiction.

Regarding conditions of a contract and mere expressions of good intentions, ***Okura v. Navana*** *[1982] 2 Lloyds Rep 537 at 540, where Lord Denning, M.R, quotes from* ***Hatzfeldt-Wildenberg v. Alexander*** *[1982] 1Ch 284* considered.

Regarding the degree of notice required for potentially unreasonable clauses, ***Spurling v. Bradshaw*** *[1956] 1WLR 461* considered.

Regarding the **Unfair Terms in Consumer Contracts Regulations,** ***Oceano Groupo Editorial SA v. Rocio Musciano Quantiro*** ***(Joint cases)*** *C240/98 to 244/98* considered.

Regarding imbalance of negotiating power ***Director General of Fair Trading v. First National Bank plc*** *[2002] 1AC 481 :* ***Zealander v. Laing Homes Ltd*** *1999 :* ***Standard Bank v. Apostolakis*** *2001* considered.

His Honour Judge Toulmin. TCC. 19th December 2002.

George Parke v The Fenton Gretton Partnership [2001] CILL 1712

Insolvency of defendant. Bankruptcy loomed for a party with a valid claim against the claimant seeking to enforce adjudication via a statutory demand. Stay ordered. ***Macob v Morrison : A&D Maintenance & Construction v Pagehurst : Herschel v Breen*** considered.

Ch.Div. His Honour Judge Boggis. 2nd August 2000.

Geris v CNIM [2005] EWHC 499 (TCC)

His Honour Judge Humphrey Lloyd considered an application for summary judgement to enforce an adjudication decision. Geris (sub-contractor) had contracted on IChemE 5 Brown Book terms to design, supply and erect a geodesic dome for CNIM, the main contractors on a waste incineration plant construction project. With two significant interim stage payment outstanding and with the work 75% complete CNIM terminated the contract. Geris sought to enforce the stage payments through adjudication, plus LADs and lost profit. CNIM mounted a series of counter-claims. Having decided that the termination was lawful the adjudicator awarded sums on both sides, leaving a modest balance due to Geris. He also held that CNIM had a valid claim for damages but was unable to quantify the damages because of lack of detail.

The contract stated that CNIM had the right to set off any sums due to CNIM from any sums due to Geris. CNIM accordingly stated that by their interpretation of the adjudicator's decision, under the terms of the contract nothing was due to Geris as and until their damages claim was quantified. In the circumstances of the case, and in particular in the light of the specific terms of the adjudicator's decision, Humphrey Lloyd J agreed with CNIM's interpretation. Accordingly enforcement denied pending quantification.

FW Cook Ltd v Shimizu (UK) Ltd *[2000] BLR 199 :* ***Ferson Contractors v Levolux*** *[2003] BLR 118.* ***Rupert Morgan Building Services v David & Harriet Jervis*** *[2004] BLR 18.* referred to.

His Honour Judge Humphrey Lloyd. TCC. 11th February 2005.

COMMENT : This is a decision on very specific facts – but it uncomfortably opens up the possibility of defeating the primary aim of the HGCRA in that an express contractual right to set-off provision frustrated enforcement of an apparent adjudicator's payment decision. Whilst Humphrey Lloyd observed that the adjudicator's decision was (reasoned – despite a default provision for an unreasoned decision in the absence of a request to the contrary) clear, logical, careful judgment, he specifically declines to comment on the adjudicator's view that certain claims, which were he held clearly sustainable, had not at that time crystallised as a dispute and were out with his jurisdiction which resulted in him declining to consider these claims.

It is unusual in adjudication to have a decision that confirms a right to un-quantified sums. Normally entitlement and quantum are considered together. Arguably, Geris adopted the wrong tactics. If they had conceded that the contract permitted set-off the adjudicator would not have been put in the position of having to decide on entitlement to set-off. Then, CNIM would not have been able to assert the right to set-off to an un-crystallised dispute about un-quantified sums at enforcement. If Geris and CNIM were subsequently unable to negotiate terms in respect of these later claims, that matter could have then been referred to adjudication. Geris had unwittingly allowed the adjudicator one bite of the apple when two bites was required. In the event, no injustice is likely to have been done, since it appears likely that the counter-claim could well far exceed the sum due to Geris in-any-case – so enforcement was likely to have resulted only in a short term gain of a very modest sum of money that was unlikely to have any great impact either way on either parties' financial standing.

Gibson Lea Retail Interiors Ltd v Makro Ltd [2001] EWHC HT 01/226 (TCC) : BLR 407

In this action Gibson Lea sought a declaration that:- *"the works forming the subject of contracts entered into by the Claimant and the Defendant in respect of the Defendant's stores in Enfield, Leicester, Cardiff and Croydon are construction operations for the purposes of Part II of the 1996 Act and that as a consequence, the Claimant is entitled to refer disputes arising under any one or more of these contracts to adjudication in accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998;"* Gibson Lea sought summary judgment for such declaration.

The court held that shopfittings which do not become fixtures are outside the scope of the HGCRA. Regarding whether a chattel attached to a building is a fixture or not the test is "whether the attachment is

intended to be permanent" as per ***Billing v. Pill*** *[1954] 1 QB 70.* See also ***Lyon v. London City and Midland Bank*** *[1903] 2 KB 135 :* ***Horwich v. Symond*** *(1915) 84 LJKB 1083.*

His Honour Judge Richard Seymour. TCC. 24th July 2001.

Gibson v Imperial Homes [2002] FWHC 676 (Qb) : HT 1353

Construction Contract : Written evidence of contract found by the court : The proposer of a company can act as agent of the proposed corporate entity before its incorporation so that the company becomes in effect a contracting party.

Section 36(C) Companies Act 1989 provides as follows: *"1. A contract which purports to be made by or on behalf of a company at a time when a company has not been formed has effect, subject to any agreement to the contrary, as one made with a person purporting to act for the company, or as agent for it, and he is personally liable on the contract accordingly."*

Braymist Limited v Wise Finance Company Limited*, [2002] EWCA Civ 127* concluded that on a proper construction of Section 36C(1) Companies Act 1989, both parties could mutually enforce a pre-incorporation contract. The wording of the section does not mean that a party to a pre-incorporation contract could be sued but had no power to sue under the contract. His Honour Judge Toulmin. TCC. 27th February 2002.

Gipping Construction Ltd v Eaves Ltd [2008] EWHC 3134 (TCC)

This concerned an application for summary judgement enforcing an adjudication decision in relation to payments for the construction of three Bungalows and asserted abatement for defective work. Ultimately the defence conceded, having belatedly taken legal advice, but the defendant nonetheless questioned whether the adjudicator should have had a site visit. The court held that since in the absence of a withholding notice, the dispute was determined on the basis of defects due to design faults not defective work, a site visit not needed (though adjudicator has in any case a discretion regarding the appropriate process in the circumstances of the case). There was no breach of the rules of natural justice here.

An application for time to pay pursuant to CPR Part 40.11 was declined but permission to apply for an extension before 14 days elapses if parties unable to broker a settlement, together with evidence of reasons for extension required. Mere inability to pay would not be sufficient and the defendant in such circumstances must deal with that through insolvency proceedings.

As to indemnity costs, which are usual where there is no defence - the defendant nonetheless successfully raised issues regarding additional appearances caused by delays in the claimant serving documents – and accordingly resultant costs were deducted. 12 hours preparation time to serve two documents was deemed to be excessive and trimmed. Mr Justice Akenhead. 11th December 2008.

Gleeson v Devonshire Green Holdings [2004] EWHC 1504 (TCC)

The contractor successfully claimed £9M in adjudication proceedings. The employer instituted proceedings counterclaiming £10M and issued a withholding notice against the adjudicator's decision before the end of the 14 days allowed for due payment. The employer sought to establish a set off.

The court held that in the absence of a notice pursuant to clause 30.3/4 JCT "***with contractor's design"*** under clause 30.5, there is an obligation to pay. JCT does not permit any set off or withholding against an adjudicator's decision for claims asserted after submission to adjudication.

VHE Construction v. RBSTB Trust Company *70 Con L.R.:* ***Rupert Morgan Building Services v David and Harriet Jervis*** *[2004] B.L.R. p18 :* ***The Construction Centre Group v Highland Council*** *[2002] B.L.R. p476 :* ***KNS Industrial Services v Sindall*** *75 Con.L.R. 71 :* ***David McLean v Swansea Housing Association*** *[2002] B.L.R. 125, and also* ***Bovis Lend Lease v. Triangle*** *[2003] B.L.R. 31* considered.

His Honour Judge Gilliland. TCC. 19th March 2004.

Glencot Development & Design Ltd v. Ben Barrett & Son Ltd [2001] EWHC TCC 15

At the request of the parties, a construction adjudicator adopted the role of a mediator, holding a joint session. The mediation failed to produce a settlement and the adjudicator assumed his original role and produced a decision. Enforcement of the decision was subsequently resisted on the grounds of irregularity and potential bias because of the information the adjudicator was exposed to during the mediation.

Whilst Mediation / Arbitration and Mediation / Adjudication clauses in contracts for the settlement of future disputes and similar ad hoc agreements for the settlement of existing disputes are quite common, great care must be taken to ensure that the parties fully understand the implications for natural justice of an adjudicator becoming aware of information during the mediation process that might not be available during a trial.

Even though members of the ADR profession are divided upon the desirability of such processes because some feel that once learnt the decision maker cannot distance himself from the information and thus his judgement will be coloured by it, the court did not outlaw med/arb processes. This perhaps recognises that many others in the profession feel that the experienced adjudicator is capable of putting such information out of mind. After all, juries are required to do this all the time when instructed by the judge to ignore information that he orders to be struck from the record following an objection by opposing counsel.
In the circumstances the court held that insufficient had been done by the adjudicator to bring the inherent risks of disclosure of information that had not been pleaded by the parties to the attention of the adjudicator and so that part of the adjudicator's decision was held to be unsound.
Bouygues v Dahl-Jensen [2000]; ***ex parte Pinochet*** *(No 2)* [1999] 2 WLR 272;, ***Laker Airways v FLS*** [1999] 2 Lloyd's Rep. 45**,** ***Locabail v Bayfield*** [2000] QB 451; ***AT & T v Saudi Cable*** [2000] 2 Lloyd's Rep 127; ***DG Fair Trading v Proprietary Association of Great Britain*** [2000] All ER (D) 2425, R ***v Gough*** [1993] AC 646; ***ex pane Dallagio*** *[1994] 4 All ER 139.* ***R v Sussex Justices, ex p. McCarthy*** *[1924] 1 KB 256.* ***Webb v The Queen*** *(1994) 181 C.L.R. 41.* ***Vakauta*** *(1989) 167 C.L.R.* ***Discain v Opecprime*** [2000]. ***How Eng. v Lindne*** *(*1999) 64 Con LR 67. ***Cameron v John Mowlem*** (1990) 52 BLR. ***Gale v Superdrug Stores*** [1996] 1 WLR 1089 considered.

His Honour Judge Humphrey Lloyd. TCC. 13th February 2001.

GPN Ltd. v O2 (UK) Ltd. [2004] EWHC 2494 TCC

O2 engaged an architect to conduct contract negotiations with GPN for a construction contract. GPN submitted an alleged dispute with 02 about the contract to adjudication and subsequently sought to enforce the adjudicator's decision. Dismissing the enforcement application Kirkham J held that the architect was not the express, implied or ostensible agent of 02 and thus had no authority to conclude a contract. Since there was no contract there could be no dispute arising out of it that could be referred to adjudication. The adjudicator had no jurisdiction.
Cleveland Manufacturing v Muslim Commercial Bank [1981] 2 Lloyds 646. ***First Energy (UK) Limited v Hungarian International Bank Limited*** [1993] 2 Lloyds Reports 194. ***DMA Financial Solutions Limited v BaaN UK Limited*** 28 March 2000. considered.

Her Honour Judge Frances Kirkham. TCC. 22nd October 2004.

Gray & Sons Builders (Bedford) Ltd. v Essential Box Company Ltd. [2006] EWHC 2520 (TCC)

An adjudicator found that a construction contract had been wrongfully repudiated and subsequently determined that £101K plus interest was due to the claimant. Here, the claimant successful sought enforcement. The day before the proceedings the defence withdrew opposition to the application but indicated that they had issues with regard to costs.

The court held that costs will be awarded on an indemnity basis if enforcement resisted and defence dropped pre-trial or at the trial. ***Carillion Construction Limited v Devonport Royal Dockyard Limited*** [2005] EWCA Civ 1358. ***Reid Minty v Taylor*** [2002] 1WLR 2800. ***Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd*** [2005] EWHC 2174 (TCC) and ***Herschel Engineering Ltd v Breen Property Ltd*** [2000] BLR 272 considered.

The costs of the present hearing were resisted because the applicant had not accepted a "reasonable offer". The court held that there is no requirement to accept "reasonable offers" to settle an award – since legal entitlement to entire amount. Finally the court heard argument on some aspects of the cost claim and accepted some minor deductions because it had been unnecessary for a law firm's partner to be accompanied by an assistant. His Honour Judge Peter Coulson. 11th October 2006

Great Eastern Hotel Company Ltd v John Laing Construction Ltd [2005] EWHC 181 (TCC) at 263/4

A sum of money (one of many issues in a much larger action) was claimed by Laing for skipping material. In a previous adjudication, which did not concern either of the parties to the present proceedings, an

adjudicator had awarded a sum in respect of these services, apparently because no evidence was offered up to oppose that claim. Accordingly he found as a fact that the services had been provided.

His Honour Judge David Wilcox stated that *"The provisional finding by an Adjudicator making a summary award under the HGCRA 1996 does not bind the party not privy to the contract"* and concluded that the previous finding of fact by the adjudicator had no relevance to the present court proceedings. He held that there was no evidence to establish that Laing had skipped the material. Accordingly no payment was due to Laing for these services. His Honour Judge David Wilcox. TCC. 24th February 2005

Green v GW IBS Ltd & G&M Floorlayers Ltd [2001] LE014261 Leicester CC

Jurisdiction : Fees : Carpets & floor tile laying within Act : Reasonable fees are recoverable jointly and severally : recovery of adjudicator's legal costs a separate issue. ***Discain v Opecprime*** 2001 considered.

Deputy District Judge T.Grannum. Leicester County Court. 18th July 2001.

Grovedeck Ltd v. Capital Demolition Ltd [2000] EWHC TCC 139

This case concerned two oral demolition contracts. The court held that an adjudicator does not have jurisdiction over oral construction contracts. Unlike arbitration, specifying (without demure by the other party) the terms of the alleged contract is insufficient to turn it into a relevant construction contract. ***Pepper v Hart*** permits examination of Hansard to determine intent of Parliament.

Regarding award of costs ***John Cothliff Ltd v Allen Build (North West) Ltd*** considered.

Regarding jurisdiction on jurisdiction, ***Smith v Martin*** *[1925] 1 KB 745:* ***Palmers Ltd v. ABB Construction Ltd*** *[1999] BLR 426.* ***Christopher Brown v Oesterreichischer Waldesbesitzer*** *[1954] 1 QB 8.* considered.

An adjudicator cannot act on two disputes on separate contract without agreement of both parties applying Part 8 of the Scheme. ***Fastrack v Morrison*** *[2000]* considered.

His Honour Judge Bowsher.TCC. 24th February 2000.

Guardi Shoes Ltd v Datum Contracts [2002] EWHC CH.D Companies Court. 5816 OF 2002

Insolvency of defendant : Lock out – non-payment : Adjudication : non-payment : Statutory demand – asserted a counterclaim – Statutory demand enforced**.** ***Bayoil CA. A Debtor v Johnson. Re Wanda Modes Ltd.*** Considered. Mr Justice Ferris. High Court. Companies Court. 28th October 2002.

Cross Reference : ***G.Parke v Fenton.***