

# ADJUDICATION CASE SUMMARIES H



LAST UPDATED 4<sup>th</sup> MAY 2008

## **Hackwood Ltd v Areen Design Services Ltd [2005] EWHC 2322 (TCC)**

This concerned an application under s72 Arbitration Act 1996 that Hackwood (the employer) was not party to an arbitration agreement. If it was a party, ADS applied for a declaration that by virtue of this application, Hackwood be debarred from taking part in any further arbitral proceedings.

ADS carried out refurbishment work to Hackwood House, commencing programming work on the basis of a letter of intent which envisage a formal contract on JCT "with contractor's design" 1998 terms. The tender document had contained a program of works A second letter of intent that referred to JCT resulted in commencement of works, whereby ADS submitted payment applications following the JCT procedure that were duly paid by the employer and otherwise applied for extensions of time and variations. The letter of intent was never replaced with a formal contract. Agreement was never finalised on a range of issues including start and finish date, CDR regulations and arrangements for a temporary roof.

Following issue of final certificate ADS referred a dispute as to extensions of time to an adjudicator. The adjudicator found against ADS. On the basis of the JCT follow on provisions from adjudication ADR then gave notice of CIMAR arbitration, since Art 6A had not been deleted. Hackwood asserted that they were not parties to an arbitration agreement and that the JCT did not apply, relying on the dicta of Lloyd J in *Amec v Whitefriars* [2003] and asserting that where the JCT annex's are not completed there is no finalised contract. ADS countered that Hackwood's position at the adjudication was that the JCT applied and they could not now assert the contrary.

Mr Justice Field held (1) that the 2<sup>nd</sup> letter of intent was on JCT terms (2) on the facts unlike *Amec v Whitefriars* sufficient terms were agreed to constitute a contract (3) the JCT adjudication / arbitration provisions applied (he also dismissed an assertion that insufficient notice in respect of time or detail had been furnished in order to make a valid appointment of an arbitrator (4) a s72 Arbitration Act 1996 reference does not automatically preclude an applicant from subsequently participating in arbitration where the application fails. Mr Justice Field declined to deal with the asserted adjudication consent estoppel issue because his finding that the JCT terms applied rendered it unnecessary to do so.

Mr Justice Field. TCC. 31<sup>st</sup> October 2005.

## **Hadden Construction Ltd v. Midway Services Limited [2007] ScotSC 58**

Insolvency – adjudicate or wind up petition : Applicants for adjudication deterred from continuing on being informed that the defendant was insolvent. Commenced winding up petition – which failed when accounts revealed the company was solvent. Court nonetheless ordered costs to the petitioner. Appellant / defendant unsuccessfully appealed the costs order.

*Costain Building and Civil Engineering Limited v Scottish Rugby Union PLC* 1993 SC 650; *Walter L Jacob & Co v The Financial Intermediaries Managers and Brokers Regulatory Association* 1988 SCLR 184. *Stonegate Securities v Gregory* 1981 Ch 576 ; *Re William Hockley Ltd* 1962 1WLR 555; *Baker Hughes Limited and Baker Hughes Inteq France SA* 2005 SCLR 1084; *Aird v School Board of Tarbert* 1907 SC 22) considered.  
Sheriff Principal Edward F Bowen QC. 17th October 2007

## **Hands v Morrison Construction Services Ltd [2006] EWHC 2018 (Ch)**

Hands, the applicant, was the principal shareholder / investor in a speedway development venture. The first event was a disaster due to water on the surface of the track. The venture failed. Hands sold his £7.5M shares for a mere £1. In this on-going negligence action, Hands asserts that Morrison, the contractor, knew that the track was not fit for purpose and was negligent / fraudulent in giving three assurances that it would be fit for purpose, which resulted in the financial loss since remedial action would otherwise have been taken to ensure the event was a success.

Here, Hands sought disclosure of an array of electronic documents as part of the pre-action protocol. The court rejected much of the application but acceded regarding a class of documents arising out of a prior

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litigation which were both compact, accessible and in the possession of Morrison's solicitors since they would assist in taking the case forward. The documents related to an adjudication between Morrison and architects/contractors (*AWG v Rockingham Speedway* [2004]) about defective design and construction of the track. Hands wished to use this material to demonstrate that Morrison had been fully aware that the race track would not be fit for purpose (in the event the adjudication decision had not been enforceable) at the time that the assurances were made. The court ordered disclosure.

*Bermuda International Securities Ltd v KPMG* (2001) 1 Lloyd's Rep 392; *Black v Sumitomo Corp* [2001] EWCA Civ 1819, *Steamship Mutual v Baring Asset Management Ltd* 2004 EWHC 202 (Comm); *XL London Market Ltd v Zenith* [2004] EWHC 1182 (Comm); *Birse Construction Ltd v HLC Engenharia E Gestão De Projectos SA*, considered. M Briggs QC. Chancery. 16th June 2006.

### **Harlow & Milner Ltd v Teasdale No1 [2006] EWHC 54 (TCC)**

The applicant initially attempted to recover sums due pursuant to an adjudication decision by way of statutory demand. The bankruptcy proceedings failed and the applicant then sought enforcement proceedings before the fast track TCC procedure. The adjudication decision was in no way deficient and therefore there were no grounds to resist enforcement. In particular the defendant cannot complain that adjudication is conducted quickly and is thus unfair. That is to miss the whole point of adjudication.

Solvency matters are only grounds for a stay of enforcement and only then if evidence of an inability to repay is demonstrated. *Wimbledon Construction v Vago* [2005] BLR 374. considered..

The existence of a counterclaim for defective works is no ground to resist enforcement. The matter was partly covered in the adjudication but if not would have to be raised at subsequent proceedings. *VHE Construction v RBSTB* [2000] BLR 107 applied.

The court then addressed costs, which were straight forward regarding the enforcement action. However, there are problems with a court dealing with costs of an action in another court i.e. the failed bankruptcy action, though the question of entitlement to payment was successful in both proceedings, none-the-less the applicant had been unsuccessful in the initial proceedings. *R v Holderness BC* 1992 considered.

His Honour Judge Peter Coulson QC. TCC. 16th January 2006.

### **Harlow & Milner Ltd v Teasdale No2 [2006] EWHC 535 (TCC)**

Interim order : 16th January the court ordered enforcement of adjudicator's decision. 20th February following non-payment, court issued an interim charging order with notice of final hearing. It was served 3 days late following correction of a clerical error. Defendant commenced arbitration. Held : Order finalised. 21 day CPR time limit discretionary. Arbitration proceedings no reason not to finalise order. *Macob v Morrison* [1999] BLR 93 : *Bouygues v Dahl-Jensen* [2000] BLR 522. applied.

His Honour Judge Peter Coulson. Q.C. TCC. 15th March 2006.

### **Harlow & Milner Ltd v Teasdale No3 [2006] EWHC 1708 (TCC)**

Application for an order for sale pursuant to CPR 73.10 as the final stage of proceedings to enforce an adjudicator's decision. Court held that the CPR prevails over any contradiction in the Practice directions which seemed to indicate that an action for sale should proceed through Chancery. Here the original order for payment pursuant to the adjudication was made by the TCC and it was appropriate and in line with the CPR for the same court to deal with the application in order in support of the original order. The basic grounds for sale were the same as those for enforcement. The court noted that the defendant's problems stemmed from the fact that their cash flow problems arose out of a failure of the Local Council to pay amounts alleged to be due pursuant to council grants – but none of that was made part of the contract relationship between the claimant and defendant. The fact that an arbitration of the dispute was pending was no basis not to order the sale.

*Macob v Morrison* [1999]; *Bouygues v Dahl-Jensen* [2000]. *Gleeson v Devonshire* 2004); *David McLean v Albany* (2005). *Interserve v Cleveland Bridge* [2006]. *Hilloview v Botes* [2006]. *Wimbledon v Vago* [2005] considered.

His Honour Judge Peter Coulson. TCC. 7th July 2006.

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### **Harris Calnan Construction Co. Ltd v Ridgewood (Kensington) Ltd [2007] EWHC 2738 (TCC)**

Initially, Ridgewood raised the argument that the adjudicator did not have the necessary jurisdiction to decide the dispute as there was no contract in writing. The adjudicator decided otherwise and as such the jurisdictional challenge failed. R did not, at any point, expressly reserve his rights on this issue and enforcement proceedings were brought to decide whether R was bound by the adjudicator's decision on jurisdiction. The court held that there was a contract in writing (even though most of the terms were contained in a letter of intent) and as such the adjudicator had jurisdiction. HHJ Coulson said that had R's position have been expressly reserved, the adjudicator's decision would not have been binding, but by not reserving his position, R was bound by the adjudicator's decision. Further the judge found that there was indeed a contract in writing, that all the terms had been agreed with the exception of a set of documents making the contract formal.

An application for summary judgement was made. R challenged it on three heads all of which failed. R tried to reduce the costs, this action also failed and HC was awarded indemnity of costs.

Regarding jurisdictional challenges, cases referred to included *Project Consultancy Group v Trustees of the Grey Trust* [1999] BLR 377. *Nordot Engineering Services Ltd v Siemens plc. Whiteways Contractors (Susses) Ltd v Impresa Castelli Construction (UK) Ltd* [2000] 16 Const LJ 453.

Regarding contracts in writing, cases referred to included *Bennett Electrical Services Ltd v Inviron Ltd* [2007] EWHC 46 (TCC). *Mott MacDonald Ltd v London & Regional Properties Ltd* [2007] EWHC 1055 (TCC).

Regarding the opposition of the application for summary judgement, cases referred to included *Gray & Sons (Builders) (Bedford) Ltd v The Essential Box Co. Ltd* [2006] EWHC 2520 (TCC)

*Summary by Rachel Ewin.*

Judgement : HHJ Peter Coulson QC: TCC. 15th November 2007

### **Hart Builders (Edinburg) Ltd v St. Andrews Ltd [2002] ScotSC A69/02 Edinburgh**

During the course of a construction contract the pursuers submitted an interim application for payment. This was not paid, but no withholding notice was issued. Did this mean that by virtue of s111 HGCRA there was no right to withhold payment? The court was referred to *S L Timber Systems Ltd v Carillon Construction Ltd 2001 : Millers Specialist Joinery Co Ltd v Nobles Construction Ltd 2001 : Clark Contracts Ltd v The Burrell Co Construction Management Ltd 2002* to the effect that despite the apparent clear words of s111 HGCRA, an applicant for a stage payment had to also demonstrate that they were entitled to payment under the construction contract.

Sheriff Isobel Anne Poole. Advocate, Sheriff of Lothian and Borders. 20<sup>th</sup> August 2002.

### **Hart Builders (Edinburgh) v. St. Andrew Ltd [2003] ScotSC 14**

On appeal from the first instance decision the court again considered the dicta of Lord MacFadyen regarding the impact of s111 HGCRA where he stated that *"...the words "sum due under the contract" cannot be equated with the words "sum claimed". The section is not, in my opinion, concerned with every refusal on the part of one party to pay a sum claimed by the other. It is concerned, rather, with the situation where a sum is due under the contract, and the party by whom that sum is due seeks to withhold payment on some separate ground. ...."*

*SL Timber Systems Ltd v Carillion Construction Ltd 2002 SLT 997*, and the cases that relied upon it, namely *Barry D Trentham Ltd v Lawfield Investments Ltd 2002 SLT 1094 : Clark Contracts Ltd v The Burrell Co (Construction Management) Ltd 2002 SLT (Sh Ct) 103 a: Millers Specialist Joinery Co Ltd v Nobles Construction Ltd [2001] CILL 1770* referred to.

The court examined the application in detail and found that it was confusing and contradictory and was related to claims for extensions of time and damages for delay rather than stage payments for work done. The application was not for sums due under the contract and thus not covered by s111. There is no requirement for a withholding notice for sums that are not due under a contract. The claimant would need to pursue these claims and establish a right to recovery.

Sheriff Principal Iain MacPhail QC : 10<sup>th</sup> January 2003

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### **Hart Investments Ltd v Fidler [2006] EWHC 2857 (TCC)**

Action to set aside main default judgement in respect of the collapse of a wall related to a construction contract and application for summary enforcement of adjudication.

- 1) The court exercised its discretion under CPR 13 and default judgment set aside : Service of documents took place on the 17<sup>th</sup> July by mail but was pre-empted by a fax on the 14<sup>th</sup>. If the fax amounted to service the applicant was entitled to the default judgment – but not if the 17<sup>th</sup> was the due date since the respondents served a statement of defence within the requisite 14 days. *Harris v. Bolt Burden* [2000] L.T.L. February 2<sup>nd</sup> 2000; *Partco Group Ltd. v. Wragg & Anor.* [2002] 2 Ll.Rep, 343 (Court of Appeal). *Molins Plc v. G.D. SpA* [2000] 1 WLR, 1741, *Hannigan v. Hannigan* [2000] 2 FCR 650, and the decision of Christopher Clarke J. in *Asia Pacific UK Ltd. & Ors. v. Hanjin Shipping Co. Ltd. & Ors.* [2005] EWHC 2443 (Comm) *Godwin v. Swindon Borough Council* [2001] EWCA Civ 1478. *Anderton v. Clwyd* [2002] EWCA Civ 933, *Lazard Brothers & Co. v. Bank Industrielle de Moscow* [1932] 1 KB 617 (CA), *Regency Rolls v. Carnell* (2000) EWCA 379 considered.
- 2) Summary enforcement refused
  - a) This did not concern a construction contract under HGCR- since whilst the work was preceded by letters of intent (*which failed to identify clearly the scope of the works and key requirements for a valid contract*), no written contract was concluded. *RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd.* [2002] 1 WLR 2344 applied. Adjudicator had no jurisdiction. *Macob v. Morrison* [1999] BLR 93, *Bouygues UK Ltd. v. Dahl-Jensen UK Ltd.* [2000] BLR 522 (Court of Appeal), and *C & B Scene Concept Design Ltd. v. Isobars* [2002] BLR 93 (Court of Appeal). *Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd.* [2006] 1 BLR 15. *Trustees of the Stratfield Saye Estate v. AHL Construction* [2004] All ER (D) 77. considered.
  - b) Referral document submitted 8 days after notice – 1 day late - so invalid notice : Hence no jurisdiction : *Barnes & Elliott Ltd. v. Taylor Woodrow Holdings* [2004] BLR 111, *Simons Construction Ltd. v. Aardvark Developments Ltd.* [2004] BLR 117, *Ritchie Brothers Plc v. David Phillip Commercials Ltd.* [2005] BLR 384 considered. Ritchie extended to referral documents and applied. *C & B Scene* and subsequent cases not applicable to this case.
  - c) Contractor insolvent - so enforcement also declined. *Bouygues, BCCI v. Prince Fahd Abdul Asis Al-Soud*, 23<sup>rd</sup> July 1996, *Stein v. Black* [1996] 1 AC 243, *Wimbledon Construction v. Vago* [2005] BLR 374, considered.  
HHJ Peter Coulson QC: TCC. 3<sup>rd</sup> November 2006.

**COMMENT :** Note the emphasis place by His Honour Judge Peter Coulson on the importance of ensuring the referral arrives within the 7 day period. Whilst we all initially thought the period was sacrosanct, gradually a degree of latitude has slipped in with adjudicators simply starting the clock a bit later if time slipped. If Hart v Fidler is not challenged then it looks as if everyone will have to be much more careful about this in future - the likelihood is that applicants who are late will have to recommence the submission process - get the adjudicator reappointed via a second request and notice followed by the referral document. It sounds a bit messy and over technical - and perhaps not very pragmatic. The assimilation with the failure to achieve 28 days for the decision is somewhat disingenious. After all the speed element is primarily for the benefit of the claimant not the respondent. But if needs be, as they appear, it is clear what must be done not to fall foul of the rules.

### **Hart Investments Ltd v Larchpark Ltd. [2007] EWHC 291 (TCC)**

Security of Costs - counter-claim - stay pending payment : Post refusal of enforcement of adjudication litigation in respect of damages for collapse of building and counterclaim for payment. Security of costs in respect of counter claim ordered - with stay of counterclaim pending payment. Main issue to proceed to trial.

*Aquila Design (GRB) Products Ltd v Cornhill Insurance plc* [1988] BCLC 134; *Keary Developments Lt v Tarmac Construction Ltd* [1995] 3 All E.R. 534; *Kufaan Publishing Ltd v Al-Warrack Bookshop Ltd* 2000, *Neck v Taylor* [1893] 1 QB 560, *Hutchinson Telephone UK Ltd v Ultimate Response Ltd* [1993] BCLC 307, *Mapleson v Masini* (1879) 5 QBD 144, *Dominion Breweries v Foster* [1897] 77LT 507 considered.

HHJ Peter Coulson QC. TCC. 9<sup>th</sup> February 2007

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### **Harvey Shopfitters Ltd v ADI Ltd [2003] EWHC TCC**

Contract Procedure : Letters of intent : formation of contract : quantum meruit : oral and written terms : estoppel : amendment of claim : damages for breach of contract.

The significance of contract terms is examined by John Uff QC in a situation where the parties conducted business in an informal manner, with neither party following the prescribed contract procedures. The defendant sought to have claims unsupported by relevant notices dismissed. In deciding whether or not to follow the terms of an IFC Contract the court stated that “*the issues can be summarised in this way:*

- (a) *the Courts now adopt a practical approach to whether and what agreement should be upheld;*
- (b) *niceties which might on a more traditional approach have been regarded as precluding agreement will not now be so regarded unless essential to the basis of the agreement;*
- (c) *this is the more so where the contract has been fully performed.”*

The defendant’s failure to follow the contract procedures gave rise to an estoppel – so that the court was able to consider claims not originally supported by contract compliant notices.

In other respects the case is an object lesson in how not to present a claim, in that the claimant made repeated applications for amendments, even after adjudication had commenced and subsequently before the court. The court afforded a degree of latitude to the claimant because, due to the informal way in which the contract works were administered, what had in fact taken place only became evident as documents and evidence were subsequently disclosed and examined. The upshot of all this was that some, but not all of the additional claims were allowed by the court.

*Hall & Tawse v Ivory Gat. British Steel v Cleveland Bridge. Pagnan v Feed Products, Hescorp v Morrison, Murphy v ABB, Serck Controls v Drake & Scull; Sykes v Fine Fare. Galliard Homes v Jarvis, Laserbore v Morrison; Stent v Carillion. Mitsui Babcock v John Brown Engineering CILL 1196. Amalgamated Investment v Texas Commerce International Bank [1982] 1 QB 84* referred to.

John Uff QC. TCC. 6<sup>th</sup> March 2003

**Comment :** Whilst the industry is continually urged to work together in a cooperative spirit, it is clear that as and when relationships break down, both parties will revert to formality. If there is no clear paper record of events, a party is likely to encounter severe difficulties in establishing entitlement. The answer must therefore be: Yes – cooperate by all means, but do not lightly dispense with contract formalities – keep written records of oral agreements as to variations and additional works – get them signed off – and deal extensions of time promptly.

### **Harvey Shopfitters Ltd. v ADI Ltd. [2003] EWCA Civ 1757**

Failed appeal from the judgement of John Uff. An agreement to use a contract form is not prevented from being a contract merely because formal documents are not executed. *Stent Foundations v Carillion Construction [2000] 78 CLR 188* applied. .

CA before Dame Elizabeth Butler-Sloss, Lord Justices Brooke and Latham. 13<sup>th</sup> November 2003.

### **Harwood v Lantrode [2000] EWHC TCC**

Insolvency : Challenging evidence of decision and equitable set off not ground to resist enforcement : Insolvency hearing pending – award to be paid into court. *Bouygues v Dahl-Jensen* 2000 considered.

His Honour Judge Richard Seymour. TCC. 24<sup>th</sup> November 2000

### **Hatmet Ltd v Herbert (t/a LMS Lift Consultancy) [2005] EWHC 3529 (TCC)**

Hatmet sub-contracted to supply and fix ceilings in lifts – as per sample. The terms were subsequently varied to accommodate architects specifications, subject to a variation in price. LMS were ordered to go ahead but without verification of price change. A refusal by LMS to pay the new price was referred to adjudication. The application was successful. Enforcement was resisted on grounds that there was no written contract.

Her Honour Judge Frances Kirkham held that despite the fact that all the terms (viz the price) were not finalised in the written documentation, since there was an identifiable mechanism to establish the price under s15 SOGA 1979, there was a complete construction contract to which the HGCRA adjudication provisions applied. Accordingly enforcement of the adjudicator’s decision was ordered.

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*RJT v DM Engineering* [2002] BLR ; *Carillion Construction Ltd v Devonport Royal Dockyard* [2003] BLR applied ; *Lloyds Project Ltd v Malnick* [2005] distinguished.

Her Honour Judge Frances Kirkham. TCC. 18<sup>th</sup> November 2005

### **Herschel Engineering Ltd v Breen Properties Ltd No1 [2000] EWHC HT 00/107 (TCC) : BLR 272**

This concerned a construction contract for electrical works. In due course, the employer rejected two applications for stage payments. The claimant secured a default judgment against the defendants which was subsequently set aside and permission granted to defend subject to a stay for adjudication to be considered. The claimant appealed – that appeal was still pending at the time of this hearing. The claimant then referred the dispute to adjudication. A first reference floundered over fees, but a second reference resulted in a default decision by an adjudicator. In this action the claimant sought summary enforcement of that decision.

The defendants resisted on the grounds that since the court was seized of the dispute, there could not be a concurrent action at adjudication, relying upon *McHenry v Lewis* [1882] 22 ChD 397 : *Royal Bank of Scotland Ltd v Citrusdale Investments Ltd* [1971] 1 WLR 1469 : *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257. *Cie Europeene v Tradax* [1986] 2 LLR 301, 305. referred to.

The defendants further sought to establish an estoppel in that once the claimants had commenced court action they could not then resort to adjudication, relying upon *Lloyd v Wright* [1983] 1 QB 1065.

The court, with reference to *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, 97: rejected an attempt to treat adjudication as a form of arbitration. The statutory regime provides a distinct right to refer a dispute to adjudication “*at any time.*”

The court further rejected application of the s9 Arbitration Act 1996 procedure to adjudication. Litigation and adjudication are not mutually exclusive and the mere fact of commencing litigation does not, on its own, amount to a waiver.

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

### **Herschel Engineering Ltd v Breen Properties Ltd No2 [2000] EWHC HT 00/107 (QBD)**

This action involved an application for stay of execution of the Dyson judgement outlined above. The court noted that whilst there is a wide ranging discretion available to the court to stay enforcement, it is for the defendant to establish special circumstances which demonstrate that that discretion should be exercised.

An error by an adjudicator alone is insufficient to establish a special circumstance. Something more is required. The principal special circumstance posited by the defendant was that the applicant companies shares were a mere £2 paid up capital and there was a real danger that they might not be able to repay the award if a subsequent trial went against the,. The court held that a possibility was not enough. The defendants had to demonstrate that this was a “real possibility” and they had failed to do so. Accordingly, the application for stay was rejected. Immediate enforcement ordered.

His Honour Judge Dyson. TCC. 28<sup>th</sup> July 2000.

### **HG Construction Ltd v Ashwell Homes (East Anglia) Ltd. [2007] EWHC 144 (TCC)**

This case concerns the issue of double jeopardy in adjudication. In Adjudication No 1 the applicant sought an adjudicator's declaration that contract terms were sufficiently clear to enable sums allocated to sections of a project to be calculated thus giving rise to a right to levy LADs. Whilst there were problems in so doing, the adjudicator held it was possible to do that.

In adjudication 3 before a different adjudicator a return of LADs previously deducted on the basis of the first decision was sought, on grounds that it was not possible to allocate sums in respect of that section. However the adjudicator determined that it was not possible to calculate sums in general terms rather than in the specific terms of that particular deduction, concluding that the withheld sum paid. In this action to enforce that decision, enforcement was refused. The court held that it was essentially the same dispute as previously canvassed and decided in the first adjudication.

*Woodrow Holdings v. Barnes & Elliott Ltd* [2004]: *Quietfield Ltd v. Vascroft Construction Ltd* [2006]; on *Henderson v. Henderson* (1843) 3 Hare 100; in *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1 30H-31G considered.

Mr Justice Ramsey. TCC. 1st February 2007.

**COMMENT :** This decision raises an interesting potential problem for subsequent adjudicators. Whilst it is clearly desirable for a general question of entitlement to be established by adjudication, nonetheless,

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subsequent adjudicators may well have to then grapple with the question of quantum. Whilst the first adjudicator may feel that everything is sufficiently clearly demarcated to allow a task to be performed, a subsequent adjudicator blessed with the task of applying it to subsequent events may find it a more challenging task than perceived by the first adjudicator. In the event that a subsequent adjudicator finds the task too difficult to perform, perhaps it would be open to determine that whilst in principle such a task is possible, in the context of the given facts of a particular claim, it is not possible to do so.

### **Highland Council v Construction Centre Group Ltd [2003] ScotCS 221**

Judicial Review of Lord Hamilton's decision [2003] ScotCS 114. Liquidated damages for delay formed the subject matter of a withholding notice issued after an adjudicator's decision. The Highland Council lost that adjudication and was ordered by court to pay on Interim Certificate no21. The Council commenced a second adjudication for late completion (the adjudicator awarded £600K +) and attempted to assert a set off against the court order (£240K + in respect of IC No21). The court stated that this was not allowed and ordered enforcement of the original decision for the third time.

Lord Carloway. Outer House, Court of Session. 5<sup>th</sup> August 2003.

### **Highland Council, Re Petition for Suspension of a Charge [2004] ScotCS 16 : P11 28/03.**

Lord Johnston acceded to an application to temporarily suspend a charge pending a further trial. This is yet one more stage in the extended litigation between the Construction Centre Group Ltd and the Highland Council. CCG had won an adjudication against the Highland Council. The Highland Council subsequently won an adjudication for a larger sum against the CCG who by then were in liquidation. This application sought to maintain the status quo pending a further trial of issues – since the outstanding sum was lodged with the bank. The Highland Council wished to prevent payment of their debt and rather to set it off against what they were owed, since anything they might receive from the trustees in bankruptcy would be on a mere contribution basis. The equitable relief in respect of insolvency proceedings was not argued before Lord Carloway at [2003] ScotCS 221 where the court had ordered immediate payment of the sum due in consequence of the original decision. It should be noted that this does not detract from the validity of the precedents in the earlier decision, but provides a bankruptcy gloss.

Lords Johnston, MacLean and Osborne. Extra Division. Inner House Court of Session. 23<sup>rd</sup> January 2004.

### **Hills Electrical & Mechanical Plc v. Dawn Construction Ltd [2003] ScotCS 107**

This concerned what payment terms apply in the absence of specification in a contract or alternatively a contradiction between the contract provisions and the statutory HGCRA scheme. The central issue here was "what was the due date for payment?" The court held that the default scheme's payment provisions only apply to aspects where the contract fails to specify payment terms. There is no requirement of compliance with the scheme in respect of contractual terms. This should be contrasted with s108 requirements where non-compliance displaces all aspects of the contract.

The construction by the pursuer of the decisions of *CB Scene Concept Design Ltd v Isobars Ltd* (2002) EWCH CIV 46 : *Barr Ltd v Law Mining Ltd* 80 Con. L.R. 134 : *Strathmore Building Services Ltd v Greig* (2001) Const. L. J. 72 : *Karl Construction (Scotland) Ltd v Sweeney Civil Engineering (Scotland) Ltd* 2001 SCLR 1995 considered but disapproved. *Ballast Plc v The Burrell Company (Construction Management) Ltd* 2001 SLT 1039 approved and applied.

The court noted that the contract provided for the final date for payment of any payments due to be made under the contract as 28 days after the date on which the payment in question fell due. The contract provided a mechanism which was not ousted by the Scheme.

Lord Clarke. Outer House, Court of Session. 7<sup>th</sup> April 2003.

### **Hillview Industrial Developments (UK) Ltd v Botes Building Ltd [2006] EWHC 1365 (TCC)**

In this action the claimant sought to enforce an adjudication decision in its favour for liquidated damages for delay. The due date for payment of the adjudication decision was the 4<sup>th</sup> April. The defendant had also pursued subsequent proceedings for the enforcement of sums allegedly due on the final account, under the JCT Standard Form 1998 ed. This hearing was scheduled for the 23<sup>rd</sup> June also before HHJ Toulmin. Initially His Honour had been prepared to consider hearing both enforcement actions together but this fell away when Hillview filed a defence, disputing the due date for payment under the final account.

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Botes wanted both enforcement actions to be heard together because this would have enabled them to set off the £190,780.46 + vat against the £292,650 inclusive claimed by Hillview. Botes conceded there were no grounds to oppose the current enforcement action. There was no likelihood of Hillview not being able to repay.

His Honour reviewed the grounds set out by Jackson J in *Interserve v Cleveland* [2006] EWHC 741. He noted that whilst the HGCRA and the Scheme aimed to ensure prompt payment and preserve cash flow, there was the facility available to the court to grant a stay if there was a risk of manifest injustice, but this had not been established by Botes. Accordingly application for stay was denied and judgement was given to Hillview with statutory interest.

*Macob Civil Engineering Limited v. Morrison Construction Limited* [1999] B.L.R. 92, 97. *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd.* [2000] 73 CLR 135. *Modem Engineering v. Gilbert Ash* [1974] A.C. 689 considered.

His Honour Judge John Toulmin QC. 7th June 2006.

### **Hitec Power Protection BV v MCI Worldcom Ltd [2002] EWHC 1953 (TCC)**

This concerned an application for enforcement of an adjudication decision. The defendant resisted enforcement on the grounds that no dispute had crystallised at the time that the notice and referral were made. The defendant disputed jurisdiction during the adjudication relying up on the dicta of Thornton J in *Fast Track Contractors Ltd.-v-Morrison Construction Ltd.* The claimant went ahead and the adjudicator made a decision in the applicant's favour which was not complied with.

Regarding whether a failure to object to jurisdiction at an early stage amounts to a waiver and submission to jurisdiction, and the impact of same, *Westminster Chemicals and Produce Ltd v Eikhaussen Nuersa* [1954] 1 Lloyd's Rep. 99 : *The Amazonia : Furniss Withey (Australia) Proprietar Ltd v Metal Distributors (United Kingdom) Ltd* [1990] 1 Lloyd's Law Reports 236 referred to. However, unlike arbitration, it may take some time in adjudication for the defendant to have an opportunity to raise the matter.

As to whether a dispute had crystallised, *Halki Shipping Corporation v Sopex Oils Ltd.* [1998] 1 W.L.R., 726 : *Haita v Nelson & Home Insurance Co.* [1990] 2, Lloyd's Law Reports 265 : *Karl Construction (Scotland) Ltd. v Sweeney Civil Engineering (Scotland) Ltd 2000 : Edmund Nuttall Ltd v R.G. Carter Ltd : Monmouthshire C.C. v Costello & Kemple Ltd* 5 B.L.R. 83 : *Fast Track Contractors Ltd v Morrison Construction Ltd* [2000] B.L.R. 168 referred to.

The court found that insufficient time had elapsed between the submission of the claim to the defendant and the notice of intention / referral to allow the defendant to consider the application and respond to it. Thus in the circumstances no dispute had crystallised capable of adjudication. Enforcement refused.

His Honour Judge Richard Seymour. TCC. 15<sup>th</sup> August 2002.

### **Holt Insulation Ltd v Colt International Ltd [2001] LV01 5929 TCC**

The applicant here was also the successful claimant in an adjudication. The defendant then successfully referred a dispute to adjudication. The claimant here seeks a declaration that the second adjudication was a nullity on the grounds of "*Double jeopardy*" or "*Issue Estoppel*" in that the dispute referred in the second adjudication "*is substantially the same as the one which has been previously referred to adjudication and in respect of which a decision has previously been taken in that adjudication, within the meaning of paragraph 9(2) of this Scheme for Construction Contracts (England and Wales) Regulations 1998*".

The second application was as follows "*the Applicant therefore claims immediate payment of the balance of the sum due under Application number 10 and earlier Applications of £139,227.13 less the part payment received on 23rd May 2000 (by the Applicant) of £28,639.57 ie £110,587.56 plus interest pursuant to contract (Clause 40.2 of the General Conditions of Contract referred to in paragraph 2 hereof - page 60)*".

The court considered *VHE Construction v RBSTB Trust Co Ltd* (2000) BLR198 : *Sherwood & Cason Ltd v Mckenzie Engineering Ltd* 2000 CILL : *Fast Track Contractors Ltd v Morrison Construction Ltd* (2000) BLR168 and concluded that whilst the adjudications were concerned with the same subject matter, the disputes were quite distinct and accordingly the second adjudicator had jurisdiction.

His Honour Judge Mackay. TCC. 1<sup>st</sup> February 2001

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### **Homer Burgess Ltd v Chirex (Annan) Ltd No1 [1999] ScotCS 264**

Homer Burgess contracted to carry out pipe and steel fabrication works at Chirex premises, a chemical plant. A dispute arose which Homer Burgess referred to adjudication. The adjudicator considered whether or not the work was plant work to a chemical plant within the exception s105(2) HGCRA or construction work subject to the Act. He concluded that pipe work etc was not plant (or machinery) and thus he had jurisdiction. He proceeded to find for Homer Burgess who sought to enforce the decision. Chirex opposed enforcement on the grounds of an s105(2) exclusion. Homer Burgess countered that whether or not the adjudicator was right in his decision with regard to the nature of plant and the application of s105(2) once made the court had to enforce the outcome.

Lord MacFadyen considered a number of Public Law cases and then reviewed *Macob* and *Project Consultancy v Gray Trust* and concluded that if the adjudicator erred on jurisdiction, the decision would not be enforceable (but declined to find that the adjudicator had no right to form such a view). He further concluded that a broad non-technical view of the meaning of plant had to be taken. In the circumstances the pipe work and steelworks formed an integral part of the chemical plant. Thus a large part of the adjudicator's decision was beyond his jurisdiction. Since the court had not heard argumentation on what order to deliver, this was put off for a subsequent hearing.

Lord MacFadyen. Outer House, Court of Session. 10<sup>th</sup> November 1999.

**Cross reference** *Gillies Ramsay* where Lord MacFadyen retracted his comparison of adjudication to public law judicial review in that error of law not a ground for challenge.

### **Homer Burgess Ltd v Chirex (Annan) Ltd No2 [2000] BLR 124**

This represented the subsequent hearing on what order to grant as a consequence of the finding that much of the adjudicator's decision was beyond his jurisdiction. The options canvassed by the court were either to "reduce" the decision of the adjudicator or to cherry pick those elements that were within his jurisdiction from those that were not and enforce those elements. It was not open to use the slip rule in the circumstances. Whilst the adjudicator was essentially out of time, the parties had agreed to give the adjudicator an extension of time and the court felt that in the circumstances it would be most appropriate to "reduce" or strike out the decision, enabling the adjudicator to make a fresh decision in the light of the courts interpretation of "plant". Accordingly, the adjudicator's decision was not enforceable.

Lord MacFadyen. Outer House, Court of Session. 18<sup>th</sup> November 1999.

**COMMENT :** A nice question, not canvassed by the court, no doubt because the parties were not opposed to continuing the adjudication, was whether or not the adjudicator was in fact by that time functus officio.

### **Honeywell Control Systems Ltd. v Multiplex Constructions (UK) Ltd. [2007] EWHC 390 (TCC)**

Multiplex brokered a settlement with Wembly (WNSL). Did the subcontractor have a right to inspect the settlement documents under the contract? The court held that since the settlement resulted in a variation to the annex to the main contract and the sub contract provided a right to inspect the main contract documentation, this included any subsequent variations. Honeywell wished to ascertain whether or not the changes in turn had implications for claims they wish to pursue in adjudication/litigation.

*Commissioners of Inland Revenue v Raphael* [1935] AC 96; *MacKenzie v Duke of Devonshire* [1896] AC 400.

*Dawes v Tredwell* [1881] 18 Ch D 354 considered. Jackson. Mr Justice. TCC. 27<sup>th</sup> February 2007

### **Hortimax Ltd v Hedon Salads Ltd [2004] Adj.Soc. TCC Salford.**

Hedon contracted with Hortimax for the installation of artificial lighting, screens in their warehouses and improvements to the watering system to their greenhouses. Financial disputes arose between the parties. The works were covered by six separate contracts, so six disputes were separately referred to the same adjudicator. The adjudicator found for Hortimax who sought summary judgement on the decision. Hedon had raised the issue of jurisdiction and the "*agricultural*" exception to HGCRA contained in s105(2)(c)(iii) whereby they asserted that disputes involving the growing of cucumbers are beyond the jurisdiction of the adjudicator. "s105(2) The following operations are not construction operations within the meaning of this Part - ....

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is- ....

(ii) the production, transmission, processing or bulk storage (other than warehousing) of .... food and drink".

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His Honour Judge Gilliland considered *Homer Burgess v Chirex : Comsite v Andritz* and determined that such works are excluded by s105. He first concluded that the equipment installed was plant, and secondly that it was central to the purpose of producing food. He declined to limit production to manufacturing processes, stating categorically that “A market gardener is engaged in the production of horticultural produce just as a farmer is engaged in the production of agricultural produce.”

However, he found that the defendant had waived the exception and given the adjudicator the power to decide upon his own jurisdiction. Accordingly the 6 awards were upheld.

His Honour Judge Gilliland. TCC. 15<sup>th</sup> October 2004.

**COMMENT :** Here, the works were, apart from the s105 exception, construction works but in other circumstances there can be a fine dividing line between supply and fix of equipment beyond the scope of adjudication and construction works. As long as adjudication is confined to the construction industry there will always be the need to deal with such issues.

A more difficult (but less justifiable) question, particularly for farmers and market gardeners is likely to be whether an installation is under the s105(2) exception “for the purpose of supporting plant/machinery for the production of food” since in small businesses such as farming many facilities are multi-purpose, merging the domestic with administration and food production. The construction of a barn without “plant” would be outside the Act whereas the construction of a “milking parlour” might be within the Act. The rationale for such exceptions is questionable.

The decision on jurisdiction is in line with *Tim Butler v Merewood Homes* where it was held that only a court can finally determine what a construction contract is for the purposes of the Act. Further, following *Whiteways Contractors v Impresa Castelli* an invitation by the parties to decide upon jurisdiction gives the adjudicator jurisdiction – a decision which is enforceable even if wrongly decided. The adjudicator never expressly decided on his jurisdiction. The court treated his decision to continue implied that he had decided he had jurisdiction – a practical solution that enabled a dispute, where the defence appeared to have little merit, to be put to rest. In *Ballast v Burrell* the court held that where an adjudicator fails to decide a question the decision will be quashed. The circumstances in which a decision can be implied involves drawing some very fine distinctions making application of the dicta in future cases unpredictable.

### **Hughes (JW) Building Contractors vs GB Metalwork.[2003] EWHC 2421**

Existence of Dispute : Bias : On the facts a dispute had crystallised: The adjudicator made every effort to ensure defendant had all relevant paperwork : No stay for insolvency allowed. *RSL v Stansell* [2003]. *Total M&E v ABB Building Technologies* [2002] considered. Mr Justice Forbes. 3rd October 2003.

### **Humes Building Contracts v Charlotte Homes (Surrey) [2007] LAWTEL AC0113534**

The employer purported to terminate a design & build contract. The contractor issued valuation 14 to recover outstanding measured works, subject to off setting defective works after the termination. The works had not been certified as required under the contract. Whilst no withholding notice issued, none was required under the contract in the circumstances, since the contract provided payment for completed works. The adjudicator concluded the defective works counter-claims were not relevant in the absence of a withholding notice, a point not pursued by the contractor and ordered payment. The court accepted that whilst the conclusions with regard to the requirements of a withholding notice, and the consequences that followed from that were legally incorrect, that was nonetheless a determination that the adjudicator had jurisdiction to make which would, even though in error, be enforceable.

Enforcement however was successfully resisted on the grounds that the issue regarding whether or not a withholding notice was required, was not canvassed in adjudication. This amounted to a breach of natural justice in that no opportunity had been afforded to the parties to address the issue. *Carillion Construction Ltd. v Devonport Royal Dockyard Ltd.* [2005] EWCA Civ 1358, *Ardmore Construction Ltd. v Taylor Woodrow Construction Ltd* (2006); *Balfour Beatty v London Borough of Lambeth* [2002] BLR 288. *Discairn Project Services Ltd* [2000] BLR 402 considered.

Whilst not necessary in the circumstances, given that enforcement was refused, an application to stay enforcement on the grounds of financial instability was rejected. *Wimbledon Construction Company 200 Ltd. v Derek Vago* [2005] EWHC 1086 considered. The contractor’s financial situation was well known at a prior

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stage and at the time of the adjudication there was no indication of insolvency. However, given that insolvency proceedings had commenced, any sum due would have to be paid into court.

Gilliland J. TCC. 3<sup>rd</sup> January 2007.

### **Hurst Stores Ltd v M.L.Europe Property Ltd [2003] EWHC 1650 TCC**

How final, if at all are interim accounts? Here there was an attempt to render a final settlement of interim accounts signed off by a project manager. The action failed because in the circumstances of the case the project manager had no contractual capacity.

The dispute concerned a large contract for the installation of toiletry fixtures. The value of the work with variations rose from £2.5M to £3.3M. Following issue of interim accounts, a final account of £6.5M was submitted embracing claims for bad management, interruption delay and lack of access. Final completion was 11 months late. In January at MLEP's behest Mr Mell, Hurst's on site project manager, produced a "final account" or costing of work, labour and material to that date, excluding any quantification of loss and delay. It was not Mell's job to produce Final Accounts. In April MLEP through Mace (a subsidiary Construction Management Company of MLEP) drew up a Final Payment document, based on Hurst's January figures. The document gave the appearance that it emanated from Hurst. MELP secured the signature of James Mell on the document which purported to establish a final payment of £600K outstanding in total discharge of contract price, being the balance between £3.4M total less prior payment of £2.8M., whilst retaining liability / responsibility for outstanding finishing works by to Hurst. MLEP's contention therefore was that that agreement precluded any further claims by Hurst.

Colin Reese QC, at first instance, accepted that Mell had not intended to sign a Final Account and had neither read nor appreciated the implications of signing the document and had no authority to sign it. He thought he was signing off a cumulative interim account for works done to date and nothing more, in line with standard practice on site. Mace made no attempt to point out that the document differed in nature in anyway from previous interim accounts. In consequence the document had no legal standing and did not amount to a final settlement of account.

Regarding the absence of authority of junior staff to vary a contract, **Sharpe v San Paulo Railway Company** (1873) LR 8 Ch App 597 referred to.

Regarding unilateral mistake, *Commission for the New Towns v. Cooper (Great Britain) Ltd.* [1995] Ch 259 : *Baden v Société Générale pour Favoriser le Développement du Commerce et de L'Industrie en France SA (Note)* [1993] 1 WLR 509 : *AGIP (Africa) Ltd v Jackson* [1990] Ch 265 referred to.

Regarding discharge of the burden of proof and impact of silence, *R v Inland Revenue Commissioners ex parte T.C. Coombs & Co.* [1991] 2 AC 283 referred to. Colin Reese QC. 21<sup>st</sup> June 2003.

### **Hurst Stores Ltd v M.L.Europe Property Ltd [2004] EWCA 490**

The CA dismissed the appeal. *Commission for New Towns v Cooper* [1995] Ch 259 : *Baden v Société Générale* [1993] 1 WLR 509 : *Sharpe v Paulo Railway Company* (1873) LR 8 Ch App 597 referred to.

Lord Justice Buxton, Lady Justice Arden, Mr Justice Pumfrey. 1st April 2004.