

ADJUDICATION CASE SUMMARIES J



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Jamil Mohammed v Dr Michael Bowles [2002] 394 SD 2002

Insolvency : Adjudicator's decision can be the subject matter of a statutory demand : In absence of a legal challenge – demand can be validly made : Costs awarded.

Macob v Morrison [1999]. *Austin Hall v Buckland* [2001]. *Project Consultancy v Gray Trust* [1999]. *George Parke v Fenton Gretton* (2002). *Oakley v Airclear* (2002) considered.

Registrar Derrek. High Court in Bankruptcy. 14th March 2003.

Jerome Engineering v Lloyd Morris [2001] EWHC ITC 00221 (TCC) : [2002] CILL 1827

Notice of Intention : The amount claimed does not have to be set out in the notice of intention : DOM2 allows for referral to set out specifics.

KNS v Sindall 2001. *Fastrack v Morrison* 2000. *F W. Cook v Schimizu* 2000. *Bouyges v Dahl Jensen* 2000. *Macob v Morrison* 1999 considered.

His Honour Judge Cockroft. TCC. 23rd November 2001.

John Cothliff Ltd v Allen Build Ltd [1999] CILL 1530

A construction dispute was referred to adjudication. The referral requested costs of the adjudication. The adjudicator considered whether or not he had power to award costs and reached the conclusion that since the HGCRA and the Scheme were silent upon this that he had power to so award. Accordingly, having found for the applicant he ordered an additional sum to cover costs of the adjudication. The respondents resisted enforcement. His Honour Judge Marshall Evans held that the adjudicator could award costs unless expressly stated otherwise, but only if a party applied for them.

His Honour Judge Marshall Evans. Liverpool County Court. 29th July 1999.

ADDENDUM : In *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158, TCC, Judge Bowsher, expressly disagreed with Marshall Evans, finding that there must be an express or implied agreement of the parties to empower the adjudicator to make a ruling on the costs of the adjudication ; see also *Total M and E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248, TCC, Judge Wilcox.

John Mowlem & Co plc v Hydra-Tight Ltd [2000] EWHC HT 184 (TCC)

Appointment mechanism : If s108 not fully implemented Scheme applies : Parties must conform to appointment procedure : declaration available if procedure defective.

His Honour Judge Toulmin. TCC. 6th June 2000.

John Roberts Architects Ltd v Parkcare Homes (No2) Ltd [2005] EWHC 1637 TCC : Bliss 1049196

JRA provided architectural services to P.H., who subsequently requested compensation for losses said to arise out of the "poor standard of service provided." On receiving no response to the request P.H. referred the matter to adjudication. An adjudicator was appointed. JRA alleged an ambush and P.H. discontinued the adjudication and reapplied for a fresh appointment the following day. Both parties consented to the appointment and agreed not to raise the jurisdictional issue. However, in their response JRA again raised the jurisdiction issue, claiming no dispute had arisen. P.H. promptly discontinued the adjudication and in accordance with Clause 30 of the Model Adjudication Procedures, incorporated by Clause 9.2. CE/99, the relevant RIBA contract of engagement of JRA, promptly paid the adjudicator his fees.

An amendment to the MAP – clause 28/29 stated that "The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another as part of his decision. The Adjudicator may determine the amount of costs to be paid or may delegate the task to an independent costs draftsman." JRA requested that the adjudicator direct payment of their legal costs incurred in engaging in the discontinued adjudication. The adjudicator concluded that he had the authority to do so and duly directed P.H. to pay JRA £87K + vat, costs thrown away.

His Honour Havery J found that the adjudicator had, under the terms of the contract, jurisdiction to direct payment of costs only "as part of his decision." Since he made no decision, the action having been discontinued, there was no jurisdiction to deal with costs. He rejected the assertion that the plain words

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should either be interpreted in a business context or alternatively that a term should be implied that he had jurisdiction over costs. Such a power was not necessary to make commercial sense of the contract. The statutory default scheme does not provide such a power either. He also rejected an argument that an applicant to adjudication is estopped from withdrawing from the adjudication. Whilst the applicant should not be able to blow hot and cold over whether or not the adjudicator has jurisdiction, there is nothing to prevent a party discontinuing an action, even if, as here, it results in wasted legal costs to the other party.

His Honour Judge Richard Havery. TCC. 25th July 2005.

COMMENT : Whether or not an adjudicator should have been given the statutory power to deal with costs is questionable, particularly where the issue is of a modest nature. The original object of adjudication was a simple, cost effective, non-procedural process. However, costs in adjudication, particularly for many of the complex disputes routinely submitted to adjudication can be significant. It is hardly surprising therefore that the power to award costs is often expressly provided for in construction contracts. No doubt such clauses will be amended in future to avoid the trap that JRA fell into, removing the words “*as part of his decision*” to ensure that costs thrown away can be recovered where a party withdraws from the adjudication. The principal objection to such a device is that it could encourage a party to keep going, in hope rather than expectation, in circumstances where a prompt withdrawal would be in everyone’s best interests.

Another question that was not canvassed here, which might draw a very different response, is whether a referring party could withdraw in circumstances where the adjudicator also had jurisdiction over a counter-claim or other relevant issue.

John Roberts Architects Ltd v Parkcare Homes (No. 2) Ltd [2006] EWCA Civ 64

John Roberts Architects successfully appealed the decision of HHJ Havery regarding the recovery of the legal costs they had incurred in responding to the adjudication. The CA held that the interpretation placed on the provision by the judge at first instance was unnatural. In particular it was the job of the adjudicator to deal with those issues contained within the notice and referral. Whilst one of those issues, that is to say the substantive aspect of the claim, had been withdrawn, the claimant had also claimed “*costs in the adjudication including costs incurred from [consultants] and the appointment fee.*” The Notice also stated, or restated, that Parkcare “*is entitled to recover from [Roberts] its legal costs of the adjudication pursuant to clause 9.2 of CE/99 plus a decision as to what those costs amount to.*” In their response the defendants likewise requested costs. These matters remained alive after the withdrawal. Whilst the parties may as demonstrated by *Northern Developments (Cumbria) Limited v Nichol* (2000) BLR 158 extend jurisdiction to costs this did not apply here. The governing factor was the meaning of the replacement clause 29.

If the adjudicator had jurisdiction over costs, then one party could not unilaterally remove that jurisdiction simply by withdrawing from the other aspects of the action. This was not disputed, so the central issue was whether or not the adjudicator had jurisdiction over costs, which turned on the construction of the clause. May LJ then concluded that “*The very odd meaning contended for and as found by the judge requires clause 29 to be read as if it said: “The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another, but only as part of his substantive contested decision.” In my judgment, the more natural meaning of the clause in its context, and certainly the commercially sensible meaning, is that the words “as part of his decision” mean “as part of what he may decide”.* Accordingly the appeal succeeded.

Macob v Morrison (1999). *Investor’s CS. v West Bromwich Building Soc* [1998] 1 WLR 896. *Antaios v Salen* [1985] 1 AC 191. *Co-op v Nat West Bank* [1995] 1 EGLR 97. *Bromarin v IMD Investments* (1999) STC 301 considered.
CA before May LJ; Keene LJ; Scott Baker LJ. 9th February 2006.

Joinery Plus Ltd (in administration) v Laing Ltd [2003] EWHC HT 02/323

Construction contract : Adjudicator applied JCT terms to a DOM 1 dispute : Since wrong contract applied decision a nullity – could not be corrected under slip rule.

Niko Hotels v MEPC [1991] 2 EGLR 103; *Bougues v Dahl-Jensen* [2000] BLR 522; *Bloor v Bowmer* [2000]; *Discaim v Opecprime* [2001]; *Shimizu v Automajor* [2002]; *C&B Scene v Isobars* [2002] *Edmund Nuttall v RG Carter* [2002] BLR 312, *Balfour Beatty v LB Lambeth* (2002). *Day v McLea* (1899) 22 QBD 610. *Stour Valley Builders v Stuart* 1993; *IRC v Barbara Fry* 2001. *Re Atlantic Computers* [1992] Ch 505. *MTI Trading Systems Ltd v Winter* (1998) BCC 591 considered.
His Honour Judge Thornton. TCC. 15th January 2003.

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Joseph Finney plc v Gordon & Gary Vickers [2001] EWHC HT 00/454 (TCC)

Waiver of right to adjudicate : Parties can contract out of right to adjudicate, or arbitrate after the event but not before in respect of statutory adjudication. *Ashville Investments v Elmer Ltd* (1989) IQB 488 considered.

His Honour Judge David Wilcox. TCC. 7th March 2001.

J T Mackley & Company Ltd v Gosport Marina Ltd [2002] EWHC 1315 (TCC)

Arbitration challenge : Clause 66 ICE : Engineer's decision a pre-requisite of arbitration, even for a challenge to an adjudication decision. *Vale Do Rio v Shanghai Bao Steel* [2000] 2 All ER (Corn) 70. *Harbour & General Works Ltd. v Environment Agency* [1999] BLR 409. *ABB Lummus Global Ltd. v Keppel Fells Ltd* [1999] 3 *Lloyd's Rep* 24 considered.

His Honour Judge Richard Seymour. TCC. 3rd July 2002.