ADJUDICATION CASE SUMMARIES M

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Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] EWHC TCC 254

Macob concerned an action for the enforcement of an adjudicator's decision. The defendant applied for stay of adjudication to arbitration (s9 Arbitration Act 1996) on the grounds that the adjudication process was not conducted fairly because the adjudicator did not hold a hearing and refused additional opportunity to make further representations into the adequacy or otherwise of payment provisions. The contract contained an arbitration clause.

Dyson J held that the process as conducted by the adjudicator was in the circumstances fair but went on the state that if the procedure adopted had not been fair then the decision would be unenforceable. Whilst the HGCRA requires even a wrong decision to be enforced by summary hearing, this does not preclude judicial review of the process. Any challenge on the merits would have to go to another place at another time, be it arbitration or litigation. His Honour Judge Dyson : TCC. 12th February 1999.

Comment : Essentially the process requires the parties to spell out their contentions in the referral and response documents and response to defence. The adjudicator only needs to do more if he is not then in a position to make a decision.

The application failed and the statutory adjudication process was supported by court. This was the first case to be heard under the HGCRA and established the legality of the process. The main body of Para 14 is set out below because selected extracts have been quoted time and again in succeeding cases. *"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see section 108(3) of the Act and paragraph 23 (2) of Part 1 of the Scheme. The timetable for adjudication's is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12 (a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."*

Makers UK Ltd v London Borough of Camden [2008] EWHC 1836 (TCC)

Appointment : suggesting named individual : In this application for summary enforcement of an adjudication decision the defendant questioned **w**hether the nomination of the adjudicator was valid. The dispute centred around a JCT Intermediate Building Contract (1998 Edition) in standard form and concerned the validity of termination or alternatively repudiation of the contract by Camden. Makers considered a legally qualified adjudicator desirable and having ascertained that a specific lawyer on the RIBA panel was available, suggested / requested his appointment. RIBA acceded. The question here was firstly whether there was a duty to consult with Camden and /or secondly whether there was apparent bias in the appointment. Held : No to both. Adjudication summarily enforced.

Regarding implied terms in contracts ***BP Refinery (Westernpoint) Pty Ltd v Shire of Hastings*** (1979) ALJR 20; ***Mosvolds Rederi A/S v Food Corp of India*** [1986] 2 Lloyd's Rep. 68; ***Crossley v Faithful & Gould Holdings Ltd*** [2004] 4 All ER 447 refered to. Regarding practice of suggesting individuals for appointment ***AMEC Capital Projects Ltd v Whitefriars City Estates Ltd*** [2004] EWCA Civ 1418 noted. Regarding bias ***AMEC v***

Whitefriars; Porter v Magill [2002] 2 AC 357; ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451 considered. As to desirability of enforcement ***Carillion v Devonport*** [2005] EWCA Civ 1358 noted.

Mr Justice Akenhead. TCC 25th July 2008

Management Solutions & Professional Consultants Ltd v Bennett Electrical Services Ltd [2006] EWHC 1720

Construction Contract : Oral variations to an otherwise written contract do not take the contract outside the scope of the HGCRA. ***RJT Consulting v DM Engineering*** [2002] 1 BLR 217 applied.

Where a written contract replaces an oral contract, the oral contract ceases to have effect and the contract is within the scope of the HGCRA. Where two adjudication decisions have been issued one may be set off against the other during enforcement proceedings. No winner - no costs.

His Honour Judge Thornton. TCC. 10th July 2006

Management Solutions & Professional Consultants Ltd v Bennett Electrical Services Ltd [2006] EWHC 1720_2

Costs : Challenge to costs order. Should costs be awarded on the basis of who writes the cheque pays the costs? ***Day v Day*** (2006) EWCA Civ 415, ***Johnsey Estates v Secretary of State for the Environment*** [2001] EWCA Civ 535, considered. Held : Both parties wrote a cheque - that one was bigger than the other does not require the court to decide whether a "draw" is a score or no score draw.

A settlement offer argument as to who was a winner was raised too late to be considered.

TAX / VAT raised too late to alter judgement and in any case did not raise question of double payment since the sums would be accounted for during VAT returns.

His Honour Judge Thornton. TCC. 23rd August 2006

Martin Girt v Page Bentley [2002] EWHC 2434

An application for Summary Judgement was made arising out of an adjudication. The amount sought was £18,000 or so. A contract between the parties was entered into whereby the Claimant was to supply to the Defendant labour only plastering works at a new building called Kilder Moray Lodge in Scotland. A dispute arose over the non-payment by the Defendant of monies owed.

Adjudication proceedings were entered into and the Adjudicators Decision awarded £53,371.49 if the Claimant could produce the relevant tax exemption certificate. Should they not be able to produce the aforementioned then £18,160.66 would be the entitled amount. The parties agreed in the legal proceedings that the Claimant was not tax exempt and as such the Claimant argued that he was owed £18,160.66. The court upheld this assertion even though the judge stated that the adjudicator went off on a "frolic of his own" when making his decision based on what he found to be the builders tax status. The judge upheld the principles from Macob Civil Engineering v Morrison Construction (1999), where it was held to be irrelevant to the enforceability of a decision that the adjudicator made an error of fact or law unless he purported to make a decision which he was not empowered to make under the Act.

Summary by Rachel Ewin. His Honour Judge David Wilcox. TCC. 12th April 2002.

Masons (A Firm) v WD King Ltd [2003] EWHC 3124 (TCC)

Recovery of legal fees for advice in respect of litigation, arbitration and adjudication of a construction dispute. His Honour Judge Humphrey Lloyd. TCC. 17th December 2003.

Mast Electrical Services v Kendall Cross Holdings Ltd [2007] EWHC 1296 (TCC)

Construction Contract : Application for declaration that three construction contracts had been concluded for electrical works. Following a detailed analysis of correspondence court determined there was no concluded contract - rates not agreed. Whilst payment due on a quantum meruit basis - this would have to be pursued by litigation. Adjudication not available. Declaration refused.

Peter Lind & Co. v Mersey Docks & Harbour Board [1972] 2 Lloyds Rep 234. ***Claymore Services Ltd v Nautilus Properties Ltd*** [2007] EWHC 805 (TCC).considered. ***RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*** [2002] EWCA Civ 270; [2002] ; ***Trustees of the Stratfield Saye Estate v AHL Construction Ltd*** [2004] EWHC 3286 (TCC) applied. Mr Justice Jackson. 17th May 2007

Maxi Construction Management Ltd v Mortons Rolls Ltd [2001] ScotCS 199
Payment provisions : Failure to deal with an application for evaluation of interim payments does not lead to a dispute : Clause 12 Scottish Builders Contract requires full basis of demand.

Regarding construction of a contract, ***Bank of Scotland v Dunedin Property Investment Co Ltd*** 1998 SC 657, and therein, the dicta of Lord Mustill in ***Charter Reinsurance Co Ltd v Fagan*** [1997] AC 313 at 384: *"... the inquiry [as to the meaning of an expression in a contract] will start, and usually finish, by asking what is the ordinary meaning of the words used,"* referred to. Lord MacFadyen. Outer House, Court of Session. 7th August 2001.

Maymac Environmental Services v Faraday [2000] EWHC HT 00/22 (TCC) : [2001] 75 Con LR
Written contract : Evidence of lack of written contract to resist enforcement insufficient : Also suggested since matter not pleaded, estoppel.

Regarding existence of a contract ***Pagnan SPA v. Feed Products Ltd*** *[1987] 2 Lloyds.Rep.601* applied.

Bouygues v Dahl Jensen 2000: ***Fastrack v Morrison Construction Ltd.*** [2000] B.L.R.166 applied.

His Honour Judge Toulmin. TCC. 16th October 2000.

Cross Reference : later cases on the extent to which ***Fast Track*** continues to apply.

McAlpine PPS Pipeline Systems Joint Venture v Transco Plc [2004] EWHC 2030 (TCC)
An application for enforcement of an adjudicator's decision under Part 24 in respect of a dispute concerning an NEC Engineering and Construction Contract for the laying of gas pipes, incorporating Option 1, was refused on the grounds that there was real prospect of the defendant defeating enforcement proceeding. The application would only be finally determined by a full enforcement hearing. The defendant asserted 1) the dispute as adjudicated was narrower than that referred to the adjudicator 2) the adjudicator considered matters not put to him and 3) the defendant was prejudiced by the late submission of evidence which he did not have time to fully respond to.

The claimant sought to recover interest on non-certified compensation events. The reference contained no details of the many asserted compensation events. The respondent asserted that the reference was based on an assertion of automatic entitlement to interest and that having advised that this was not the case, the adjudicator had invited the claimant to prove the entitlements, which was different to the dispute referred and further that there had subsequently been insufficient time to respond to the evidence thereafter provided. The court agreed with the respondent and declined to order enforcement.

Pegram Shopfitters v Tally Weijl *[2003] 91 CLR, 173 :* ***Amec Projects Ltd v Whitefriars City Estates Ltd.*** *[2004] EWHC(TCC) 393:* ***AWG Construction Services Ltd v Rockingham Speedway Ltd****. 2004 EWHC (TCC) 888 :* ***Macob Civil Engineering Ltd. v Morrison Construction Ltd*** *[1999] CLR 1 :* ***Thomas-Frederic's (Construction) Ltd. v Wilson*** *[2003] 91 CLR 161 :* ***Woods Hardwick Ltd. v Chiltern Air Conditioning*** **(***2001) BLR 23 :* ***Glencott Development v Barrett*** *[2001] BLR 207 :* ***Ballast plc v Burrell Company*** *[2001] BLR 529 and* ***C & B Scene Concept Design v Isobars*** *[2002] 82 CLR 154 :* ***Fastrack v Morrison*** *[2000] BLR 168 :* ***Discain Project Services v Opek Prime Development Ltd****. [2000] BLR 402* referred to.

Regarding what is a dispute, ***AWG v Rockingham*** *[2004] EWHC 888(TCC):* ***Carter v Nuttall*** *[2002] BLR 312:* ***London and Amsterdam Property Ltd. v Waterman Partnership Ltd****. [2003] EWHC 3059(TCC):* ***Halki Shipping Corporation v Sopex Oils*** *[1998] 1 WLR 727* considered.

His Honour Judge Toulmin. TCC. 12th May 2004.

McConnell Dowell Constructors (Aust) P/L v National Grid Gas plc [2006] EWHC 2551 (TCC) Bailii
The parties to a pipeline construction contract entered into a new contract which provided for a later completion date. A dispute subsequently arose in respect of application for additional payments. There were referred to adjudication. The respondent asserted that the new contract was not a construction contract and hence HCGRA adjudication provisions did not apply. The adjudicator however considered that he had jurisdiction and found for the referring party. Following non payment the claimant brought this action for enforcement. The respondent's defence was that the new contract was not a construction contract and extinguished all prior debts.

The court disagreed. It was merely an extension / variation of the original contract and as such an impartial onlooker would have concluded at the time that the prior adjudication provisions were carried over to the

new contract. Accordingly the adjudicator had jurisdiction and thus enforcement was granted. The new contract did not purport to extinguish or settle all prior claims and was not therefore a settlement agreement.

Westminster v Beckingham [2004] & ***Brown v Crosby*** [2005] considered. ***Shepherd v Mecright*** [2000] distinguished. Mr Justice Jackson. 3rd October 2006.

Mecright v Morris [2001] EWHC HT 01 84 (TCC)

Jurisdiction Internal: Dispute as to legality of termination : Adjudicator found unlawful repudiation but went on to award unclaimed damages. Outside Scope.

KNS Industrial Services (Birmingham) Ltd v Sindall Ltd : Holt Insulation Ltd v Colt International Ltd : Fastrack Contractors Ltd v Morrison Construction Ltd *[2000] BLR 168* considered.

His Honour Judge Richard Seymour. TCC. 22nd June 2001.

Medlock Products Ltd v SCC Construction Ltd. [2006] LAWTEL AC0111733

Cross claims; Debts; Invoices; Striking out; Winding up petitions; Withholding payments. Where there was no substance in the submission that the wrong company was the subject matter of the winding-up petition, and where neither the dispute as to the petition debt nor cross-claims in relation to poor work had any genuine prospect of success, the claimant's application for either restraint of advertisement or the striking out of the winding-up petition would be refused.

SCC, a subcontractor, raised a series of invoices against the contractor, Medlock. No withholding notices had been served. These were not paid and SCC proceeded to present a petition to wind Medlock up. The sum in dispute was approximately £52k.The solicitors acting for Medlock indicated that the quantified losses of Medlock greatly outweighed those sums claimed by SCC. In other words, the debts were bone fide disputed on substantial ground or there were cross claims which Medlock had not yet been able to litigate which exceeded the amount of the petition debt. Consequently, they issued an application to restrain the advertisement of the winding up petition saying that the winding up petition was inappropriate.

The Judge noted that the contracts were written contracts within the meaning of the HGCRA because they incorporated the written terms of Medlock which are standard terms of contract. The Judge considered the possibility that the absence of a withholding notice might be a special circumstance following the leading insolvency case of ***Bayoil*** for refusing an order restraining advertisement. However he decided that he could rely on the absence of any withholding notice to support his conclusion that the cross claims were not substantial or serious claims which Medlock would have had in mind irrespective of the winding up proceedings.

The cross claims were described as being thought of as a last resort and would not have been advanced until the threat of winding up proceedings was already very much to the fore. This was therefore a situation where the main contractor was trying to take every possible point and *"throw up a lot of dust to conceal"* that he had failed to pay an agreed sum. The Judge did not think that the dispute was a genuine one on substantial grounds and the restraining application was thrown out.

Bayoil v Sea-wind [1998] BCC 908 ; ***Re A Company 685 of 1996*** [1997] BCC 830. considered

Weeks QC HHJ. District Registry (Bristol). 13 July 2006

Melville Dundas Ltd v. Hotel Corporation Of Edinburgh Ltd [2006] ScotCS CSOH_136

This case involved an application for summary enforcement of a settlement agreement of a construction dispute. The Court held that a dispute arising out of a compromise agreement to a construction dispute is not a construction dispute for the purposes of the HGCRA. It could not be referred to adjudication and thus was not amenable to enforcement by way of summary judgement.

Prenn* v *Simmonds, [1971] 1 WLR 1381; ***Reardon Smith* v *Hansen Tangen***, [1976] 1 WLR 989. ***Howgate* v *Catercraft*** 2004. ***Redpath Dorman Long* v *Cummins Engine Co Ltd***, 1981 SC 370, and ***Gilbert-Ash* v *Modern Engineering*** [1974] AC 689. ***Capital Land* v *SS Environment***, 1997 SC 109, ***Bank of Scotland* v *Dunedin*** 1998 SC 657; ***Mannai* v *Eagle Star*** [1997] AC 749. ***Commercial Union* v *Hayden***, [1977] QB 804. ***Mycroft, Petitioner***, 1983 SLT 342. ***SL Timber* v *Carillion*** 2002 SLT 997, ***Shepherd* v *Mecright Ltd***, [2000] BLR 489 ***Quality Street* v *Elmwood*** (2002 SCLR 1118, ***BCCI* v *Ali***, [2002] 1 AC 251 considered

Lord Drummond Young, Outer House Court of Session. 7th September 2006

Melville Dundas v Wimpey [2004] ScotCS cla 1810

The claimants contracted under the Scottish Building Contractor's Contract with Design 2000 to build a housing development. Whilst by virtue of Clause 30 an interim payment would in the ordinary course of things have become due in the absence of the issue of a valid withholding notice, payment was resisted because clause 27(5) stated that *"from the date ….. when the employer gives notice to determine [*on grounds of liquidation etc clause 27(1)-(4)] *… the employer shall not be bound by any provisions of this contract to make any further payment …."*

Since the clause 27(5) notice cancelled out all sums due under the contract, the interim payment application became unenforceable. The claimants argued that there was no withholding notice and the contract did not comply with s109/110 HGCRA and ensure a mechanism that guaranteed stage payments. Lord Clark disagreed. Whilst the HGCRA deals with ongoing interim payments, it was not intended to interfere with liquidation provisions. The operation of clause 27(5) of the contract lawfully stopped the sum from becoming due. There was thus no due payment that fell to be enforced through the HGCRA mechanism.

S L Timber* v *Carillion 2002. ***Rupert Morgan* v *Jervis*** (2003) considered

Lord Clarke. Outer House, Court of Session. 22nd October 2004.

Melville Dundas Ltd v George Wimpey UK Ltd [2005] _ScotCS CSIH_88

In this reclaiming motion the pursuers successfully appeal against the decision of Lord Clarke that under the terms of a JCT Contract, on the appointment of a receiver all claims cease to be payable. ***SL Timber Systems Ltd* v *Carillion, Clark Contracts* v *The Burrell*** and ***Rupert Morgan* v *Jervis*** considered.

The central issue was whether the effect of Clause 27 was to retrospectively alter the date when the monies (if any since a balancing act would then occur between the financial rights and liabilities of each party would be carried out) would become due or to defer payment, contrary to the requirements of the HGCRA. The court held that the effect was to defer payment contrary to the intention of the HGCRA provisions which were designed to improve cash flow. The provisions cannot be contracted out of by the parties. An assertion that the HGCRA only applied to on going contracts and did not apply once a contract had been determined was rejected. The provisions of the contract, for the purposes of payment etc continue after the contract comes to an end. Lords Nimmo Smith, Mackay & MacLean. Extra Division, Inner House, Court of Session.

15th December 2005

COMMENT : The implications of this case are considerable and are likely to result in the redrafting of many standard form construction contracts. From the adjudication perspective, they address important issues of jurisdiction for adjudicators involved in disputes where one of the parties has entered into liquidation.

Melville Dundas Ltd v George Wimpey UK Ltd (Scotland) [2007] UKHL 18

Unpaid stage payments post filing of letters of Administration. By a 3/2 majority the House of Lords restored the first instance decision of Lord Clarke. Clause 27 JCT, that suspends outstanding payments of all payments that accrue from a date 28 days prior to a contractor entering into administration pending the making up of a final account, does not offend the HGCRA. Thus payment of a sum due in the absence of a withholding notice, 14 days before administration, is not enforceable under the HGCRA.

Bouygues v Dahl-Jensen [2000] BLR 522, : ***Highland Engineering Ltd v Thomson,*** 1972 SC 87, ***Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd*** [1974] AC 689. ***Stein v Blake*** [1996] AC 243; in ***C & B Scene v Isobars*** [2002] BLR 93) considered.

House of Lords before Lords Hoffmann, Hope & Walker. Mance & Neuberger dissenting. 25th April 2007

Michael John Construction Ltd v Golledge [2006] EWHC 71 (TCC)

This concerned payment for construction works to a rugby pitch in Cardiff. A central issue arose in respect of who is liable for work to a Rugby Club (in the circumstances an unincorporated association – though it was subsequently incorporated) - members, nominated members, trustees? ***L.G. Omnibus v Pope*** *(1922) 38 TLR 270..* ***Fillite v Aqua-Lift*** *[1989] 45 BLR 27,* ***Sherwood v Casson*** *[2002].* ***Re Medicaments No.2*** *[2001] 1 WLR 701;* ***Locabail v Bayfield*** *[2000] QB 451;* ***Pring v Hafner*** *[2002].* ***Amec v Whitefriars*** *[2005] 1 BLR 1* referred to.

The first adjudication to be commenced was against an individual. The contractor was having difficulty getting clarification of who was the appropriate individual to take the action against. He prevailed at the

adjudication, but following questions as to who was the appropriate person commenced a second adjudication against a group of members.

This action was commenced to enforce those decisions. The court held that the adjudicator had jurisdiction to determine who the relevant persons were. The 2nd adjudication corrected matters from the first so only the 2nd was enforced. The court further determined that there no issue of double jeopardy involved here.

Macob v Morrison *[1999]:* ***Bouygues v Dahl Jensen*** *[2000].* ***C B Scene v Isobars*** *[2002].* ***David MacLean v Swansea H.A.*** *[2002]:* ***Chamberlain v Alfred MacAlpine*** *[2002].* ***Sindall v Solland*** *2001,* ***Barr v Law Mining 2001 : Absolute Rentals v Glencor*** **(20***00);* ***Herschel v Breen*** *[2000];* ***Rainford House v Cadogan*** *2001 :****AWG v Rockingham*** *[2004].* ***Wimbledon v Vago*** [2005] considered.

Peter Coulson HHJ. TCC. 27th January 2006.

Michael John Construction Ltd v St Peters Rugby Football Club [2007] EWHC 1857 (TCC)

Double jeopardy : The ***Michael John Construction Ltd v Golledge*** dispute sent on to arbitration by different legal personalities to the original adjudication enforced in 2006. Arbitrator delivered an interim award on jurisdiction proclaiming current applicant the actual party to the contract & dispute. s67 AA 1996 jurisdiction reference - award set aside - personalities subject to determination by enforcing court - where any new evidence should have been canvassed. Issue now res judicata. ***Arnold v National Westminster Bank plc*** [1991] 3 All ER 41 applied. HHJ Wilcox. 30th July 2007.

Middleton (G) Ltd v Berry Creek Overseas Development Ltd [2007] EWHC 318 (TCC)

Insolvency : Stay of enforcement on the grounds of an asserted inability to repay - pending the outcome of the trial of cross claims. Whether cross claims arose out of the same matter. Adjudication and arbitration compared. Award enforced - appeal refused. HHJ Peter Coulson. TCC. 9th February 2007

Midland Expressway Ltd v Carillion Construction Ltd (No1) [2005] EWHC 2810 (TCC)

Post adjudication litigation : A number of disputes arising out of the M6 Toll Road project were referred to adjudication. The disputes were considered together in a single action before Mr Justice Jackson. Whilst some of the outcomes changed many did not. This was a very speedy trial given its complexity - no doubt assisted by the recycling of material from the adjudications. The facts also set the scene for Case No2 below.

His Honour Mr Justice Jackson. TCC. 14th November 2005

Midland Expressway Ltd v Carillion Construction Ltd (No2) [2005] EWHC 2963 (TCC)

A variety of changes to the specifications for the merging of the M6 Toll road with existing motorways resulted in additional expenditure which CAMBBA (a consortium of contracts headed by Carillion) sought to recover through adjudication. MEL applied for a declaration and injunction to halt the adjudication. MEL did not dispute that monies were due to CAMBBA relying rather on a range of jurisdictional matters to avoid/postpone payment. The contract was complex and in several parts, involving the Highways Agency (Minster for State) which part funded the project and the Consortium agreement. Part of the contract was based on PFI standard form but this was not a PFI contract. The various agreements contained a range of dispute resolution provisions.

The court had to decide who the relevant parties were to this dispute and whether or not a dispute could exist. The Highway's Agency had a role in this in that they were part-financing the project and had a veto over expenditure. The question therefore was whether the dispute was between CAMBBA (with or without MEL) and the Highways Agency or directly with MEL. MEL's problem was that if they paid out more than the Highway's Agency approved they might not be able to recover the balance from the Agency – but the HGCRA had abolished ***Pay when Paid*** provisions. The court held that in the circumstances the relevant parties were MEL and CAMBBA so that a dispute had come into existence.

MEL further sought to establish that a dispute could not come into being until the value had been determined by a certifying body. The court rejected this, stating that a provision which restricts the ability of a party to a construction dispute to refer that dispute to adjudication is invalid.

His Honour Mr Justice Jackson. TCC. 24th November 2005

Midland Expressway Ltd v Carillion Construction Ltd [2006] EWHC 1505 (TCC)

Can a party withdraw a claim from adjudication? Per Mr Justice Jackson :-

100. In litigation, the right of a party to discontinue its claim or certain heads of claim is enshrined in and regulated by the Civil Procedure Rules. Adjudication, however, is a very different process from litigation. Every construction contract contains, either expressly or by statutory implication, a series of adjudication provisions which comply with the requirements of Part 2 of the 1996 Act. The 1996 Act says nothing about the entitlement of a party to withdraw or not to withdraw a claim which has been advanced in adjudication.

101. Having considered the competing submissions of counsel, I have come to the conclusion that it is impossible to read into either the 1996 Act or the Scheme any restriction prohibiting a party from withdrawing a disputed claim which has been referred to adjudication. I reach this conclusion for four reasons:

(i) There is nothing in the Act or the Scheme which suggests that any such restriction is intended.

(ii) Adjudication is an informal process which arrives at an interim resolution of disputes pending final determination by litigation or arbitration. It would be contrary to the statutory purpose to prohibit a party from withdrawing from such a process any claim which it did not wish to pursue.

(iii) If there were such a restriction, it would have the bizarre consequence that parties would be forced to press on with bad claims in adjudication. This would lead to wastage of costs and resources on the part of all parties. In my view, this simple consideration outweighs all the policy arguments which have been urged in Mr Blackburn's skeleton argument.

*(iv) In **John Roberts Architects Ltd v Park Care Homes** [2006] BLR 106, the Court of Appeal stated obiter that a referring party could discontinue an adjudication. See the judgment of Lord Justice May at page 109.*

102. Let me now turn to the adjudication provisions in the D&C contract and the concession agreement. These provisions do not expressly prohibit a party from withdrawing a claim from adjudication. I see no basis for implying such a restriction. It therefore seems to me that CAMBBA were entitled, on 15th December 2005, to withdraw their claim, if any, relating to the indirect costs of DC11.

103. If, contrary to my view, the adjudicator's approval was required before CAMBBA could withdraw any claim for indirect costs, it is clear that the adjudicator gave such approval in his decision on 30th December.

104. In my view, the adjudicator was quite right to approve that course. I reach this conclusion for three reasons:

(i) In the circumstances of this case it would have been quite wrong to force CAMBBA to press on with a claim for the indirect costs of DC11 before that claim had been prepared.

(ii) There were numerous contractual issues between the parties. These were being, and had to be, dealt with sequentially and in an orderly manner. It was perfectly logical to deal with the indirect costs of DC11 separately from the direct costs. These were two severable and very substantial topics upon which a great deal of work was required.

(iii) All parties to this litigation have been making their way through a minefield. All parties have made tactical errors from which they subsequently sought to escape. MEL included the indirect costs of DC11 in the Bingham adjudication before resiling from that position on 8th December 2005, when the implications became clear. The Secretary of State objected to the inclusion of indirect costs in the Dennys adjudication, but resiled from that position five days later, when the implications became clear. CAMBBA included indirect costs in their notice of joinder, but resiled from that position when the implications became clear. In my view, it would be unduly harsh to hold CAMBBA to the consequences of their mistake.

105. More generally, in my view, both adjudicators and the courts should approach procedural issues in adjudication in a manner which accords with fairness and common sense (as the adjudicator did in this case). Adjudication should not become a game of chess in which the tactical skill of the players determines the outcome.

106. For all of the above reasons I have come to the conclusion that the answer to the question posed in part 7 of this judgment is "yes".

Hayter v Nelson *[1990] 2 L.L.Rep 265,* ***AMEC v SS for Transport*** *[2005] EWCA Civ 291;* ***Khan v Golecha*** *[1980] 1WLR 1482,* ***SCF Finance v Masri*** *[1987] 1 QB 1028* and ***Republic of India v India Steamship Co*** *[1993] AC 410.* ***Herschel v Breen*** *[2000]* considered.

His Honour Mr Justice Jackson. TCC. 13th June 2006.

COMMENT : There are two separate related issues that are of interest here. The first is what impact, if any does the withdrawal of a claim from adjudication have upon costs? The answer is straight-forward in arbitration and litigation in that both judges and arbitrators have mechanisms within s44 CPR 1998 and s61 Arbitration Act 1996. However, unless that parties otherwise agree there is no facility to award costs in adjudication, the norm being that each party covers their own costs. The costs mechanism, where it applies acts as a deterrent to the pursuit of unjustifiable claims, which might otherwise be marshalled as part of a war of attrition, only to be dropped subsequently if the other party is not frightened off from asserting their legal rights. Whilst legitimate tactics in negotiation to bid high, leaving scope to appear to "compromise" it is not to be encouraged in litigation.

The second aspect, which was explored by the parties here, was to what extent positing and then withdrawing a claim falls foul of subsequent assertions of issue estoppel and double jeopardy. Jackson J made it clear that once withdrawn, a claim can be subsequently reasserted in a fresh action since withdrawal is not tantamount to conceding the issue. Thus not settled, it is still remains on the table as the potential subject matter of a dispute. In the circumstances of this case, this is appropriate in that the problem was that the claim had not yet been quantified – but it would be less satisfactory if a party were to seek to salami slice different aspects of a crystallised dispute and separate bust closely related aspects of a "claim" in successive actions.

Millers v Nobles Construction Ltd [2001] EWHC HT 64/00 (TCC)

Withholding notice : Requirement of withholding notice applies not just to adjudication but also to summary judgement, general litigation and arbitration. ***VHE v RBSTB*** [2000]. ***Whiteways v Impresa Castelli*** (2000) considered His Honour Judge Gilliland. TCC. 3rd August 2001.

Mitsui Babcock Energy Services Ltd, [2001] ScotCS 150

A dispute arose in connection with a construction contract involving boiler plant at a chemical works. The adjudicator acceded to a request by the respondent to step down because the contract was covered by the s105(2)(c) exemption in that it was concerned with "*(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 chemicals, pharmaceuticals, oil, gas, steel or food and drink*".

The petitioner here sought a declaration that the exemption did not apply. The court confirmed that in the circumstances of the case, the works fell within the exemption. The central issue was one of fact, namely was the work on a site which was distinct and separate from the main plant or on a site which was an integral part of the plant? Following ***Norwest Holst*** the court applied a test related to the intended future relationship between the two sites once the work was complete and not merely at the time of the works and found that the works would become an integral part of the main plant.

Reference was made to ***Palmers Ltd v ABB Power Construction Ltd*** *(1999) 68 Con.L.R. 52;* ***Homer Burgess Ltd v Chirex (Annan) Ltd*** *2000 S.L.T.277;* ***ABB Power Construction Ltd v Norwest Holst Engineering Ltd*** *2000;* ***ABB Zantingh Ltd v Zedal Building Services Ltd*** *2000.*

Lord Hardie. Outer House, Court of Session. 13th June 2001.

Mivan Ltd v Lighting Technology Projects Ltd [2001]

Mivan, the main contractor for Faith Zone, Millenium Dome works subcontracted electrical works to L.T.P. Interim payments were not fully satisfied and at the end of the project L.T.P. referred the matter to adjudication to recover outstanding sums. Mivan counterclaimed for over-payment. L.T.P. asserted that in the absence of withholding notices, the invoices could not be challenged. This was accepted by the adjudicator who found for L.T.P.

Mivan then referred the repayment issue to a fresh adjudication. L.T.P. raised the double-jeopardy jurisdiction issue. The adjudicator decided to continue and found for Mivan, who in this action sought summary judgement on the decision.

Section 9 Arbitration Act 1996 states

1) *The party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice*

to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

2) *An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other resolution procedures.*

Mivan contended this was a different dispute. The first adjudication was about contract procedure. The second was about the merits of Mivan's claim.

His Honour Judge Richard Seymour concluded that the first adjudication was in respect of the narrow issue concerning whether sums were payable under specific invoices. The second adjudication was concerned with what sums were properly due under the contract, a matter not considered in the first adjudication. Hence there was no double-jeopardy. The second decision was therefore enforceable. There is no transcript available for this case. Her Honour Judge Frances Kirkham. TCC. 9th April 2001

Monavon Construction Ltd v Davenport No. 2 [2006] EWHC 1810 (TCC)

The parties to a construction dispute opted to litigate rather than adjudicate the dispute. In the event the result was a "No Score Draw" and applying the CPR s44 Rules, the court held that each party bear its own costs. In the circumstances no adverse consequence for spurning adjudication would be visited on either party. This firmly places adjudication on a different plane to mediation, making it clear that there is no statutory pressure to adjudicate, ensuring that it is a cost free choice of the parties whether to do so or not.

His Honour Judge Thornton. TCC. 17th July 2006

Moorside Investments Ltd v DAG Construction Ltd [2007] Lawtel AC0115735

Winding up petition for non-payment of progress claims : Held : questionable whether HGCRA applied - full terms of contract not written re scope of works and competion date : arguable whether EOT due - arguable counter claim for costs of refinancing and defective works. Petition denied.

Bayoil SA, Re (1999) 1 WLR 147; Re A Company 1299 2001 and the second ***Re Environmental Services Limited on 14th November 2001, Pan Interiors Limited*** [2005] EWHC 3241 (Ch) ***referred to.***

Warren J Chancery Division. 1st November 2007

Mott MacDonald Ltd v London & Regional Properties Ltd [2007] EWHC 1055 (TCC)

A contract arose out of a letter of intent, followed over several years by extensions, written variations and oral variations reinforced by subsequent practice. A payment dispute was submitted to adjudication on the basis of the terms of the letter of intent which it was submitted had coalesced into a written contract. The applicant asserted during enforcement proceedings that jurisdiction had been conceded during the course of submissions and response. The responding party on the other hand objected to jurisdiction from the outset and adhered to terms under a subsequent variation, not the initial letter of intent. The court held that there was no jurisdiction. The contract was not in writing. Also the adjudicator had no jurisdiction to determine his jurisdiction. The decision was out with his jurisdiction and could not be categorised as non-reviewable.

On a separate matter the validity of the decision was disputed. Delivery of the decision had been withheld pending payment of the adjudicator's fees by the referring party in furtherance of a lien imposed by the adjudicator as a term of acceptance of the appointment. The court held that requiring the referring party to pay all the fees amounted to impartiality contrary to s12(a) of the Scheme. There is an appearance of partiality arising out of the fact that the adjudicator is financially beholden to the referring party.

In addition, there is no right to assert a lien over an adjudication decision, since to do so will, and in this case did, lead to a breach of s19(3) of the Scheme in that the decision had not been delivered promptly, since it had withheld for 5 days pending payment. Promptly requires delivery by email or fax. Finally, whilst the decision was signed and posted on the final date for delivery it was posted but not faxed and arrived a day late, rendering it unenforceable. Faxed delivery was a term imposed by the adjudicator which he had breached. For all of these reasons the decision was not enforceable.

RJT v DM Engineering considered regarding what is a written contract; ***Bloor v Bowmer & Kirland***, *St* ***Andrew's Bay v HBG***, ***Barnes & Elliot v Taylor Woodrow***, ***Ritchie v David Philip***, ***Hart v Fidler***, ***Cubitt v Fleetglade*** considered regarding late delivery of decision. HHJ Anthony Thornton. 23rd May 2007.

COMMENT : Why would a lien amount o an appearance of bias in adjudication but not in arbitration? What is the difference between the parties agreeing a lien and an adjudicator imposing one? Does this decision push the prompt delivery requirements too far and open up an additional can of worms for the future?

Multiconcept Developments Ltd v Abacus (CI) Ltd [2002] EWHC

A self confessed "unqualified interior designer" undertook the role of contract administrator for refurbishment works on JCT Intermediate Form terms. A dispute arose about payment on an intermediate certificate. The contractor successfully referred the dispute to adjudication and subsequently sought enforcement.

The employer, in the absence of grounds to challenge the validity of the certificate and the correctness of the decision, sought a stay of action pending the resolution of a final account dispute, on the basis that on balance the contractor was indebted to the employer. The employer asserted that the contractor has already received sufficient funds to protect his cash flow but by contrast the contractor's accounts were in a precarious position and noted that the adjudicator's decision was based on a consideration of the contract mechanism not on the merits of the contractor's claim.

His Honour Judge David Wilcox refused to order a stay on the grounds that the defendant has failed to adduce evidence that in the event that the final account action was successful, the contractor would be unable to repay. Whilst the adjudicator's decision did not deal with whether or not the sum claimed by the contractor was due that was not determinative proof that the sum was not due (N.B. *issue of the certificate indicates that the employer had at one stage deemed the sum was due*). The aim of the HGCRA was to protect cash-flow and speedy payment, subject to final determination by arbitration/litigation.

His Honour Judge David Wilcox. TCC. 22nd March 2002

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2006] EWHC 1341 (TCC)

Repudiatory Breach : Non-payment of a certified sum for bona-fide reasons will not automatically translate into a repudiatory breach simply because an adjudicator subsequently finds monies due under the certificate.

Jackson J. TCC. 6th June 2006.

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2006] EWCA Civ 1834

Application to appeal Jackson J's decision on Issue 4, the construction of a supplemental agreement, granted. Trial to follow.

May LJ. Smith LJ. CA. 20th December 2006.

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd No 2 [2007] EWHC 145 (TCC)

11th preliminary issue : viz which party was responsible under the terms of the Supplemental Agreement for the cost of temporary works for the stadium roof. Court found in favour of Cleveland Bridge.

Mr Justice Jackson. TCC. 31st January 2007.

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd No 3 [2007] EWHC 659 (TCC)

Application for costs regarding the 2nd round of the litigation between Multiplex and Cleveland. Power of the court to award interim costs in relation to a distinct aspect of litigation without regard to the question of global success of on-going litigation. ***AEI Rediffusion Music Ltd v Phonographic Performance Ltd*** [1999] 1 WLR 1507; ***David de Jongh Weill v Mean Fiddler Holdings Ltd*** [2003] EWCA Civ 1058; ***HSS Hire Services Group plc v BMB Builders Merchants Ltd*** [2005] EWCA Civ 626; ***Intense Investment Ltd v Development Ventures Ltd*** [2006] EWHC 1628 (TCC); ***Jackson v MOD*** [2006] EWCA Civ 46 considered. Re payment on account ***Mars UK Ltd v Teknowledge Ltd*** [1999] 2 Costs Law Reports 44 considered.

Mr Justice Jackson. 12th March 2007

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd No4 [2007] EWCA Civ 1372

Multiplex were the contractor and Cleveland Bridge were the original steelwork subcontractor for the reconstruction of Wembley Stadium. The main issues within this appeal were the costs attributed to the meaning of the words "Temp Works – Roof Props" and the construction of one short clause of a one-off construction contract.

The Heads of Agreement and the Supplemental Agreement set out work packages and their cost. This appeal had to decide the extent of the Temp Works – Roof Props. The judge in this instance was not persuaded on the evidence given that whoever erects the roof must also be responsible for the design and

fabrication of the temporary works. Therefore one can be omitted from the contract without the other as was alleged here.

The court held that the appeal was allowed in part, stating that the fabrication and supply of all the temporary roof steelwork was omitted from Cleveland Bridge's subcontract works, and that design and fabrication of drawings for that work remained Cleveland Bridge's responsibility.

Regarding Heads of Agreement for the purpose of understanding meaning, cases referred to included ***HIH Casualty and General Insurance Ltd v New Hampshire Insurance*** [2001] 2 Lloyds Rep 161.

Regarding construction sequencing, cases referred to included ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1 WLR 896; ***Jumbo King Ltd v Faithful Properties Ltd*** [1999] HKCFFAR 279

Summary by Rachel Ewin. CA. before Pill LJ; May LJ; Smith DBE LJ. 21st December 2007

Multiplex Construction Ltd v Cleveland Bridge Ltd [2008] EWCA Civ 133
Appeal against costs in previous actions before Jackson J. CA before May LJ; Smith LJ. 6th February 2008

Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd No2 [2008] EWHC 231 (TCC)
Application to amend : On going saga. Mr Justice Jackson. 7th February 2008.

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 569 (TCC)
Partially successful application to amend pleadings. ***Cobbold v Greenwich LBC*** (9th August 1999): considered. Mr Justice Jackson. 19th March 2008

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2220 (TCC)
Final chapter of the ongoing saga : determination of the final account. Mr Justice Jackson. TCC. 29th September 2008.

Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 236 (TCC)
The central feature of this on going litigation is whether or not time was at large qua contractor / subcontractor, as determined at adjudication in respect of yet another dispute over the Wembly Stadium project. The instant case concerned whether or not the terms of a settlement agreement involving potentially the same issues was admissible in support of the respondent's case and hence subject to disclosure. The court had already held that it was not, which is hardly surprising given that a settlement may be brokered on pragmatic grounds without any admission of facts. The decision was accepted without challenge on the day but having had time to reflect on the matter Honeywell sought to appeal. The question was whether or not the court should hear a late application to appeal and determined that since the order had not yet been taken up it was able to do so. The court noted that it was otherwise open to Honeywell to apply to the Court of Appeal inanycase, since it was not out of time for such an application. The court felt that in such an event it would be beneficial for the CA to have available to it the views of the lower court.

However, the application having been heard failed on the merits. This of course is not the end of the matter since the trial with regard to "*time at large*" is still ongoing.

Charlesworth v Relay Roads Ltd. [2000] 1WLR 230 applied – which in turn referred to ***Preston Banking Co v. William Allsup & Sons*** *[1895] 1 Ch. 141,* ***Millenstead v Grosvenor House (Park Lane) Ltd.*** *[1937] 1 K.B. 717,* ***In re Harrison's Share under a Settlement*** *[1955] Ch. 260,* ***R. v Cripps, Ex parte Muldoon*** *[1984] Q.B. 686,* ***Pittalis v. Sherefettin*** *[1986] Q.B. 868.* Mr Justice Jackson. TCC. 8th February 2007

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No2) [2007] EWHC 447 (TCC) Bailii
Where the employer prevents the contractor from completing in time, does time become at large, ie. does time for completion become a moveable feast – thereby depriving the employer of the right to claim LADs for late completion? The court held that it did not in the circumstances of the case. Where a contract provides for notices for EOTs in the event of a preventative action by the employer, such notices must be provided - a default by the employer does not automatically put time at large. Contract provisions do not however inhibit a court or adjudicator from determining further extensions of time. However, a failure to provide prompt notices in accordance with contract provisions can result in a loss of right to an EOT. Application to appeal refused.

Holme v Guppy (1838) 3 M&W 387, ***Dodd v Churton*** [1897] 1 QB 566, ***Westwood v. The Secretary of State for India, Peak Construction (Liverpool) Limited v McKinney Foundations Limited*** [1970] 1 BLR 111, ***Trollope & Colls Limited v North West Metropolitan Regional Hospital Board*** [1973] 1 WLR 601 considered.

Gaymark Investments Pty Limited v Walter Construction Group Limited [1999] NTSC 143; (2005) 21 Construction Law Journal 71 not followed. ***Corporation Limited (Receiver and Manager Appointed) v Austotel Pty Limited*** (2nd June 1994); 1997 13 BCL 378; ***Peninsula Balmain Pty. Limited v Abigroup Contractors Pty. Limited*** [2002[NSWCA 211, ***City Inn Limited v Shepard Construction Limited*** 2003 SLT 885 applied. Mr Justice Jackson. TCC. 6th March 2007

Multiplex Constructions (UK) Ltd v Mott Macdonald Ltd [2007] EWHC 20 (TCC)

In this action for summary enforcement of an adjudicator's decision the court was asked to determine whether the adjudicator had jurisdiction to determine which documents the contract required to be made available to the main contractor by the design consultant post novation of the design contract from employer to contractor and what remedies if any were available by summary judgement in the event of non-compliance. The court held that the adjudicator had jurisdiction to determine the issue, rejecting a narror versus broad interpretation of what had been submitted for determination. That the adjudicator did not hold to the submissions on interpretation of either party, but rather formulated a separate interpretation did not take him outside his jurisdiction, He had ruled on the point at issue.

However, the question of compliance with the decision was not amenable to summary judgment and the issue was set down for trial. ***Fastrack v Morrison*** [2000]: ***Edmund Nuttall v Carter*** [2002] considered.

His Honour Mr Justice Jackson. TC C. 10th January 2007

Multiplex Constructions (UK) Ltd v West India Quay Dev. Co (Eastern) Ltd [2006] EWHC 1569 (TCC)

This concerned an application for summary enforcement of an adjudicator's decision. Multiplex, the referring party, relied upon an "*impacted as planned analysis*" to establish three EOTs. WIQ relied on an "*as-built windows analysis*" in defence. Whilst adopting a cautionary approach to the ISP analysis the adjudicator determined that there were entitlements to extensions of time and awarded repayment of £1.1M that had been retained as liquidated damages for late completion. Enforcement was resisted. WIQ asserted ***Balfour Beatty v Lambeth*** [2002] BLR 228 bias in that the adjudicator made his own analysis - without putting it to the parties for comment and consideration. The court held that this was not the case. The adjudicator had found on the evidence and accordingly enforcement was ordered. ***Construction Ltd. v. Devenport*** [2006] BLR 15; ***Discain Project Services Ltd. (No. 1)*** [2000] BLR 402 considered.

The court noted that there is no general duty on an adjudicator to give reasons unless asked. Reasons may be cursory. ***Amec v. Whitefriars*** [2005] BLR 1: ***Gillies Ramsay Diamond v. PJW Enterprises*** [2004] BLR 131**:** ***Carillion v Devonport*** (2005) BLR 310 **:** Sufficient reasons were given. The rationale was self evident.

His Honour Mr Justice Ramsay. TCC. 8th June 2006

Murray Building Services v Spree [2004] TCC4804

The developer faxed instructions to the main contractor to complete electrical and mechanical installation as per consulting engineers scheme at the contract sum less 2½% main contractor's discount. The contractor successfully claimed via adjudication and sought enforcement of the decision. The developer resisted on the grounds that there was no written contract under s107 HGCRA and so no jurisdiction to the adjudicator.

The court considered whether the exact price had to be stated for the purposes of HGCRA or alternatively whether a mechanism to determine the price would suffice, and further whether or not there was an agreed mechanism. In the circumstances the court found that there was no agreement on the subcontractor's price so the 2½% calculator could not be applied. If however, the parties had agreed 2½% of whatever the sub-contractor billed then it would have worked. In the circumstances the claim was put down to trial to determine a quantum meruit.

RJT Consulting v D.M.Engineering. ICS v West Bromwich Building Soc. *[1998] 1 W.L.R 896*. considered.

His Honour Judge Raynor.TCC. 30th July 2004.