

ADJUDICATION CASE SUMMARIES P



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Palmac Contracting Ltd. v Park Lane Estates Ltd. [2005] EWHC 919 (TCC)

An initial appointment of an adjudicator was frustrated when the adjudicator resigned upon learning that no notice of intention had been received by the defendant (even though the claimant asserted that a notice had been sent in advance to the defendant). A second appointment then took place. The defendant resisted payment of the sum due under the decision on the grounds that whilst the request for and appointment of the mediator took place the same day that a notice of intention was allegedly delivered to their property the defendant had not read the notice of intention until the following day. The defendant contested jurisdiction from the outset but the adjudicator decided to go ahead notwithstanding that objection. The court was referred to *Thomas-Fredric's (Construction) Ltd v Keith Wilson* [2003] EWCA Civ 1494.

Ground 1 : The defendant asserted that email applications for payment did not comply with the contract requirement of fax or letter. The adjudicator held that the email application was valid. Her Honour Judge Frances Kirkham held that the court could not and would not disturb that finding, since it was in the adjudicator's jurisdiction to so decide. However, whilst the contract permitted "any effective means of communication" for applications the parties had discussed and anticipated email communications, but the defendants had raised concerns about using email, so in the absence of a decision by the adjudicator it may have been arguable that there was no valid notice. (*Comment : It should not therefore be assumed that it will always be alright to email applications for payment*). *IDE Contracting Ltd v R G Carter Cambridge Ltd* [2004] EWHC 36 (TCC). considered.

Ground 2 : Notice of intention contrary to Clause 39 was communicated after the application for appointment, not before and thus was invalid. Kirkham J was unable to establish one way or the other whether the notice of intention was delivered before or after the application but nonetheless held that neither s108 nor clause 39 prescribed a sequence of events. The main aim was to adopt a procedure that aimed to ensure appointment within 7 days. That had been achieved. Besides which, because of the prior attempt at instigating an appointment, there was no case to argue that an ambush had occurred.

Ground 3 : The adjudicator ignored the parties' agreed position that all communication be actually communicated. The court agreed with the adjudicator that this only referred to communication of notice of appointment of adjudicator. Accordingly the application for payment was validly issued by email. *Balfour Beatty v London Borough of Lambeth* [2002] EWHC 597 (TCC) considered.

Her Honour Judge Frances Kirkham. TCC. 22nd March 2005.

Palmers Ltd v ABB Power Construction Ltd [1999] BLR 426

Palmers (scaffolders) were sub-sub-sub-contractors to a project for the installation of boilers and infrastructure, including pipes and steel work. A dispute arose on non-payment of interim payments and counter-allegations of delay through inadequate workforce. Palmers gave notice of intention to suspend and reference to adjudication, applying the terms of the Scheme since there was no provision for the HGCRA in the contract. This application was made for a declaration regarding jurisdiction. ABB asserted that the works were plant not construction and hence the HGCRA did not apply. They further asserted a right to set-off for delay and disruption.

His Honour Thornton J found that this was a construction contract. Apart from the expressly exempt operations under s105(1)(2) HGCRA, the Act made it clear that plant infrastructural work is construction work for the purposes of statutory adjudication. There was no lack of clarity in the legislation and following *Pepper v Hart* there was no need to examine Hansard to assist with interpretation of the provision.

He further found that there had been no effective withholding notice and finally stated that it is appropriate for the court to deliver declarations in respect of jurisdiction, rather than to leave the adjudicator to form a view – even where an adjudicator would have the power and jurisdiction to deal with it.

His Honour Judge Anthony Thornton. TCC. 6th August 1999

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ADDENDUM : Thornton J considered that there may be situations where the main contractor was exempt in his relations with the employer from the HGCRA whereas the sub-contract would be subject to the Act. If however the test is whether the primary purpose of the site is for an exempt or non-exempt purpose should ensure that there is no need to draw statutory pencil lines around part of an application for payment and only apply it to part of the work. All or none of the work should be within or outwith the Act.

Further, it should be noted that unless granted expressly by the contract, or by agreement of the parties, the adjudicator does not have implied power to decide upon his jurisdiction – only to form a view. Hence, the facility to seek a declaration is invaluable to ensure that time and money is not expended unnecessarily – though the declaration needs to be procured promptly – or a joint agreement to stop time running is needed if the adjudication is not to run beyond its 28 day timescale, rendering the adjudicator functus officio.

Pan Interiors Ltd (In the matter of) [2005] EWHC 3241 (Ch)

Statutory demand in lieu of adjudication reference : In the absence of realistic defence injunction restraining presentation of petition denied.

In Re Bay Oil [1999] 1 WLR 147; *v Goldstein* [1968] 1 WLR 1091. *Re A Debtor (No 87 of 1999) (17 January 2000)*, *Montgomery v Wanda Modes Limited* [2002] 1 BCLC 289. *Popely v Popely*, (Times Law Reports 15th September 2003). Considered. Warren J. Chancery Division. 14th July 2005.

Parsons Plastics v Purac Ltd [2001] EWHC (TCC)

Compliance with s108 and scheme : Despite parties agreement that contract compliant – adjudicator ruled non compliant : Held could do so even though not point not argued by parties. *Maymac v Faraday* (2000). *Farebrother v Frogmore* (2001). *Forbes v Git* (1922). *KNS v Sindall* (2000) considered

Her Honour Judge Francis Kirkham. TCC. 13th August 2001.

Parsons Plastics (Research and Development) Ltd. v Purac Ltd. [2002] EWCA Civ 459

Compliance with s108 and scheme : Despite parties agreement that contract compliant – adjudicator ruled non compliant : Held could do so even though not point not argued by parties. Appeal Failed. *Modern Engineering v Gilbert-Ash* [1974] AC 689, *Swain v Hillman* [2001] 1 All ER 91 considered.

CA before Lord Justices Pill, Mummery and Latham. 12th April 2002.

Patrick PA Birchall v West Morland Car Sales Ltd [2001] EWHC (TCC)

Birchall concluded an oral contract to construct a steel frame for a workshop. A payment dispute arose which was referred to adjudication. The adjudicator order the payment of £45K+ to the contractor and following non-compliance sought enforcement. WMCS resisted enforcement on the grounds that 1) it was an oral contract, not subject to HGCRA and 2) that enforcement proceedings did not comply with Art 6 Human Rights Act because there was no opportunity for their defence to be considered. MacKay J, relying on his first instance decision in *RJT Consulting v DM Engineering* (subsequently appealed) held that there was sufficient evidence in writing of a construction contract to satisfy HGCRA and further ruled that the Human Rights Act does not apply to the temporary finality concept involved in adjudication. The full transcript of this case is not available.

His Honour Judge MacKay. TCC. 2001

Paul Boardwell t/a Boardwell Construction v k3D Property Partnership Ltd [2006] Adj.C.S. 04/21

Application for summary enforcement refused. The adjudication decision noted that whilst only a limited number of matters were addressed by the decision all other matters had been considered. The court held that the adjudicator had failed to deal with all aspects of the defence. The catch all phrase "all other matters had been considered" was insufficient to establish that this was in fact the case.

Chamberlain v Alfred McAlpine [2002]; *Fastrack v Morrison* [2000]; *Michael John v Golledge* [2006]; *Wimbledon v Vago* 2005; *Opecprime* [2001], *Try v Eton* 2003, *Carillion v Devonport* [2005] EWCA Civ. 1358 : *Quietfield v Vascroft* [2006]. *Kier v City & General* [2006] considered

HHJ Raynor. 21st April 2006.TCC. Salford.

Paul Jensen Ltd v Stavely Industries [2001] WN 101245

Adjudicator's fees : Adjudicator resigned on basis of lack of jurisdiction and sued for fees. Defendant claimed he should not have resigned : Fees upheld. *Atlas Ceiling* considered.

Mr District Judge Donelly. Wigan County Court. 27th September 2001.

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Paul Thomas Construction Ltd v Hyland [2000] CILL 6/0 /1743

Indemnity costs less ADR cost : Cost hearing on failed s24/25 CPR applications by a domestic house builders who provided no final account and refused to wait for D?s valuation report. Offer of adjudication rejected - though adjudicator had agreed to act. Adjudication considered a viable ADR and costs accordingly for unreasonable behaviour in refusing to either adjudicate or mediate.

Joseph v Boyd & Hutchinson Chancery Division, 13th January 1999 per Mr Justice Park, *Munkenbeck & Marshall. v McAlpine* 44 Construction Law Review, *Disney v. Plummer* considered.

HHJ Wilcox. 8th March 2000.

PC Harrington Contractors Ltd v Multiplex Constructions (UK) Ltd [2007] EWHC 2833 (TCC)

PCH was a subcontractor to Multiplex, the main contractor for the design and construction of the New Wembley National Stadium. In April 2007, PCH submitted an application for payment for £13,434,726.30. Multiplex issued an interim certificate plus grounds for withholding. The certificate stated a net payment of £2,301,608.45, with an additional withholding of £13,048,219.16, thus stating no money was due to PCH. Part of the £13,048,219.16 was a claim for £1,658,665 for alleged but disputed defects in the concrete floors poured by PCH. This claim soon rose to £2,070,110.50 and multiplex commenced adjudication seeking an order for that amount.

PCH argued that they were at least owed £2,301,608.45 stated by Multiplex in their interim certificate, the judge disagreed. He said that under Clause 21 of the contract, this figure was the aggregate of the positive amounts. It did not therefore amount to a representation of what Multiplex certified to be a sum that PCH was entitled to receive. On the contrary, the contract and the certificate made it clear that Multiplex did not accept that PCH was entitled to anything. He further stated that if PCH sought to recover a monetary from Multiplex, it would have to commence an adjudication of its own.

Regarding interim payments, cases referred to included *Rupert Morgan Building Services (LLC) Ltd v David Jervis and Harriet Jervis* [2003] EWCA Civ 1563.

Summary Rachel Ewin.

Judgment Mr Justice Christopher Clarke. TCC. 30th November 2007

Pegram Shopfitters v Tally Weijl No1 [2003] EWHC HT 03/25 (TCC)

Construction contract : Was the contract a JCT or bespoke ? Matter was never settled, so an unwritten quasi-contract existed – which is outside scope of HGCRA. *C&B Scene v Isobars* [2002] considered.

His Honour Judge Anthony Thornton. TCC. 14th February 2003.

Pegram Shopfitters v Tally Weijl No2 [2003] EWCA Civ 1750

The CA upheld the decision of Thornton J that an unwritten construction contract was outside scope of HGCRA. *Dawnays v Minter* [1971] 1 WLR 1205. *Modern Engineering v Gilbert-Ash* [1974] AC 689. *Mondel v Steel* (1841) 8 M&W 858 referred to. *Macob v Morrison* (1999). *RJT v DM Engineering* [2002] EWCA Civ 270. *Homer Burgess v Chirex* [2000]. *Project Consultancy v Gray Estate* [1999]. *Thomas-Fredric's v Wilson* [2003] considered.

CA before Lord Justice May, Lady Justice Hale and Mr Justice Hooper. 21st November 2003.

Pierce Design International Ltd v Johnston [2007] EWHC 1691 (TCC)

Payment post determination; CI 27 JCT : no insolvency : no withholding . Determination and payment of sums previously due : Court analysed *Melville Dundas v Wimpey* which held that JCT clauses 27.6.5.1 complies with s110 / 111 HGCRA : then held on the facts that the sums were due 28 days before determination and had been unreasonably withheld in that there were no withholding notices issued. What is unreasonable must be judged at time of withholding not in light of subsequent events. Summary judgement granted. *Bouygues v Dahl-Jensen* [2000] BLR, 522; *KNS v Sindall Ltd.* [2001] 17 Const.L.J., 178 considered.

HHJ Peter Coulson. TCC. 17th July 2007

Prentice Island v. Castle Contracting [2003] ScotSC 61

Adjudicator's fees : Assertion of breach of CI9 provision "dispute settled by previous adjudication." Adjudicator held No. Was adjudicator entitled to fees cl25? YES.

Sheriff Principal R.A.Dunlop QC. 15th December 2003

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Pring & St Hill Ltd v C J Hafner (t/a Southern Erectors) [2002] EWHC 1775 (TCC)

Bias : Same adjudicator acted on 4 related adjudication involving different parties. Ask to step down. Refused. Prior knowledge etc caused prejudice. *D.G. Fair Trading v Proprietary Association of GB* [2000] All ER (D) 2425. *Discain v Opecprime (No 1)* [2000]. *Discain v Opecprime (No 2)* [2001]. *Fox v Wellfair. Bouvgues v Dahl-Jensen* [2001]. *Balfour Beatty v LB Lambeth* [2002] referred to.

His Honour Judge Humphrey Lloyd. TCC. 31st July 2002

Pro-Design v New Millenium Experience Co Ltd [2001] EWHC LV 190224 (TCC)

This short judgement concerned an application for enforcement of an adjudication decision relating to lighting works on the Millenium Dome. Enforcement was opposed on the grounds that the contract was induced by fraud in that the claimant company had been set up by an employee of the defendant company, in order to tender for work, which the employee then awarded essentially to himself. At the hearing the claimant failed to adduce evidence to rebut this allegation. In the circumstances, whilst the claim was otherwise impeachable, the summary enforcement application failed because the court considered that a full trial was required to establish whether or not the underlying contract was or was not fraudulently procured, since it was not possible to determine that in this forum.

His Honour Judge MacKay. TCC. 29th September 2001

Project Consultancy Group v Trustees of The Gray Trust [1999] BLR 377

Professional construction services were provided to the Trust by PCG. A dispute about the payment of fees arose which was referred to adjudication. The question as to whether there was ever a contract or alternatively that if there was it pre-dated the HGCRA were raised and considered by the adjudicator – but subject to a disclaimer by the Trust that they would not be bound by the decision. The adjudicator determined that the HGCRA applied and proceeded with the adjudication. The Trust participated under protest. The adjudicator found for PCG who sought enforcement. His Honour Judge Dyson clarified that it is permissible to resist enforcement on the grounds of absence of adjudicatory jurisdiction and further found that the Trust had not accorded jurisdiction over jurisdiction to the adjudicator. *Westminster Chemicals & Produce Ltd v Eicholz & Loeser* [1954] 1 LLR 99 considered. *Higgs & Hill Building Ltd v Campbell Denis* 28 BLR 47 distinguished.

Dyson J found that there was an arguable and triable issue as to whether or not there had ever been a concluded contract. As such the adjudication decision was a nullity and the case was put down for trial on that and the further issue of a quantum meruit – assuming the work was not performed on an “at risk” basis. A further question regarding abatement of adjudicator’s fees was not considered.

His Honour Judge Dyson. TCC. 16th July 1999.

Purac Ltd v. Byzak Ltd [2004] ScotCS 247

Retention monies : Action for immediate payment. Release as between members of consortium following certification and payment made by client :

VA Tech Wabag UK Ltd v Morgan Est (Scotland) Ltd distinguished and error corrected. Summary enforcement resisted on grounds of arguable issue of defects. HGCRA not applicable by virtue of s105.

Lord Drummond. Outer House Court of Session. 12th November 2004.

Pynes Three Ltd v Transco Ltd [2005] EWHC 2445 TCC

Pynes took over the extensive refurbishment of a large warehouse in Bournemouth from insolvent contractors who had received a substantial payment of the project costs. The continuation of the project included remedial works and suffered from delays due to a dispute between the defendant and neighbours over a party wall. Two previous adjudications had been resolved substantially in Pynes favour and a third adjudication, which Pynes had demonstrated to the court had a reasonable chance of success was pending.

Transco Ltd (a special project vehicle) had failed to pay on the first two adjudications and had reneged upon a settlement agreement, at one stage claiming that no settlement had been brokered though subsequently it had asserted that Pynes had breached the agreement and maintained an entitlement to damages for breach. Further negotiation were proposed by Transco that proffered the change that something might be offered to Pynes at some stage in the future, provided Pynes acted reasonably, but with a threat that if not Transco would go into liquidation. It would appear that Transco were looking to dispose of flats on a cash basis and

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Pynes sought here a freezing order to prevent dissipation of funds pending the outcome of adjudication No3.

The court held that in these special circumstances Pynes had satisfied the court that the requirements of CPR 25.1.3, 25.1.9, 25.1.23, 25.2.4, 25.3 and 25.3.3 were satisfied and this was a suitable case for the granting of the without notice freezing order. *Ninemia Maritime Corporation*, and *Mercedes Benz* referred to.

His Honour Judge Thornton QC. TCC. 22nd July 2005