ADJUDICATION CASE SUMMARIES V

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VA Tech Wabag UK Ltd v Morgan Ltd [2002] CA 46/02

VA Tech and Morgan concluded a joint venture contract on a 60/40 basis to design and build a sludge process plant for Scottish Power / Water. In due course they successfully tendered for the work and the project got underway. Monies were paid into a joint account and distributed by a process of certification between the parties, whereby both parties were required to sign certificates. The consortium was also paid by a certification process which apportioned the sums due to each of the parties to the joint venture, since they undertook distinct and separate functions in respect of the project.

A dispute arose as to which of the parties was entitled to payments and of how much. By this action Va Tech complain that Morgan has refused to sign certificates, thereby keeping Va Tech out of funds. Va Tech seeks a declaration that Morgan has no right to withhold funds and must not hinder the release of funds and an order that Morgan release £1.5M+ outstanding to Va Tech. Va Tech had already procured an interim interdict to that effect. Morgan cross petitioned for a motion to recall the interdict.

The contract provided for adjustments to the sums due arising out of variations to the work. This led to a dispute with Morgan asserting the right to an adjustment for variations to ancilliary supplies – which Va Tech maintained was not a contractual ground for adjustment. Morgan assert that this dispute as to variations arising out of ancilliary supplies should have been settled by adjudication.

Lord Drummond Young concluded that the pursuers version of events was correct. They had made out a prima facie case. ***N.W.L. Limited v Woods***, *[1979] 1 W. L. R. 1294* considered. Adjustment only related to variations in the works and the contract price. Funds were to be distributed in proportion to the certificates issued by the employer.

The court was further reinforced in its opinion by the purpose of the HGCRA adjudication and payment procedures aimed at ensuring cash flow. The court ordered Morgan to release funds. ***Interconnection Systems v Holland***, *1994 SLT 777* referred to.

Motion to recall the interdict denied. Interim interdict affirmed. Regarding the applicable procedure, ***Stirling Shipping v N.U.Seamen***, *1988 SLT 832, at 835 J-K,* and ***Black Arrow Group v Park***, *1990 SLT 254*. considered.

Lord Dummond Young. Outer House, Court of Session. 30th May 2002.

COMMENT : Compare ***Purac Ltd v. Byzak Ltd [2004] ScotCS 247***

Van Oord ACZ Ltd & Harbour & General v Port of Mostyn Ltd [2003] BM350030 TCC

Van Ord and Harbour & General formed a joint venture to carry out works for the Port of Mostyn. A dispute arose which was referred to adjudication. Under the governing ICC contract, clauses 64-66 imposes a time bar of 3 months following an adjudication for the referral onwards of the dispute to arbitration, after which the decision becomes unchallengeable. The notice of referral had under the contract to be delivered to the JV's main address.

Mostyn served the notice one day in advance of the expiry date but sent it to the JV's Morcambe address, not to their Newbury address. The notice was forwarded to Newbury but arrived there after expiry of the 3 month period. Whilst it had never been confirmed that Newbury was the HQ and thus the relevant address for service of notice, the JV maintained that since the notice was not served, as required by the contract, to the Newbury address it was invalid and the adjudication decision could not therefore be challenged.

The court reviewed the history of relationships between the party. It was evident that over a prolonged period of time communications had been exchanged between Mostyn and the JV which involved both addresses. The court noted that the JV was fully aware of the notice and its contents prior to expiry and felt that the JV was, in JV's own words, exercising "*commercial savvy*" to avoid the arbitration on technical grounds. ***Central Provident Fund Board v Ho Bock Lee*** *(1981) 17 BLR 28.* ***Eriksson v Whalley*** *[1971] 1 NSWLR 397* on methods of communication referred to.

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The court concluded that the notice was given in time, but further noted that even if out of time, the court was prepared to exercise its discretion to extend time. ***Harbour & General v Environment Agency*** considered.

Her Honour Judge Frances Kirkham. TCC. 10th September 2003.

Vaughan Engineering Ltd v Hinkins & Frewin Ltd [2003] ScotCS 56

The pursuers were sub-contracted to carry our mechanical works on DOM/1 standard form. They brought this action to enforce an adjudicator's decision. The defenders applied for a sist (stay) to judicial review, asserting that the adjudicator had acted ultra vires. In the alternative, the defender asks that the decision be set aside because of a failure of the adjudicator to exhaust his jurisdiction (by refusing to consider a counterclaim for set off.)

Lord Clarke, in an exhaustive judgement on the scope of the court to entertain a defence of ultra vires determined that whilst it is open to a defender to challenge an inferior judicial decision (including adjudication or arbitration) by way of judicial review resulting, if successful in reduction of the award, nonetheless, it was also available to any court to consider such a defence, though if successful it would not lead to a reduction of the award. It would however achieve the objective of the defence in that the award would not be enforced. (The court briefly refers to setting the award aside – but otherwise does not expand on the impact that is had on the award – so it is not clear whether or not it would then be open to the unsuccessful applicant to commence a fresh adjudication without being hit by the double jeopardy rule).

Ballast v Burrell* *2001 S.L.T 1309*.** ***Naylor v Greenacres *2001 S.L.T. 1092,* ***West v SS for Scotland*** *1992 S.C. 385.* ***Forbes v Underwood*** *(1886) 13R. 465.* ***Wandsworth LBC v Winder*** *(1985) A.C. 461* ***Cannock Chase DC v Kelly*** *(1978) 1 W.L.R. 1,* ***R v IRC ex parte Federation of Self Employed and Small Businesses*** *(1982) A.C. 617,* ***Pyx Granite v Ministry of Housing*** *(1960) A.C. 260.* ***Docherty v Norwich Union*** *1974 S.L.T. 37.* ***Sundt v Watson*** *(1914) 31 Sh.Ct. Rep. 156.* ***Leggat v Gray*** *1912 S.C. 230;* ***Donald v Donald*** *1913 S.C. 274.* ***Brown v Hamilton DC*** *1982 S.C. (H.L.) 1.* ***R v Wicks*** *(1998) A.C. 92 and* ***Boddington v British Transport Police*** *(1999) 2 A.C.143.* ***Whitehead v Finlay*** *16 Nov 1833.* ***Thomson v Munro*** *(1882) 19 S.L.R.739.* ***Quietlynn*** *(1988) 1 Q.B.114.* ***Nivison v Howat*** *(1883) 11 R.182* referred to.

The outstanding issues, namely whether or not the adjudicator had acted ultra vires, was put out to Order. There is no report available on what, if anything took place thereafter.

Lord Clarke. Outer House, Court of Session. 3rd March 2003.

Vaultrise Ltd. v Paul Cook [2004] TCC 2 BLISS 23 : 1045724 [1]

The defendant asserted breach of natural justice because he was not represented at the adjudication hearing because his solicitor was unavailable. An extension of time had already been granted by the claimant who refused a further extension when the defendant's solicitor gave notice that he would not after all be available. The court held that the adjudicator had the right to insist on going ahead to ensure a decision was reached within the 28 day deadline of HGCRA. The defendant could have secured alternative counsel and has the right to chose how he will be represented (Regulation 16 Scheme).. Accordingly there was no breach of the rules of natural justice.

Following practical completion the claimant issued a final account claiming an additional £85,000. The contract administrator certified that the proper sum due was £400,000 but never issued a final certificate despite the fact that one was due at the end of July. The claimant served notice of adjudication in December. At the adjudication the defendant sought to reclaim £7,000. The adjudicator found for the claimant who then sought enforcement.

The contract was on IFC 98 standard form. The defendant argued that only contract administrators and arbitrators have the power to open up and revise certificates, not adjudicators arguing that Reg 20 does not apply unless the contract states that a certificate is final or conclusive. Further more there was no power to determine a dispute where a certificate had not been issued.

The court held that an adjudicator can consider whether or not a certificate should have been issued and if a missing certificate was due he could determine the sum. The judge held at para 12 that *"… There seems to me no good reason why the adjudicator should not make an adjudication on those issues which would be binding only until*

[1] There is a short entry on the BLISS web site and a more extensive commentary was contained in the BLISS Bulletin at IB 23/4.

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there had been an arbitration under clause 9(b) of the contract conditions [IFC 98]. It is said that under clause 9(A), the settlement of dispute adjudication provisions of this contract, there is no power given to the adjudicator to make measurements or to award any sum which ought to have been included in a certificate; whereas that power is contained in 9(b)(2). It seems to me that it is not a decisive argument given, as I say, that the statute allow as any dispute under a contract to be adjudicated on. This was, in my judgement, a perfectly valid dispute fit for adjudication. Therefore, I reject the defendant's contention." *Name of judge not available*. TCC 6th April 2004.

VGC Construction Ltd v Jackson Civil Engineering Ltd [2008] EWHC 2082 (TCC)

This concerned a 26 week sub-contract for the provision of ducts and cabling on the M3 Motorway based on the ICE form of Sub-Contract (September 1991 with 1998 amendments), for use in conjunction with the ICE Conditions of Main Contract Sixth Edition. Due to variations the works were by the time of progress application No13 already 26 weeks late – resulting in an item for delay and disruption (no prose was included and this subsequently led to a request for detailed specification). Certificate 13 rejected the item and made further deduction for contra charges in respect of overheads. An application by VGC for an EOT was followed by application No14. Face to face discussions in an unsuccessful attempt to broker a settlement took place where the EOT etc were canvassed, with Jackson holding out for further information.

The notice of adjudication was made in respect of the final account. The referral contained more detail, which disclosed that part of the sum claimed related to delay and disruption arising out of the asserted EOT. Attribution was briefly made, but lacked specification. Jackson responded asserting insufficient detail to consider claim for an EOT or for delay and disruption claim. VGC countered that sufficient information had been provided during the currency of applications 13 & 14 but then provided a half page Hudson Formula calculation which identified a claim for time-related overheads and profits 10 days before the decision was due. In closing submissions Jackson asserted that the formula etc was too late to be considered and insufficient opportunity had existed for negotiations in the absence of prior detail

The adjudicator found that a dispute as to the final account had crystallized. He itemized the areas under dispute and found for the applicants in respect of delay and disruption and rejected the contra charges of the respondents. A reasoned decision was not requested and hence no reasons were given. Jackson did not honour the decision, resulting in these enforcement proceedings.

Issues :- whether or not a) there was a sufficient dispute (if any) to be referred to adjudication; b) whether any claim giving rise to a possible dispute was withdrawn ; c) a new claim was raised in the adjudication outwith the adjudicators jurisdiction ; d) there has been a waiver of the right to challenge jurisdiction ; e) a claim for delay & disruption was so nebulous & ill-defined as to be unable to give rise to a dispute.

As to the policy of the court in respect of challenges to decisions ***Carillion v Devonport*** [2006] BLR 15 considered. As to the meaning of dispute ***Amec v S.S. for Transport*** [2005] BLR 227 noted, citing ***Cruden Construction v Commission for the New Towns*** *[1995] 2 Lloyd's Rep 37*.

The court found that there was jurisdiction in respect of the final account. Jackson invited the adjudicator to determine a NIL figure in respect of delay and disruption, confirming jurisdiction. In closing submissions an assertion of non-admissibility of evidence did not amount to a reservation in respect of jurisdiction. The court found that the 150 plus variation items in applications 13 & 14 paved the ground for the EOT application in respect of the 26 week overrun acknowledged by both parties. The Hudson Calculation merely provided further evidence for consideration by the adjudicator and was admissible.

Mr Justice Akenhead. TCC. 15th August 2008

COMMENT : It is interesting to note the approach here of the court to crystallization of and the meaning of "**a dispute**". The court has essentially rejected the tactic of refusing to address an issue / claim by the employer on the grounds of insufficient specification where the basic ingredients have already been set out in applications. The subtext here is that sufficient information was on the table to address the matter during negotiations but Jackson had stonewalled – perhaps to buy time by attempting to force VGC to spend additional time and resources charting the progress of the project. Whilst an Emden or Hudson calculation at that time might have been helpful to the negotiations, the failure to produce it at the time was not fatal to including the matter in a final account adjudication. There was nothing nebulous or unspecific about the claim. This all presents the reverse side of the coin to that developed in ***Cantillon*** et al.

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VHE Construction plc v. RBSTB Trust Co Ltd [2000] EWHC TCC 181

VHE contracted on JCT Form with contractors design to carry of remedial ground works. Clause 30.3.3-3.6 sets out the interim application procedure which included the requirement for withholding notices and the due date for payment following issue of VAT certificate by the applicant.

After practical completion, by interim application No4 VHE applied for a payment £1M+. RBSTB did not issue a withholding notice. VHE did not issue a VAT certificate. VHE commenced adjudication. The adjudicator, Mr C M Linnett decided that no monies were due because the VAT certificate had not been issued but then went on to decide the monies would become due upon issue of a VAT certificate, stating that there could be no abatement against the sum, firstly because there had been no withholding notice and secondly because he had not been given jurisdiction to open up and review the application.

VHE duly issued a VAT certificate but RBSTB did not pay. Instead they commenced a second adjudication this time before Mr Standinger, the terms of reference being to open up, review and revise interim application No4 and requiring the amount due under the first adjudication be reduced accordingly or in the event that the original sum is paid for an immediate reimbursement of the difference. Mr Standinger's decision left a balance of £254K. RBSTB calculated that £207K was due to them from VHE for non completion and sent a cheque to VHE for £47K being the balance of what they considered to be due.

VHE applied for enforcement of the two adjudicator's decisions, factoring in interest on the initial £1M+ to cover the period between the first and second adjudication. Hicks J first noted the Dyson J judgement in ***Macob v Morrison*** and Humphrey Lloyd J in ***Outwing v Randell*** to the effect that the HGCRA requires that the decisions of adjudicators should be promptly complied with Mr Linnett had decided that payment was due 28 days from issue of VAT certificate. RBSTB should have paid the £1M+ to VHE on the 17th November.

Hicks J decided that Standinger had placed an impediment on the enforcement of Mr Linnett's decision in that it was only enforceable if VHE became immediately liable to repay £783K to RBSTB. He noted that it is hardly surprising that in this action VHE had limited its application to recovering the balance. It would have been open to VHE to demand full payment under adjudication No1 and for RBSTB to counterclaim for the enforcement of adjudication No2 by way of set off. The outstanding balance owing to VHE, taking into account the cheque for £47K was £207K which the court ordered RBSTB to pay.

RBSTB attempted to issue a withholding notice before payment was due under adjudication No2. This was ineffective since it was too late to issue a withholding notice against the application No4 under the contractual mechanism. An assertion that a VAT certificate was required for the revised figure post adjudication No2 was also rejected. Furthermore, the liquidated damages claim was issued too late under the contractual machinery to act as a set off. Kicks J also rejects the assertion that the words without prejudice to contractual rights in clause 30 in relation to the requirement to honour an adjudication decision gives a right to set off a contractual claim for liquidated damages. An assertion that, the contract provisions apart, there is a common law residual right to set off for liquidated damages was also rejected. S111(4) HGCRA required full compliance with the decision of the adjudicator.

Noting the power under Part 24 to order summary judgement in the absence of any real prospect of success, Hicks J found that RBSTB had no real prospect of challenging his judgement and issued summary judgement. His Honour Judge John Hicks. 13th January 2000.

Vitpol Building Service v Samen [2008] EWHC 2283 (TCC)

Existence of building contract : Declaration : Domestic contract : The court took the unusual step here of issuing an interim judgment during the course of case management, because, even though the case was approaching the end of the TCC pre-action protocol and a trial was fast approaching, the claimant wished to reduce the scope of the action and proceed with an adjudication and thus wished the court to limit its role to determining whether or not there was a HGCRA compliant contract and if so, the terms of that contract.

The question thus that fell to be answered was *"Does the TCC have jurisdiction to decide a dispute as to the existence and/or terms of a contract, in circumstances where it is said that the court's decision will determine whether or not the claimant has the right to adjudicate, but where there is presently no adjudication (or even reference to adjudication), and there has instead been an almost completed pre-action protocol process?"* The conclusion of the court was that it did have the power to determine that question. Regarding the power of TCC to make orders

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in a dispute where there is an ongoing adjudication, ***ABB Power v Norwest Holst*** [2000] TCLR 831 ; ***John Mowlem v Hydra-Tight*** [2001] 17 Const LJ 358 noted. However in the circumstances no reference to adjudication had been made to date. The court however saw the application as analogous to an application to determine the existence of a dispute where arbitration was pending. The court noted that it is appropriate for a court to consider such applications since it eliminates potential disputes during adjudication and thereafter at the time of enforcement.

As to the terms of the contract the court concluded there was a contract on JCT Intermediate IFC form. Regarding domestic contracts & HGCRA adjudication ***Picardi v Cuniberti*** [2003] BLR 487 noted.

Mr Justice Coulson**:** TCC. 16th September 2008

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