ADJUDICATION CASE SUMMARIES W

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Walter Lilly & Co Ltd v DMW Developments Ltd [2008] EWHC 3139 (TCC)

This case concerned a post adjudication application for a declaration in respect of a dispute about whether the sale and fix of timber by sample complied with contract terms, and whether the supplier was in breach when timber subsequently faded in colour. The court held that it was not suitable to determine the issue of breach under a Part 7 application : Part 8 proceedings needed to settle matter. Limited declarations were provided to facilitate future proceedings. Mr Justice Coulson. 11th December 2008

Watkin Jones v Lidl UK GMBH [2001] HT 02/121

Watkin Jones contracted under JCT 1998 with contractor's design to demolish a site and build a replacement high street shop. Practical completion occurred on 22 June 2001. On 17 July 2001 the contractor submitted interim application No11. Following non-payment (but without issue of withholding notice) the dispute was referred to adjudication.

During the course of the adjudication, which Lidl participated in without prejudice to its objection to jurisdiction, Lidl asserted "*that application number 11 was solely a final account and final statement which was not due for payment if at all until the latest of the events referred to at Clause 30.5.5 of the contract, which event was many months hence, and that until that date was reached there was no dispute capable of being referred to adjudication.*"

The adjudicator rejected this objection, finding that the application was both an interim account and a draft final account. As an interim account, any withholding required a notice and none had been issued. Monies were due on the interim account. Since no payment had taken place there was a dispute. An assertion that the document was originally proffered as a final account and that Watkin Jones had sought to transform its nature into an interim account was rejected by the adjudicator because on questioning Lidl was unable to provide any substantiating evidence that this had occurred.

The adjudicator found for the applicant. Again following non-payment Watkin Jones commenced this action for enforcement. Lidl resist on the grounds that there was no dispute (in different terms to those put at the adjudication) because they had been led to believe that application 11 was not a demand for payment but merely paperwork in preparation for a final account. Watkins Jones should be estopped from treating the application as an interim application. As a final account payment was not yet due and so there was no dispute. Moseley J found that there was a dispute. He further found that Lidl cannot in these proceedings challenge the finding of fact by the adjudicator that there was no factual basis to the estoppel argument.

Lidl also asserted that the application was invalid because of an absence of supporting documentation required by the contract. Mosely J rejected this stating that the contract did not specify any consequences for failing to provide detailed and quantified lists within the application. Note that 2 arch lever files were submitted to Lidle for their consideration.

Lidl also asserted that the application was made prematurely in that under the contract applications had to be separated by a month and only 2 weeks had passed since application No10. Mosely J stated that the contract provided that payments would be a month apart. This did not prevent an application being submitted less than a month after the last application.

Lidl also asserted that monies must be "due" in accordance with ***SL Timber Systems v Carillion Construction Ltd*** and ***C & B Scene Concept Design v Isobars Ltd.*** Lidl asserted that some sums covered by the application were in respect of works that had not been carried out. However, in ***Carillion*** the 30.3.5 provision was not part of the contract and in ***Isobars*** the absence of Appendix 2 nullified 30.3.5 so both cases can be distinguished from the present case where a withholding notice is required – in the absence of which the application is deemed to be conclusive of entitlement. Consequently, summary enforcement ordered.

An application for stay a counterclaim under s9 Arbitration Act 1996 was also granted. Lidl asserted that theie intention had been to delete the arbitration provisions and they had been left in by mistake. He backed this up with correspondence indicating that this was Lidl's intention at one stage. Mosely J held that whether

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or not rectification was in order was a matter for the arbitrator who had jurisdiction to rectify and to determine his own jurisdiction.

Macob v Morrison *[1999] BLR 93.* ***Bouygues v Dahl-Jensen*** *[2000] BLR 522.* ***Sherwood & Casson v Mackenzie*** *1999.* ***Halki Shipping v Sopex Oils*** **[***1998] 1 WLR 726.* ***Ellerine Brothers v Klinger*** *[1982] 1 WLR 1375.* ***Fastrack v Morrison*** *[2000] BLR 168.* ***Maxi Construction v Morton Rolls*** *7 August 2001* referred to.

His Honour Judge Moseley. 21st December 2001.

Watkin Jones v Lidl UK GMBH [2001] EWHC HT 01/465 (TCC)

After the adjudication set out in **Watkin Jones v Lidl UK GMBH [2001] HT 02/121** had concluded Lidl tried to recover its position by itself referring a dispute to adjudication in relation to what sums should have been referred and were due under application 11. The first adjudicator to be appointed resigned. Lidl then applied for a second appointment on the same terms and this adjudicator accepted the appointment. Watkin Jones in this action applied for a declaration that the adjudicator did not have jurisdiction. The court noted that the issue had also been considered by Mosely J. In the absence of a withholding notice, the sum applied for was due. The dispute was at an end and could not be reopened by a subsequent adjudication.

SL Timber Systems v Carillion Construction *[2000] BLR 516).* ***Woods Hardwick v Chiltern Air Conditioning*** *[2001] BLR 23.* ***C & B Scene Concept Design v Isobar.*** ***VHE Construction v RBSTB Trust Co*** *[2000] BLR 187* considered.

His Honour Judge Humphrey Lloyd. TCC. 27th December 2001.

Watson Building Services Ltd, Re Application For Judicial Review [2001] ScotCS 60

Rot eradication work on a church was subcontracted to Watson. The contract was somewhat imprecise and purported to be by enlarge on the same terms as the main contract, which was in the *Scottish Building Contract Contractors Designed Portion without Quantities (1998*) standard form.

A dispute arose and was referred to the ACA for appointment. The other party disputed the appointment and the adjudicator was given jurisdiction to determine the validity of his appointment. The first adjudicator determined that he did not have jurisdiction. The pursuer then referred the dispute, again to the ACA who appointed a second adjudicator. The pursuer accorded jurisdiction to the second adjudicator who first determined that the reference in the sub-contract documents to the SBCC was ineffective and that in the absence of a mechanism for appointing an adjudicator in compliance with the HGCRA, the Scheme applied. Under the scheme an applicant can approach any ANB for an appointment. The ACA as an appointing body fulfilled that criteria and accordingly he was validly appointed. He then went ahead and decided the issue. The pursuer was discontented with the decision and applied here for judicial review on the grounds that the adjudicator did not have jurisdiction to decide his jurisdiction and the SBCC appointment procedure should have been followed.

Lady Paton held firstly that once the adjudicator had been given jurisdiction over jurisdiction that was the end of the matter. His decision, whether right or wrong stood, pending final determination by arbitration or adjudication. She further held that the adjudicator was correct in deciding that the SBCC did not apply. Much of the SBCC terms are only relevant to the relationship between employer and main contractor. It is not possible to cherry pick appropriate clauses and omit others that are not suitable and thus it is not possible to simply select the clauses relating to the dispute resolution procedure and hold that they are incorporated.

Lady Paton rejected the assertion that a non-lawyer adjudicator was not competent to interpret the provisions of a construction contract. She also rejected the assertion that decisions in respect of jurisdiction are not construction disputes under the HGCRA. Jurisdiction is a central issue under construction contracts and as much part of a construction dispute as any other dispute arising out of the contract.

However, a further decision of the adjudicator that disputes be referred to arbitration is not a specific non-compliant provision which lets in the Scheme, since adjudication is not expressly excluded and could be slipped in as an interim settlement process. The arbitration provision would then become the follow on process.

John Mowlem **v** ***Hydra-Tight*** 2000, ***Donaldson's Hospital*** **v** ***Esslemont,*** 1925 S.C. 199. ***Mensah*** **v** ***SS for the Home Department,*** 1992 S.L.T. 177. ***McIntosh*** **v** ***Aberdeenshire Council***, 1999 S.L.T. 93. ***Homer Burgess*** **v** ***Chirex*** 2000 S.L.T. 277. ***Allied London & Scottish Properties*** **v** ***Riverbrae Construction*** 2000 S.L.T. 981; ***Karl Construction*** **v** ***Sweeney Civil Engineering*** 2000. ***Bouygues*** **v** ***Dahl-Jensen*** 2000. ***Northern Developments*** **v** ***J. &***

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J. Nichol [2000] B.L.R. 158. ***Whiteways Contractors* v *Impresa Castelli Construction*** 9 August 2000. ***Tim Butler Contractors* v *Merewood Homes*** 2000. ***Macob Civil Engineering* v *Morrison Construction*** [1999] B.L.R. 93. ***Watt* v *Lord Advocate*,** 1979 S.C. 120, ***Anisminic* v *Foreign Compensation Commission*** [1969] 2 A.C. 147. ***Parklea* v *W. & J.R. Watson***, 1988 S.L.T. 605. ***Goodwins Jardine* v *Charles Brand*** (1905) 7F 995. ***Tersons* v *Stevenage Development Corp*** [1963] 2 Ll.R. 333. ***Comorex* v *Costelloe Tunnelling*** 1995 S.L.T. 1217. referred to.
Lady Paton. Outer House, Court of Session. 13th March 2001.

Westdawn Refurbishments Ltd v Roselodge Ltd [2006] Adj.L.R. 04/25

Westdawn Properties Ltd contracted to refurbish a flat. On the 25th May 2004, WPL purportedly assigned the benefit of its contracts, including this one, to the current claimant, Westdawn Refurbishments Ltd. WPL entered into creditor's voluntary liquidation on the 9th August 2004. WRL submitted a claim for the balance of sums due on the refurbishment to adjudication. The adjudicator resigned. A second adjudicator was appointed. He awarded WRL £14.480 which it then sought in this action to recover by summary judgement. Roselodge resisted the application on the ground that the adjudicator lacked jurisdiction, in that (1) the contract is not a contract in writing, or evidenced in writing, for the purposes of s107 and/or (2) WRL was not a party to any construction contract, for the purposes of s108.

Roselodge played no active part in the merits of that adjudication, even though they maintained that they had cross-claims of substance relating to delay and defective workmanship, which were not put before the adjudicator for decision. They did however take the jurisdictional point asserting 1) that the second adjudication was in some respect an abuse of process because of the earlier ineffective adjudication. The adjudicator dismissed that on the basis there had been no earlier adjudication, 2) that the adjudicator had no jurisdiction, because there was no agreement in or evidenced by writing, as required by the 1996 Act. The adjudicator found a contract implied by the SG&SA 1982.

At the enforcement hearing, Roselodge further asserted 3) that WRL was not a party to the original contract and since Roselodge had made no novation, the adjudication was flawed in that 4) WPL should have been a party to the adjudication, but was not served notice, not least because it had gone into liquidation and no longer exists.

As to the s107 written requirements there was common agreement that :-

1) s107 (2), (3) and (4) requires all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing. ***Trustees of the Strathfield Saye Estate v AHL Construction Limited.*** [2004] EWHC 3286
2) Implied terms are permitted. ***Connex South Eastern Limited v MJ Building Services*** [2004] BLR 333.
3) A failure to record trivial or minor details (things the adjudicator is not required to deal with robustly) will not deprive the adjudicator of jurisdiction. ***RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited*** [2002] 1WLR 2344.
4) Subsequent fundamental oral variations can take a previously compliant contract outside s107 requirements. ***Carrillion Construction Limited v Devonport Royal Dockyard*** [2003] BLR 79
5) No specific time is established under the Act for the provision of a written contract. ***Dean and Dyball Construction Limited v Kenneth Grubb*** [2003] EWHC 2465

The court established that WPL quoted for the work. The quotation was accepted. Thus there was a written contract. However, subsequently it was orally agreed that the works would be completed when the keys were handed over. There was an oral agreement that payment would be 30 days after issue of invoice. This was followed subsequently by a new approach whereby 25% became due at time of invoice with the remainder due after 30 days. The court determined that these took the contract outside s107 and accordingly the adjudicator had no jurisdiction – and implied terms could not fill the statutory vacuum created by the express oral terms.

The court noted that there were a number of contentions regarding whether a 14 day turn around per flat was a condition of the contract – which could not be dealt with in a summary application. CPR 24.2 :- *"The Court may give summary judgment against the claimant or defendant on the whole of a claim or on a particular issue if*
(a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) that defendant has no real prospect of successfully defending the claim or issue; and

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(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

As to assignment, the court determined that this matter was not significant since the application had already failed. However, the court considered that it was arguable that s36 LPA 1925 could act as a bar to assignment. As to whether WPL had to be given notice depended on whether or not there had in fact been a valid assignment, and or novation requirements were fulfilled.

HHJ McCahill QC TCC. 25th April 2006.

Westminster Building Company Ltd. v Beckingham [2004] EWHC 138 TCC

This case concerned a domestic refurbishment contract subject either to specifications or to an amended JCT Intermediate 1998 Form. Enforcement of an adjudicators decision for payment of £125K of interim payments certified in compliance with JCT terms was resisted by Beckingham on the grounds that :-

1) The JCT did not apply - rather subject to specification contract without adjudication clause
2) If JCT applies adjudication contravenes the UCTA 1977
3) The parties had concluded a capping agreement which over-rides any payment mechanism and was not subject to an adjudication provision applying qua ***Shepherd v. Mecright***.

A letter of intent included the JCT. Whilst rejected, a letter of comfort also included JCT. The court ruled that by conduct the JCT was thus incorporated, so adjudication applied; the adjudication process is not an Unfair contract provision; the Cap was not a settlement agreement. The adjudicator had found that the CAP contract was unenforceable because it lacked consideration of special ***Williams v Roffey Brothers & Nicholls (Contractors) Ltd*** *[1991] 1 QB 1.* circumstances and ordered payment of the certified sums. The court ordered enforcement of the decision.

Stent Foundations v Carillion *(2001) 78 Con LR 188 ;* ***Harvey Shopfitters v ADI*** *[2003] EWCA Civ 1757.* ***Director General of Fair Trading v First National Bank*** *[2002] 1 AC 481 :* ***Lovell Projects v Legg and Carver*** *[2003] BLR 452* referred to. His Honour Judge Anthony Thornton. TCC. 20th February 2004.

Westwood Structural Services Ltd v Blyth Wood Park Management Co Ltd [2008] EWHC 3138 (TCC)

Here the court consider whether all payments are suspended upon determination under a JCT Minor Works Form, 1998 edition standard form contract.

The adjudicator had found 1) in adjudication No1, that the sum claimed for was due prior to determination and 2) in adjudication No2, that clause 7.2.3. was not therefore applicable :

The court held that the decision was enforceable under clause D7 1-3. As to non-enforcement ***Carillion v Devonport*** [2005] noted. Whether right or wrong - ***Bouygues v Dahl-Jensen*** [2000]; ***C & B Scene v Isobars*** [2002] noted - the court thought they were correct decisions regarding that form of contract – see ***KNS v Sindall*** [2000]; ***Bovis v Triangle*** [2003]; ***Ferson v Levolux*** [2003] ; ***Verry v L.B. Camden*** [2006] referenced and accordingly the decision was enforceable.

Melville Dundas v Wimpey [2007]; ***Pierce Design v Mark Johnson*** [2007] distinguished on the facts, viz there was no question of insolvency here, and on the relevant standard form contract terms.

Mr Justice Coulson. 9th December 2008.

Whiteways Contractors Ltd v. Impresa Castelli Construction Ltd [2000] EWHC TCC 67

Whiteways, the applicants for summary enforcement of an adjudicator's decision were plastering subcontractors engaged on DOM/1 standard form. The notice of intention referred to 1) *Failure to make payment against our Final Account* and *2) Failure to make payment against our interim applications nos. 22 and 23.* In the referral document the disputed heads of claim were claims for: *a) Extension of time; b) Contractual interest; c) Prolongation costs; and d) Financing charges.*

Impresa wrote to the adjudicator asserting that he did not have jurisdiction over a-d as matters outside the scope of the Final Account and applications 22 & 23. The letter concluded as follows *"We invite you to decide on this issue as a matter of urgency as our response to Whiteways Notice of Referral will depend on your decision. Our client does not wish to incur costs on matters which, in our view, fall outside the jurisdiction of the Adjudication."*

The adjudicator received representations from Whiteways and concluded that he did in fact have jurisdiction. Impresa took part in the adjudication "*without prejudice*" to the question of jurisdiction. The adjudicator awarded sums due to Whiteways. Impresa did not pay, resulting in this action.

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Impresa maintained that the adjudicator did not have jurisdiction over matters not canvassed in the notice and further sought an abatement in respect of monies paid out for work that had not been done. Whiteways countered that as explained by the adjudicator, he did have jurisdiction and even if his decision was incorrect, Impresa were bound by it because they had given him jurisdiction to decide upon his own jurisdiction.

The reasoning of the adjudicator was that in order to determine what was due on the final account he had to investigate and determine points a-d so they were clearly within the scope of the notice. Bowsher J indicated that he had no reason to differ from that point of view, but did not rehearse the issues further, since having accorded jurisdiction over jurisdiction to the adjudicator, they were bound by the decision whether right or wrong.

On the matter of abatement, Bowsher J held that in the absence of withholding notices, there was nothing to abate from the decision. ***Fastrack Contractors v Morrison*** *[2000] BLR 168* considered.

His Honour Judge Peter Bowsher. TCC. 9th August 2000.

William Verry Ltd v Camden London Borough Council [2006] Adj.C.S. 03/20

The claimant contractor engaged on JCT standard form terms including requirement, 'without prejudice' to other rights under the contract, to comply with adjudication decisions. The claimant referred a dispute in respect of the interim certificate issued upon practical completion to adjudication. The adjudicator found for the claimant, subject to an allowance for LADs flowing from delays in the completion of the works.

Between referral and issue of decision the final certificate was issued by the defendant. The defendant notified the claimant of an intention to deduct the LADs identified by the adjudicator from the final certificate and asserted that in consequence there had been an overpayment. Unsurprisingly the defendant did not pay the adjudication sum and the claimant sough summary enforcement.

In defence, the defendant asserted that the final certificate displaced the adjudication decision and then referred a counter-claim to a fresh adjudication.

The court, following established principles held that the effect of S108 HGCRA was to exclude set off of sums based on defences, counter-claims and contract terms. The decision by nature is only temporary. Other claims and rights are not prejudiced and may be pursued at a later date – but payment must be complied with. Subsequent contradictory certificates cannot negate the decision, nor can cross claims. ***Levolux v Ferson*** [2003] : ***David McClean Contractors v Albany Building*** *[*2005] applied **:** ***Balfour Beatty v Serco*** [2004] referred to*;* ***Parsons Plastics v Purac*** [2002] distinguished : ***KNS v Sindall*** [2000] : ***David McLean v Swansea H.A.*** [2001] : ***Bovis Lend Lease v Triangle*** [2002] *not followed*

His Honour Judge Ramsey. TCC. 20th March 2006

William Verry (Glazing Systems) Ltd v Furlong Homes Ltd [2005] EWHC 138 TCC

Developer submitted a final account to adjudication. The adjudicator was invited to determine what extensions of time were validly due under the contract and to find against the contractor for late completion. In the event the adjudicator found that the contractor's version of extension of time (to February) was correct and accordingly there was no late completion. The decision found monies due to the contractor rather than LAD's to the developer.

The developer sought a declaration that the extension of time considered by the adjudicator (to July) was outside the scope of the reference which had referred only to a previous extension of time. The court reviewed the cases on the meaning and scope of a dispute and concluded that it as not open to a claimant to restrict the scope of a defence to matters referred to in the referral notice, so that the defendant could mount only *"half a defence"*. ***CIB v Birse*** [2004] EWHC 2365., ***Edmund Nuttall v R G Carter*** *and* ***AWG Construction Services v Rockingham Motors Speedway*** ***[2005]*** considered.

Any relevant matters could be raised, even if it gave an outward appearance of being an application for an additional extension of time. The court distinguished between situations where a claimant seeks to introduce new matter and the need for a defendant to discuss issues relevant to the defence. Effectively by submitting a final account and inviting a decision on what was the appropriate extension the claimant could not object if the court concluded that a greater extension was due than that which the claimant sought to rely upon. In

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the event the extension granted was longer than that requested originally by the defendant (to June), because work had continued after that date.

The developer also sought to establish breach of due process in that the adjudicator had insufficient time to make a decision and should thus have resigned. On this matter the court held that there was sufficient time and due consideration had been given to all matters.

Re what is a dispute, cases referred to **:** ***AMEC Civil Engineering v SS for Transport*** *[2004] EWHC 2339 : Mon****mouthshire County Council v Costelloe & Kemple*** *5 BLR 83;* ***Tradax International v Cerrahogullari*** *[1981] 3 All ER 344;* ***Ellerine Brothers v Klinger*** *[1982] 1 WLR 175****; Cruden Construction v Commission for New Towns*** *2 Lloyd's Law Reports 37;* ***Halki Shipping Corporation v Sopex Oils*** *[1988] 1 WLR 726****; Fastrack Contractors v Morrison Construction*** *[2000] BLR 168****; Sindall v Soland*** *80 Con LR 152 ;* ***Beck Peppiatt v Norwest Holst Construction*** *[2003] BLR316.* ***Cowlin Construction v C. F.W Architects*** **[**2003] BLR 241; ***London and Amsterdam v Waterman Partnership*** [2003] 91BLR; ***K N S v Sindall*** 75 BLR 71

Re procedural irregularities, ***Arbitration Vee Networks v Econet Wireless International*** *[2004] EWHC 2909* referred to. His Honour Judge Peter Coulson. TCC. 13th January 2005.

William Verry Ltd. v North West London Communal Mikvah [2004] EWHC 1300 : 1 BLISS 24

The court held that a construction contract must establish a mechanism aimed at securing referral within 7 days, but fulfilling that aim is not mandatory – an adjudicator can allow an extension. The terms of reference were limited to release of retention. The adjudicator did not consider the validity of defects notified to him by the respondent. Since this went to the heart of the defence, the court advised NWLCM to commence adjudication on the defects and held that the previous retention award be stayed pending the outcome of adjudication No2. Cases referred to ***: Ferson Contractors v Levolux, Joinery Plus Ltd v Laing*** *[2003] TCLR 4* His Honour Judge Anthony Thornton. TCC. 11th June 2004.

COMMENT : There is a difficult balance to be struck by an adjudicator, as to whether to allow elements of a defence that might go beyond the terms of reference, and thus result in the decision becoming unenforceable and allowing the dispute to be broadened out to cover matters that he deems to be an integral part of the dispute, particularly if the referring party makes it clear that they consider this to be beyond the scope of the reference. Indeed, great care is often taken to shape a reference out in such a manner that matters which do not favour the applicant are excluded.

Thornton J gives respondents faced with such a problem a very clear steer as to how to deal with the problem. Raise the defence. If it is not permitted, quickly make a fresh application – which may result in the same or a different adjudicator being appointed. Expense may be saved if the same adjudicator is appointed since he will already be up to speed on the background to the dispute. If there is a very short period of time between enforcement of adjudication No1 and the issue of a decision under adjudication No2, the court may well follow Thornton J's example and stay enforcement for that short period of time. Even failing this, assuming the second adjudication is successful, the respondent is unlikely to be out of funds for any great length of time (assuming that there are no problems with insolvency).

Williams (t/a Sanclair Construction) v Noor (t/a India Kitchen) [2007] All ER (D) 51 (Dec)

The Court was asked to enforce an Adjudicators decision. The Defendant raised a number of defences against Summary Judgement.

The Defendant considered that the party to the adjudication had been Mr Williams, not the Claimants wife Mrs Williams, and as such Mrs Williams did not have the benefit of an Adjudicators decision to claim Summary Judgement.

The Defendant raised four potential defences to the application for summary judgement:

1. Adjudicator did not have jurisdiction, for which various reasons were provided. This defence was not pursued at the hearing.
2. Adjudicator did not have jurisdiction as the Contracting Party was Mrs S Williams trading as Sanclair Construction but the party to the Adjudication was Mr C Williams trading as Sanclair Construction.
3. The Notice of Adjudication was invalid as it was in the name of Mr C Williams not Mrs S Williams.
4. Mrs Williams was in breach of the Business Names Act by not setting out the name of the proprietor on company.

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HHJ Hickinbottom, after consideration, did not find that any of the potential defences relied upon by the Defendant stood any real prospect of success and entered summary judgement for the Claimant.

Macob v Morrison [1999] BLR 93, ***Pegram v Tally Weijl*** [2003] EWCA 1750, [2004] 1 All ER 818 : ***Carillion v Devonport*** [2005] EWCA Civ 1358; ***Three Rivers D.C v Bank of England (No 3)*** [2001] 2 All ER 513; ***Unisys International Services Ltd v Eastern Counties Newspapers Ltd*** [1991] 1 Lloyd's Rep 538. ***Prenn v Simmonds*** [1971] 1 WLR 1381. ***West Bromwich Building Society v Wilkinson*** [2005] UKHL 44. ***Total M & E v ABB*** [2002] EWHC 248 (TCC). ***Rok Build v Harris Wharf Dev. Co Ltd*** [2006] EWHC 3573 (TCC), ***Andrew Wallace v Artisan*** [2006] EWHC 15 (TCC), ***Burman v Mount Cook Land Ltd*** [2001] EWCA Civ 1712. ***Aveat v Jerram Falkus*** [2007] EWHC 131 (TCC) considered. Summary by Nick Tuner.
Judgment HHJ Hickinbottom. TCC. Cardiff District Registry. 21st November 2007.

Wimbledon Construction Company 2000 Ltd. v Vago [2005] EWHC 1086 TCC

His Honour Judge Peter Coulson considered an application for enforcement of an adjudicator's decision which was opposed on the grounds of the financial insecurity of the applicant and the potential inability to repay any sums due in the event of an arbitrator overturning the decision. The dispute centred on a JCT Minor Works form 1998 (as amended for private residential properties) for an extension and renovation to the defendant's home. The application was successful.

Coulson J reviewed a wide range of cases on the impact of insolvency and financial insecurity on the enforcement of adjudication decisions and deduced the following principles that govern the court's discretion to refuse enforcement :-

"a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

*c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see **AWG Construction Services v Rockingham Motor Speedway** [2004] EWHC 888).*

*d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see **Herschell Engineering Ltd v Breen Property Ltd** 28th July 2000.*

*e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see **Bouygues UK Ltd v Dahl-Jensen UK Ltd** [2000] BLR 522 and **Rainford House v Cadogan Ltd** 13.2.01)).*

f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

*(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see **Herschell**); or*

*(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see **Absolute Rentals v Glencor Enterprises Ltd**"*

The court held that whilst the contractor was a small and financially insecure business, that was a risk the client had accepted when engaging him. If anything, that insecurity was increased by the client's failure to pay monies due under the contract. In addition, the client had failed to establish that the contractor was insolvent. In consequence, the application for a stay failed.

Cases referred to **:** ***Total M and E Services v ABB Building Technologies*** *[2002] CILL 1857.* ***Sir Lindsay Parkinson & Co v Triplan*** *[1973] QB 609.* His Honour Judge Peter Coulson. TCC. 20th May 2005.

Woods Hardwick Ltd v Chiltern Air Conditioning Ltd [2000] EWHC HT 00/28 (TCC) : [2001] BLR 23

Thornton J considered an application for the enforcement of two adjudication decisions, made by the same adjudicator between the same parties but in respect of two separate contracts. The court enforced the first of

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decision. The important aspect of this case relates to the second decision. The defendant successfully challenged decision on the basis of procedural errors by the adjudicator and a failure to act impartially.

Woods Hardwick contracted to provide architectural services for the refurbishment of a building, the construction of a new 3-storey extension, an additional storey to the original building and allied professional work in connection with planning & building control applications. Woods Hardwick sought to recover unpaid fees, an uplift in fees arising out of expansion of the scope of works, fees for additional fees and the costs of the adjudication.

From Chiltern's point of view the development went badly wrong. The building as constructed was out of alignment with the highway. This was due either to design faults or faulty setting out. Chiltern accordingly resisted payment on the grounds that the project was incomplete and any fees otherwise due would in effect be abated by virtue of breaches of contract – in that Woods Hardwick made errors in setting out and failing to conduct a full survey.

The adjudicator found that the absence of a full survey was not causative of the problems and that the details for setting out relied upon by Woods Hardwick were supplied by Chiltern and by the "***shambolic way***" that Chiltern ran the construction site. He also found that the incorrect alignment had not resulted in financial loss. Woods Harwick's claim for fees was reduced because the adjudicator did not accept that Chiltern's conduct had not resulted in additional works, but otherwise he confirmed liability for fees arising out of additional works.

Apart from the referral documents received from the parties, the adjudicator reached these conclusions following a site meeting with both parties in attendance , by corresponding with two other contractors, the local council's legal department, the RIBA Legal Helpline and from additional information provided at his request by Chiltern. However, he reached his decision without having received other papers that he had requested. Chiltern's complaint is that the adjudicator did not aford them the opportunity to comment on any of the information gleaned from outside sources. Chiltern complained of bias, exacerbated by the adjudicator witness statement provided by Woods Hardwick for use in these proceedings which was far from complimentary to Chiltern

Thornton J refused the enforcement action. The adjudicator had not provided Chiltern with an opportunity to know about or to challenge any of the additional information that his inquisitorial procedures had brought about. Furthermore, the witness statement clearly demonstrated that he had taken against Chiltern from an early stage. Whilst there is nothing to prevent an adjudicator from providing a witness statement, this is not an advisable course of action. The adjudicator should not have used the opportunity to expand upon his reasons for his decision. He should have limited himself to a factual account of what had occurred. A better alternative would have been for the adjudicator to have been called as a witness. ***Macob v Morrison*** [1999] 1 TCLR 113 regarding the fairness of the adjudication process considered.

His Honour Judge Anthony Thornton. TCC. 7th July 2000.

Workplace Technologies v E Squared Ltd & Mr J L Riches [2000] CILL 1607

Squared and Workplace entered into a construction construct some time been 9th October 1997 and the 5th June 1998. A dispute arose between the parties which was referred to adjudication (the Mr Riches named above – who took no part in the action). Workplace sought a declaration that the contract pre-dated the HGCRA and an injunction to prevent the adjudication proceeding.

The court, following a detailed consideration of the history of the contract formation process, which involved changing personalities and protracted negotiation, determined that the contract was concluded at the earliest 20th May, but certainly by 5th June. Consequently, the HGCRA applied. As to whether or not an injunction could be issued (this being considered to determine whether or not the litigation was vexations and thus impacted upon an application for costs) the court stated as follows :-

49. I am not persuaded there is power to grant an injunction to restrain a party initiating a void reference and pursuing proceedings which themselves are void and which may give rise to a void and thus unenforceable adjudication decision. There does not appear to be any legal or equitable interest such as an injunction would protect. Mr Darling was unable to identify one. Doubtless the initiation of such proceedings may be conceived to be a source of harassment, pressure, or needless expense.

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50. *In the analogous field of arbitration no action lies to prevent this, see* ***North London Railway Company v Great Northern Railway Company*** *[1888] 11 QBD 30, approved in* ***Siskina V Distos*** *[1979] AC 210, in the speech of Lord Diplock at page 256, at letter E, where he said and I quote: "****That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was firstly laid down in the classic judgment of Cotton LJ in North London Railway Company, which has been consistently followed ever since.****"*

Bremer Vulkan *[1981] AC 909.* ***Re Cable (deceased)*** *[1977] 1 WLR 7* applied.

His Honour Judge David Wilcox. TCC. 16th February 2000.

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