

CONSTRUCTION CASE SUMMARIES



LAST UPDATED 9th APRIL 2006

Abbott v Will Gannon & Smith Ltd. [2005] EWCA Civ 19

Accrual of action - statutory limitation - negligent design - Pirelli and Murphy revisited.

Actionstrength Ltd v International Glass Engineering [2001] EWCA Civ 1477

Guarantees : A guarantee must be in writing under s4 Statute of Frauds 1677 - so a sub-contractor cannot rely on an oral promise.

CA. Simon Brown LJ, Peter Gibson LJ, Tuckey LJ. 10 October 2001

Actionstrength Ltd v International Glass Eng. [2003] UKHL 17

Guarantees : A guarantee must be in writing under s4 Statute of Frauds 1677 - so a sub-contractor cannot rely on an oral promise.

Lord Woolf, Lord Hoffmann, Lord Clyde, Lord Walker of Gestingthorpe. 3rd April 2003.

AG Falkland Islands v Gordon Forbes Construction (Falklands) Ltd [2003] F.I.S.Ct 14.03.2003

FIDIC 4th : Clauses 53 & 54 : Contemporary records in support of additional payments do not include notes made subsequently for the purpose of litigations.

Alderson v Beetham Organisations Ltd [2003] EWCA Civ 408

Defective Premises Act : Limitation Period

Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] EWHC 2

Validity of liquidated damages clause.

Alfred McAlpine Construction Ltd v. Panatown Ltd [2000] UKHL 43

Recovery on behalf of third party : collateral warranties.

HL. Lord Clyde Lord Goff of Chieveley Lord Jauncey of Tullichettle Lord Browne-Wilkinson Lord Millett.
27th July 2000.

Alstom Signalling Ltd. v Jarvis Facilities Ltd [2004] EWHC 1232 (TCC)

The parties agreed to a "*Pain and Gain*" provision under an I.Chem.E Sub-contract Contract for the design and installation of signalling equipment as part of a main railway line development contract. The main contract also contained a P&G provision. The mechanism for determining the exact proportion of P&G between the Main and Sub Contractor was not finalised, but the court was made the final determinator. His Honour Deputy Judge Colin Reese Q.C. held that the criteria would be a "*fair and reasonable*" apportionment.

The court held that this was not a **May v Butcher / Walford v Miles** agreement to agree, since the parties were committed to the sharing and had provided a method of determining the rate, which whilst not expressly stated, would impliedly operate in the absence of agreement between the parties. Whilst there were potentially a range of fair and reasonable outcomes, the parties had undertaken the risk in respect of which outcome the court opted for and would have to live with whichever outcome the court determined.

His Honour Deputy Judge Colin Reese Q.C. TCC. 11th May 2004.

Amalgamated Roofing & Building Co v. Wilkie [2003] Scot CS 309

Human Rights Act : Court held that a lawfully applied inhibition is not contrary to HRA requirements in respect of quiet enjoyment of property.

Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339 (TCC)

Amec were contractors for the Thelwall Viaduct. Subsequently problems arose with the viaduct. The S.S. referred the problems to an engineer for a preliminary decision without advising Amec. The S.S. then advised Amec of the decision and advised that unless Amec indicated acceptance of the decision, the matter would be referred to an arbitrator. Amec challenged the arbitrator's appointment. The arbitrator found that he had jurisdiction. Amec unsuccessfully challenged that decision.

His Honour Judge Jackson considered the principal arbitration and adjudication cases on what constitutes a dispute. The court found 1) that there is no requirement of notification to refer to an expert for preliminary

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determination, since the expert could have reached a decision without receiving submissions from Amec. Further, if the expert had wished to hear from Amec he could have asked; 2) that Amec were fully aware of the situation and it was clear that Amec would not simply accept liability. The requirement to respond by a 5pm deadline the very day of notification, whilst at first sight unreasonable, was more a formality than anything else. The parties were already in dispute. Amec had no intention of agreeing. No injustice was done to Amec. The Secretary of State had to act quickly as both parties were fully aware because the statutory time limit was imminent.
His Honour Judge Jackson. TCC. 11th October 2004.

Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291

Lord Justices May and Rix dismissed an appeal, providing a clear account of the role of the certifier under Clause 66 of the ICE contract. Rix LJ considers that even if an engineer's decision is flawed (in this case potentially because the defendant may have been denied an opportunity to express views about responsibility for the defects), since the decision is subsequently opened up and re-examined in adjudication, such flaws have no impact upon the outcome of the dispute. In such circumstances it is a valid decision for the purposes of referring the dispute onwards to adjudication.

CA before Lord Justice May; Rix and Hooper. 17th March 2005

Amec v S.S. for Transport [2005] EWCA 291 CA

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C.H.Spurin

Aqua Design v Kier [2002] EWCA 797 : Lawtel AC0102137

Developer insolvency exception to the bar on pay when paid clauses by the HGCRA. LJ Gibson, Parker & Dyson 14th May 2002.

AWG Group Ltd v Morrison [2005] EWHC 2786 (Ch)

This case raised questions in respect of conflict of interest and perceived bias in respect of the trial judge, but the same considerations would apply equally to an adjudicator or arbitrator. The trial judge declined to recuse himself from the trial on the grounds that he knew a potential witness who had not been called by the claimants. He concluded that since alternative witnesses had been called, there was no longer a problem. Furthermore, the enhanced costs of the trial that would arise out of appointing a replacement judge and the undesirability of postponing a trial where the judge was already up to speed on all the issues outweighed any concerns about potential bias, particularly since they had ceased to be relevant.

Mr. Justice Evans-Lombe. Chancery Division. 1st December 2005.

Baker & Davies Plc v Leslie Wilks Associates (a firm) [2005] EWHC 1179 (TCC)

In this case the applicants sought a contribution, from the defendant structural engineers, under the CLCA 1978 for damages paid out to a third party. Subsidence occurred in a building. The contract carried out remedial work and the amount due in compensation was determined by adjudication. The applicant sought a contribution both in respect of the costs of remedial work and compensation payment. It was not contested that the payment of a sum pursuant to a HGCRA adjudication decision satisfies the requirements of the Civil Liability (Contribution) Act 1978 viz a payment to an injured party and gives rise to a right to receive a contribution.

The main issues centred on whether or not the payments (in particular remedial work as opposed to cash) fell within the scope of the CLCA; in respect of statutory limitation periods and whether or not the settlement was of a legal action.
His Honour Judge Richard Havery. TCC. 30th June 2005

Ballast Wiltshier Plc (formerly Nedham) v. Thomas Barnes [1998] EWHC TCC 306

Retention Monies : Interpretation of contract.

HHJ Bowsher. 29th July 1998.

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Bath & North East Somerset D.C. v Mowlem Plc [2004] EWCA Civ 115

This concerned a JCT LAQ 1998 contract for the refurbishment of the Roman Spa at Bath with a target for completion in 2002. By 2003 problems with the sealing paints in the pools became evident, due either to design faults/inappropriate materials or defective workmanship. The architect issued instruction for removal of paint coatings to open up the works for inspection. Mowlem refused. The Council instructed Waring to do the work. Mowlem refused Waring access to the site. Mowlem offered to do the work *“without prejudice”* whilst referring the validity of the instruction to adjudication. The court applied for a mandatory interlocutory injunction for access to be afforded to Waring. The judge considered Mowlem’s proposal to be potential prejudicial to the Council. Mowlem claimed the instruction was used as a device to avoid ordering rectification. Mowlem wished to have the injunction removed, claiming the balance of convenience was with them. Waring would destroy the evidence by removing the paint. The judge at first instance held that if the evidence was destroyed Mowlem would not suffer because the Council’s case against Mowlem would also be destroyed. There was a need for work to progress and not for the project to be placed in limbo. The agreed liquidated damages under the contract was set at £12K which the Council asserted was well below their actual daily losses, so that an action in damages would not provide an adequate remedy, thus justifying the granting of an injunction. The court agreed with the Council and confirmed the injunction. Whilst an adjudication may have produced an answer, the adjudicator could not grant an injunction. Stay of injunction pending adjudication denied.

C.A. before Lord Justice Brooke, Mance and Park. 20th February 2004

Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1998] UKHL 19

This landmark case dealt with the vexed issue of the final binding status of certificated. The House of Lords ruled that jurisdiction to open up and amend certificates is available to judges. **Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd.** [1984] Q.B. 644 had been wrongly decided and was overruled. However, where a certificate is stated in the contract to be final arbitrators and adjudicators need express power to open and revise.

CA before Lord Justice Goff, Lloyd, Nolan, Hoffmann and Hope. 20th May 1998.

Comment : See now however the express power in the Scheme for adjudicators to open up certificates.

Bennett v FMK Construction Ltd. [2005] EWHC 1268 (TCC)

The applicant sought a declaration that a final certificate issued under a JCT Form 1998 P without Q is conclusive evidence of the matters stated in it. The defendant disputed the validity and correctness of the certificate and referred the dispute to adjudication. Having accepted the appointment, due to a bereavement the adjudicator resigned to avoid any allegations that the contractual timetable for adjudication was not complied with. Five days later the dispute was referred again to adjudication and the same adjudicator was appointed. The problem was that this second appointment was outside the 28 day period specified under clauses 30 and 41 respectively of the JCT, which effectively precludes the opening up of final certificates by the adjudicator, which in consequence become final and conclusive according to the contract. Does this offend the HGCRA and the Scheme which empowers the adjudicator to open up certificates? Further, was the adjudicator validly re-appointed?

Havery J held that the certificate became conclusive evidence. However, he also found that the adjudicator had been validly appointed, since an adjudicator can be appointed at any time.

His Honour Judge Richard Havery. TCC. 30th June 2005.

Comment : The implication of all this is that whatever else the duly appointed adjudicator might decide, opening up the conclusive certificate would no longer be available to him. The outcome for the defendant was very serious. Tactically, if there was any way that the adjudicator could have kept going, rather than resigning, by seeking at least the minimum 10 day extension, which was the gift of the claimant under the adjudication procedure would have been preferable. Certainly, the risk of allegations of breach of contractual timetable for adjudication were less for the applicant than the outcome of resigning in the circumstances of the tight timetable and specific terms set out in the JCT Form.

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Bernhard's Rugby Landscapes Ltd v. Stockley Park Consortium Ltd [1997] EWHC TCC 374

Global Claims : Landscaping contract.

Lloyd HHJ Humphrey. 7th February 1997.

Birse Construction Ltd. v McCormick (U.K.) Ltd [2004] EWHC 3053

Establishing cause of action in a claim for breach of contract and Statutory Limitation.

Birse Construction Ltd v McCormick (UK) Ltd [2005] EWCA Civ 940

Failed Appeal : Establishing cause of action in a claim for breach of contract and Statutory Limitation.

Clarke LJ; Carnwath LJ; Mr Justice Patten. 26th July 2005.

Birse v ETC [2004] EWHC 2512

Claim for alleged defects : Award of £2 nominal damages - the price of an empirical victory.

His Honour Judge Humphrey Lloyd QC TCC. 5th November 2004

Bouygues UK Ltd v. Dahl-Jenson UK Ltd [1999] EWHC Technology 182

Retention monies : Adjudication :

HHJ Dyson. 17th December 1999

Brian Andrews v Bradshaw [1999] EWCA Civ 2008

John Bradshaw appealed against his removal as an arbitrator in a dispute between Andrews against Randells, on the grounds of bias, by His Honour Judge Knight sitting in the Central London County Court.

Randells had been contracted, under a JCT contract, to build a wing of a nursing home by Jawaneer. Demolition and ground works were sub-contracted to Andrews. Having settled claims with Jawaneer, Randells sought by arbitration to recover their losses from Andrews asserting delays and defects caused by Andrews were the direct cause of their liability to Jawaneer. Randells wished to rely on the pleadings from the previous arbitration, without further proof in this second arbitration. Randells also wanted to recover the costs of the first arbitration from Andrews.

Even though the arbitration was initiated by Andrews, Mr Hossak (Andrew's claims consultant) indicated that Andrews had now become an unwilling participant in the arbitration. Mr Hossak refused to sign the arbitrator's terms of appointment, which contrary to the provisions of Clause 38.12 JCT and rules 9.1 & 9.2. Arbitration Rules made the parties jointly and severally liable to the arbitrator for fees and expenses, subject to three monthly instalments on account, required each party to make a payment on account of £250.00. Randells made the requested down payment but Andrews consistently refused to do so.

First Randells, followed by Andrews tabled issues for preliminary hearing, related to the relevance of materials from the previous arbitration and about the potential recovery by Randells of costs related to that arbitration.

Bradshaw retained a solicitor to advise on legal aspects of Randells' interim application, but for some time refused to take on board Andrews' interim matters or to refer them to the solicitor. Ultimately, after protracted communications Bradshaw eventually took on board the matters tabled for consideration by Andrews and made a decision himself without reference to the solicitor. Bradshaw continually raised the matter of the non-payment of his initial retainer in practically every communication he made to Andrews. The decision broadly favoured Andrews but an interim award for costs went against Andrews rather than costs following the event.

In the meantime Andrews had successfully applied to the court to have Bradshaw removed for bias. Bradshaw appealed. The Court of Appeal, with some doubt, came to the conclusion that whilst Bradshaw may well have been somewhat intemperate and impatient with Andrews, there was nothing to indicate a "real danger of bias" as prescribed by Lord Goff of Chieveley in **R v Gough** [1993] AC 646, that would justify an order to set aside his appointment. As a Judicial Review hearing, not an appeal, the court was not able to overturn the costs order, though it is clear the court did not approve the order.

CA before Lord Justices Nourse, Mantell and Mance. 29th July 1999.

Comment : In this finely balanced case Bradshaw was fortunate to escape the setting aside order. The tone of his communications to Andrews were to say the least ill advised. If he had taken on board the implications of Clause 38 and Rule 9 he would never have got into this unfortunate situation regarding the fees. Accepting the down payment from one party created a degree of imbalance in his relationship with the

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parties, which was undesirable. It is submitted that the arbitrator displayed a less than an adequate understanding of the rules of natural justice as they apply to arbitration.

Brian Warwicker Partnership v Hok International Ltd [2005] EWCA Civ 962

Failed appeal against Mr Recorder Blunt's order of contribution by Architect for the damages due to property developers for defective design and build.

The V.C.; Arden LJ; Keene LJ. 27th July 2005.

Cameron v Mowlem (1989) 52 BLR 25

The parties contracted on Dom/1 (1980) standard form terms. The contract contained a very early form of limited adjudication (which is quite unlike that provided for under the HGCRA). Following an adjudication Cameron sought the assistance of the court to enforce the decision. The CA restricted the jurisdiction of the adjudicator under the contract to a very narrow sphere of activity, namely set-off and the destination of the sums awarded under the adjudication – which involved a form of escrow account. The court refused to enforce adjudicator's decision and in consequence an arbitration was required to resolve the outstanding matters.

High Court. 20th November 1989.

Catlin Estates Ltd v Carter Jonas (a firm) [2005] EWHC 2315 (TCC)

Third Party Rights : Right to recover on behalf of another : Shareholder rights : Defective Premises : Meaning of dwelling : Linden Gardens v Linesta Sludge revisited.

HJH John Toulmin CMG QC. 31st October 2005.

Cape Durasteel Ltd v Rosser & Russell Building Services Ltd [1995] Lawtel AC0300143 QBD

This concerned an application to stay an action to adjudication under the terms of a construction contract. This action predated the introduction of statutory adjudication under the HGCRA and indeed informed the legislature about the nature and role of adjudication. The court held that an agreement to adjudicate is similar to and should be treated in the same way as an agreement to arbitrate, concluding that :-

- (1) The use of the word "adjudication" was not of itself decisive as to whether or not the procedure could in fact constitute a binding agreement.
- (2) The test to be applied was - whether the agreement to refer the dispute had or had not the essential feature of an arbitration agreement. In applying the test the courts will look at both the dispute clauses and their context in the contract as a whole.

The Official Referee went on to state as follows :- *"It is clear on the authorities that the test to be applied is the customary one of ascertaining the presumed intention of the parties from their contract and its circumstances. It is plain that 'adjudication' taken by itself means a process by which a dispute is resolved in a judicial manner. It is equally clear that 'adjudication' has yet no settled special meaning in the construction industry (which is not surprising since it is a creature of contract and contractual procedures utilising an 'adjudicator' vary as do forms of contract). Even if it were to have the special meaning accorded to it in some sections of the construction industry where it describes the initial determination of certain classes of dispute in a summary manner, the force of which is tempered by its ephemeral status as there are concomitant provisions for the decision to be reviewed and if necessary reversed by an arbitrator, I would see no reason why it should have that meaning in this contract"*

His Honour Judge Humphrey Lloyd. Official Referee. 4th August 1995

CFW Architects (A Firm) v Cowlin Construction Ltd [2006] EWHC 6 (TCC)

De Nouvo Trial : 3 adjudication decisions and an enforcement action embraced in an all embracing de nouvo trial of all the issues in a claim against architects and counter claim to recover monies from adjudication. Essentially 1st two adjudications substantially upheld : 3rd reversed. Counterclaim failed.

His Honour Judge Thornton. TCC. 23rd January 2006.

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 HL.

In this case a stay of action was granted to a Construction Adjudication Board to be convened in France, since this had under the contract been established as the dispute resolution procedure for disputes arising under the contract. This is an example of a pre-HGCRA form of adjudication, and the willingness even at that early stage for the courts to respect the choice of the parties to resort to alternative forms of dispute resolution, in addition to arbitration.

CA before Lord Justices Keith, Goff of Chieveley, Jauncey, Browne-Wilkinson and Mustill. 21st January 1993.

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COMMENT : Note that the Dispute Adjudication Board (DAB) procedure is now a standard feature of the post 1999 rainbow suite of FIDIC international construction contracts.

Charles David Jackson v Laurieston Homes (Howood) Ltd [2005] CSOH 7

Non-payment of construction contract sums : Arrestment as security under Scottish Law.

Opinion of Lord Eassie. 14th January 2005.

Clark Smith Partnership Ltd v Leyton Football Club [2005] EWHC 3102 (TCC)

AEC Payment provisions : Whether notice pre-requisite to payment for variation.

Deputy Judge : Colin Reese QC : TCC. 14th December 2005

Costain Ltd v Bechtel Ltd [2005] EWHC 1018

Here Jackson J considered an application for an Interim Injunction against a construction contract certifier, on the grounds of partiality and bad faith. The application arose out of a Gain and Pain (NEC derivative) contract for the Channel Tunnel High-Speed Rail link project, and specifically regarding extension work to St Pancras station, between Costain as contractors; Bechtel as project managers and Union Rails North Ltd as employer. Bechtel's profit was geared to a management fee plus a percentage (+ or -) of the difference between the target cost and the delivered cost. The Project Manager was tasked with certifying allowed and disallowed costs payable to the contractor. Between the 47th and 48th interim payment disallowed costs rose from £1.4M to £5.8M following a briefing by Mr Bassilly, the project manager and Bechtel staff about the need to stay within the target cost of the project. Costain came to the conclusion that Bassilly was acting partially and in bad faith in his contract administration duties. Hence the application for an injunction to abandon the asserted "new" policy.

The court came to the conclusion (it was not trying the facts) that Mr Bassilly was acting in a partial manner to protect the interests of Bechtel, but was not acting unlawfully or in bad faith. The central issue therefore was whether there is a duty on the administrator to act impartially and correspondingly whether it is permissible for him to act in the interests of Bechtel? Furthermore, if there was a duty to act impartially was it appropriate to injunct Bechtel?

The dispute resolution procedure involved the parties meeting to discuss dissatisfactions about certifications which if unsuccessful would give rise to applications for adjudication by either party. The court felt that in the light of this procedure, an injunction would be inappropriate. However, whilst the court was not in a position to give a definitive ruling on the legal rule as to whether or not there was a duty to be impartial, the court felt that there was nothing in the terms of the contract to the effect that the traditional role of certifier, set out in **Sutcliffe v Thackrah** did not apply. If this were not the case, the number of disputes referred to adjudicators as a consequence of partiality would be considerable, which would be illogical. There was an arguable (but difficult) case that Bechtel had acted partially and by implication URNL may have been induced to breach of contract. The parties might chose to refer this matter to a full trial.

His Honour Mr Justice Jackson. 20th May 2005.

CRS v Taylor Young Partnership [2000] EWCA Civ 207

Liability for Fire : Subcontractor not liable for fire under JCT form of contract – prevented consultants from claiming a contribution from the Sub contractor.

CRS v Taylor Young Partnership [2002] UKHL 17

Liability for Fire : Subcontractor not liable for fire under JCT form of contract – prevented consultants from claiming a contribution from the Sub-contract. Appeal Failed.

Cruden Construction Ltd v Commission for the New Towns [1994] 75 BLR 134 : [1996] 46 ConLR 25

Declaration granted that a dispute had not yet crystallised –arbitration invalid. Whilst a demand had been made which had not been satisfied, insufficient detail of the complaint had been provided for the other party to be able to make any decision as to whether or not to pay. Referred to as an authority in a number of the construction adjudication cases canvassing the issue of what is a dispute.

Gilliland QC : QBD. Official referee. 21st December 1994

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David Wilson Homes Ltd v Survey Services Ltd [2001] EWCA Civ 34

Dispute resolution clause required a dispute to be referred to a QC but did not say for what purpose (whether ADR, adjudication or arbitration). CA. held that it was implied that it was for determination of the dispute – so it was an arbitration clause, pursuant to s6 Arbitration Act 1996.

CA. before Simon Brown LJ and Longmore LJ. 18th January 2001

Dew Pitchmastic Plc v. Birse Construction Ltd [2000] EWCH 169

Out of time expert report : Application to court to serve expert report out of time refused.

TCC. HHJ Humphrey Lloyd. 2nd February 2000.

Dinkha Latchin v General Mediterranean Holdings [2003] EWCA Civ 1786

Oral design contract : Architect able to recover fees on a quantum meruit basis even though no written contract or instructions.

CA. Brooke LJ; Sedley LJ; Jacob LJ; 16th December 2003

Dinkha Latchin v General Mediterranean Holdings [2004] EWCA Civ 52

Oral design contract : Architect able to recover fees on a quantum meruit basis even though no written contract or instructions.

Brooke LJ; Sedley LJ; Jacob LJ; 6th February 2004

Drake and Scull Engineering Ltd v McLaughlin and Harvey plc (1993) 60 BLR 102

Jurisdiction : Pre HGCRA : Set off dispute. Adjudication pursuant to Cl 23 Dom/1 – adjudicator ordered payment into a trustee stakeholder a/c pending outcome of arbitration. Court granted a mandatory injunction enforcing adjudicator's decision.

His Honour Judge Peter Bowsher. QBD.

E & J Glasgow Ltd v. UGC Estates Ltd [2005] ScotCS CSOH_63

When can terms be implied into a construction contract? In the circumstances, assertions of lack of information leading to variations and delay failed.

Opinion of Lord Eassie. 16 May 2005

Earls Terrace Properties Ltd v Nilsson Design Ltd [2004] EWHC 136

Assessment of damages : Architect questioned applicable interest rate on award and set off a rise in property value, occurring because of delay taken into account.

QBD TCC Before: His Honour Judge Thornton Q.C. 20th February 2004

Elvin Building Services v Peter Noble [2003] EWHC 837 (TCC) : Lawtel AC0104986

Non-payment : Right to suspend works - suspension not a breach of contract. Contractor entitled to payment for value of works done immediately prior to suspension.

TCC. Recorder Akenhead. 3rd April 2003.

Emcor Drake & Scull Ltd v Sir Robert McAlpine Ltd [2004] EWCA Civ 1733

Letters of Intent : McAlpine unsuccessfully appealed against a ruling that a letter of intent accompanying a sub-contract for limited M&E works created an obligation to carry out all the works. Payment for subsequent works held payable as a quantum meruit. Costs incurred procuring an alternative contractor refused.

CA. Peter Gibson LJ; Clarke LJ; Keene LJ. 21st December 2004

Emcor Drake v Robert McAlpine [2004] EWHC 1017

Interpretation of scope of contract.

HHJ Richard Havery. TCC. 7th May 2004

Great Eastern Hotel Company Ltd v John Laing Construction Ltd & Anor [2005] EWHC 181

Examination of performance of a construction management contract.

HHJ David Wilcox. TCC. 24th February 2005

Gurney v Pearson Pension Property Fund [2004] EWHC 1961

Existence of a construction contract a pre-requisite of arbitral jurisdiction

HHJ Richard Seymour. 2nd September 2004

Hackwood Ltd v Areen Design Services Ltd [2005] EWHC 2322 (TCC)

This concerned an application under s72 Arbitration Act 1996 that Hackwood (the employer) was not party to an arbitration agreement. If it was a party, ADS applied for a declaration that by virtue of this application, Hackwood be debarred from taking part in any further arbitral proceedings.

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ADS carried out refurbishment work to Hackwood House, commencing programming work on the basis of a letter of intent which envisage a formal contract on JCT "with contractor's design" 1998 terms. The tender document had contained a program of works. A second letter of intent that referred to JCT resulted in commencement of works, whereby ADS submitted payment applications following the JCT procedure that were duly paid by the employer and otherwise applied for extensions of time and variations. The letter of intent was never replaced with a formal contract. Agreement was never finalised on a range of issues including start and finish date, CDR regulations and arrangements for a temporary roof.

Following issue of final certificate ADS referred a dispute as to extensions of time to an adjudicator. The adjudicator found against ADS. On the basis of the JCT follow on provisions from adjudication ADS then gave notice of CIMAR arbitration, since Art 6A had not been deleted. Hackwood asserted that they were not parties to an arbitration agreement and that the JCT did not apply, relying on the dicta of Lloyd J in **Amec v Whitefriars** [2003] and asserting that where the JCT annex's are not completed there is no finalised contract. ADS countered that Hackwood's position at the adjudication was that the JCT applied and they could not now assert the contrary.

Mr Justice Field held (1) that the 2nd letter of intent was on JCT terms (2) on the facts unlike **Amec v Whitefriars** sufficient terms were agreed to constitute a contract (3) the JCT adjudication / arbitration provisions applied (he also dismissed an assertion that insufficient notice in respect of time or detail had been furnished in order to make a valid appointment of an arbitrator (4) a s72 Arbitration Act 1996 reference does not automatically preclude an applicant from subsequently participating in arbitration where the application fails. Mr Justice Field declined to deal with the asserted adjudication consent estoppel issue because his finding that the JCT terms applied rendered it unnecessary to do so.

Mr Justice Field. TCC. 31st October 2005.

Hadley Design Assoc. Ltd. v City of Westminster [2003] EWHC 1617 (TCC)

Termination Provisions : Dispute as to which terms of a contract prevailed, where contract had been amended on a number of occasions : Had the claimant been paid design fees and was the contract lawfully terminated? Yes to both.
HHJ Richard Seymour. TCC. 9th July 2003

Halki Shipping Corporation v Sopex Oils Ltd [1997] EWCA Civ 3062

Dispute, Meaning of : Non-construction contract – but the principal authority of the meaning of what is a dispute – and relied upon as an authority in most of the adjudication cases where the meaning of a dispute is discussed. Stay of Action : Application to defer to Arbitration under s9 Arbitration Act 1996.

Hirst LJ, Henry LJ, Swinton Thomas LJ : CA. 19th December 1997

Henry Boot Construction Ltd. v Alstom Combined Cycles Ltd. [2005] EWCA Civ 814

When does an action for payment accrue and time start to run for the purposes of limitation - when work is done or on certification? Held : On certification or when the certificate should have been issued. This applies individually to interim payments and to the final account.
Dyson LJ; Thomas LJ. 16th June 2005.

JDM Accord Ltd. v S.S. Environment, Food & Rural Affairs [2004] EWHC 2 (TCC)

Definition of construction operations : application of HGCR because payment provisions did not comply with statutory requirements.
TCC. His Honour Judge Thornton Q.C. 16th January 2004

John Doyle Construction Ltd V Laing Management (Scotland) Ltd [2004] A806/01

Global claims are viable but the claimant must dissect each separate element and prove his case.

Extra Division Inner House Court of Session. Lord MacLean; Lord Johnston; Lord Drummond Young. 11th June 2004

John Doyle v Laing [2002]

Global claims are viable but the claimant must dissect each separate element and prove his case.

Outer House, Court of Session. Lord MacFadyen. 18th April, 2002

Kuenyehia v International Hospitals Group Ltd. [2006] EWCA Civ 21

The claimant had contracted to provide construction contract procurement services to the defendants. Some time later he died. An action was commenced to recover asserted outstanding fees. The claimant's solicitors inquired of the defendant's solicitors whether or not they were empowered to take service on behalf of the defendants. They replied but did not answer this particular question.

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On the last day before limitation would set in the claimant's solicitors served notice by fax and post. The defendant's had not given consent to electronic service. The court at first instance waived strict compliance with the CPR Rules on service, thus keeping the action alive (the postal service arrived too late). The defendants successfully appealed. The CA held that the procedures for service of claim forms set out in CPR must be strictly adhered to. In consequence the limitation time bar kicked in, bringing the action to an end. The court made it clear that this was due to the professional negligence of the claimant's solicitors. Whilst this might be unfair to the claimant, the implication was that their remedy now lies elsewhere. The court was not prepared to save the claimant solicitor from embarrassment.

CA. Waller LJ; Dyson LJ; Neuberger LJ. 25th January 2006.

COMMENT : Cross reference **Scrabster Harbour Trust v Mowlem plc [2006] CSIH 12** and **Peacocks Ltd v Chapman Taylor [2004] EWHC 2898 (TCC) Lawtel AC0108593**. Where the rules on notice and methods of communication are clear, as in the CPR rules, it is essential to comply fully with the rules. In **Scrabster v Mowlem** it was only the imprecise nature of the rules that allowed an exception. This emphasises the importance of construction claims managers being fully conversant, not only with Construction Adjudication, but also the terms of construction contracts, allied adjudication rules and the CPR, particularly where there is a need to engage the legal profession to assist with enforcement proceedings or onward litigation post adjudication.

Lomax Leisure Ltd. v Fabric London Ltd. [2003] EWHC 307 (Ch)

Termination of a construction contract, on grounds of insolvency / liquidation is lawful under terms of construction contract.

Mr Justice Peter Smith. Chancery Div. 26th February 2003.

London Borough of Barking & Deagenham v Terrapin Construction Ltd [2000] EWCA Civ 247

Final Certificates :Pre-1998 JCT Clause 30.8.11 Design & Build : Led to amendments to later contracts : See also Mowlem.

Otton LJ, Buxton LJ, Hooper LJ. 31st July 2000.

Mabey & Johnson Ltd. v Ecclesiastical Insurance Office Plc & Ors [2003] EWHC 1523

Jurisdiction – separate cases : Failures in a bridge prompted revisiting and rectifying design in another : Held Separate contracts so separate causes of action and limitation times.

HHJ Morison. 27th June 2003

Machenair Ltd v Gill & Wilkinson Ltd [2005] EWHC 445

Dispute on Final Account : The underlying factors in this case concerned the disproportionate costs involved in dispute resolution and the attitude of the parties

The dispute concerned a mainly labour only sub-sub-contract with a small portion of supply and fix at the Macaulay Hall refit for Leeds Metropolitan University. In dispute were whose terms applied, whether an extension of time was due or alternatively there was late completions, the valuation of variations and items of counterclaim for alleged defects/damage. The claimant substantially prevailed in his claims and one of four heads of counterclaim was granted. There is nothing remarkable in all of that.

The significance of the case thus lies in the comments of the judge on the conduct of the litigation by the parties. He observed at the outset that the parties had attempted but failed to negotiate a compromise. The court assumes that all reasonable steps were taken, yet whilst mentioning the existence of mediation, there is little reflection on the fact that the defendant was really pushing out the boat on the bulk of the counterclaims, which failed on the basis of absence of causation yet absorbed most of the trial time. The nub of the main issue lay in whether or not A or B's terms applied, a short sharp issue to determine.

Rather the judge concentrated on the absence of a Scott Schedule, missing evidence and experts straying into the territory of legal opinion – typical trial problems as his central remit whilst commending the court as the most appropriate forum for the determination of construction disputes. It is not clear why this is preferable to ADR or indeed to adjudication or arbitration, unless one accepts that judges are of a higher calibre than adjudicators and arbitrators.

Whilst there is some level of dissatisfaction with the quality of adjudicators, it would be wrong to assume that judges are always superior. Most adjudication enforcement actions successfully survive resistance on the grounds of judicial review and breach of due process. A number of first instance judgements have been recently overturned by the Court of Appeal. Clearly, it is desirable that everything possible is done to ensure the highest standards amongst arbitrators and adjudicators, particularly to avoid judicial criticism However,

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the suggestion that they do not have a valuable contribution to make to the settlement of construction disputes is one that should be stoutly resisted.

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.

Medtia v Hamid [2004] EWCA Civ 691

Scott Schedule ignored by judge and global award made. CA set aside the decision.

Pill LJ; Sir William Aldous. 21st May 2004.

Mellowes Archital Ltd v Bell Projects Ltd [1997] EWCA Civ 2491

Abatement and set off under DOM/1. Inter-relationship between set off and abatement : Are they mutually exclusive? Butler-Sloss LJ; Hobhouse LJ; Buxton LJ.CA. 15th October 1997

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.

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 and 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.

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

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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 (Minister 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

Mirant-Asia Pacific v OAPIL [2004] EWHC 1750

Negligent design of foundations of powerstation.

HHJ Toulmin. 21st July 2004

Morrison v AWG Group Ltd [2006] EWCA Civ 6

This concerned an appeal against the decision of Mr. Justice Evans-Lombe. Chancery Division who had dismissed an application by the defendant to recuse himself from the trial on the grounds of conflict of interests and perception of bias. The trial judge had admitted that he would have difficulty ruling on the character of a potential witness but had then decided that no prejudice would arise since the claimant had chosen to call other members of the board instead. The Court of Appeal held that the option of the claimant calling alternative witnesses to save the judge embarrassment was prejudicial to the defendants who might wish to cross question that witness. Accordingly the judge should recuse himself.

CA before Mummery LJ, Latham LJ, Carnwath LJ. 20th January 2006.

Mowlem v Stena [2004] EWHC 2206

Letters of Intent revisited.

HHJ Richard Seymour. 6th October 2004

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 subcontractor billed then it would have worked. In the circumstances the claim was put down to trail to determine a quantum meruit.

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

Newman Shopfitters Ltd v. M.J. Gleeson Group Plc [2003] ScotSC 17

Want of prosecution : Case cited for want of prosecution – originally destined for arbitration – claimants delayed excessively and lost right of action.

Sheriff Principal Iain MacPhail QC 4th March 2003.

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Nolan Davis Ltd v Steven P Catton (No2) [2001] EWHC HT 99 267 (TCC)

A compromise agreement and consent order were incorporated into a Tomlin Order on the 2nd May 2000, whereby the judgment of the 22nd February 2000 was set aside. Essentially the schedule to this agreement acknowledged that the contracts were in fact made between Nolan Davis Ltd and Hazel Green Village Management Ltd and that sums were due to Nolan Davis Ltd. This hearing concerned applications to rectify the agreement particularly regarding its impact upon VAT payments. The applications failed.

His Honour Judge David Wilcox. TCC. 6th March 2001

Northern Regional Health Authority v Derek Crouch Construction Co Ltd [1984] 1 Q.B. 644

Arbitration clause gave arbitrator power to open up review & revise architects certificates. Held : power confined to arbitrator on whom conferred : not available to a court. Application to stay arbitration refused since arbitration was the only way to challenge an architect's certificates.

CA before Donaldson M.R. Dunn LJ and Browne-Wilkinson LJ. 17th February 1984.

Comment

- 1) **Beaufort v Gilbert-Ash** overturned **NRHA v Crouch** so that today a judge can also review an architect's certificate.
- 2) The HGCRA now gives adjudicators the power to open up and revise certificates.

Odebrecht Oil and Gas v North Sea Production Company Ltd [1999] EWHC TCC

Double Jeopardy Expert empowered to estimate damages due under bonds for breach of contract – with power to subsequently revise and amend. Court examined the circumstances when revision is permitted and when it amounts to double jeopardy : same principles apply to adjudicators regarding issues previously determined by adjudication e.g. interim / final accounts. His Honour Judge Dyson. TCC. 10th July 1999.

PC Harrington Contractors Ltd v Co Partnership Developments Ltd [1998] EWCA Civ 605

Release of Retention : Set off. Stuart-Smith LJ; Morritt LJ; Walker LJ Robert. 2nd April 1998

PC Partitions v Canary Wharf [2004] EWHC 1766

Sub-contractor in dispute with main contractor struck a deal with the developer. Interpretation of and impact of that agreement. HHJ Richard Seymour. 28th July 2004

Peacocks Ltd v Chapman Taylor [2004] EWHC 2898 (TCC) Lawtel AC0108593

The defendant asserted that claims / writs had been sent to the wrong address and that when eventually served at the right address, they were outside the statutory limitation period. In the circumstances court held, exercising its discretion, that there had been effective service within time.

His Honour Judge Thornton QC. TCC. 5th November 2004

COMMENT : Similar issues regarding effective service could apply equally to adjudication and arbitration - and similarly the same might apply in respect of statutory limitation periods.

Peakwell Management Ltd v Globalsantafe Drilling UK Ltd [2006] S.Ct A2661/05

A contract for the hire of a drilling rig contained payment provisions in very similar terms to those in use in the construction industry, in particular it provided for stage payments, by application, subject to a withholding provision.

An application was duly made and a withholding notice issued. The applicant, nonetheless applied to the court to enforce payment on the application, substantially basing its case on the balance of convenience, in particular because the payment was supported by a documentary credit which was due to expire.

The sheriff at first instance and the Sheriff Principal on appeal held that the issue of a withholding notice under the terms of the contract resulted in a dispute crystallising : consequently, in the absence of resolution of the dispute no sums became due - so no action for summary enforcement of sums allegedly due under an interim payment scheme could lie.

Sheriff Principal Sir Stephen S T Young Bt QC. 7th February 2006

Comment : The facts of this case illustrate the strengths of the construction adjudication process and provide compelling grounds for the extension of the process to other industries, in particular satellite construction industries and some of the activities currently exempted from the HGCRA, where cash flow is of prime importance. Once the dispute had crystallised an adjudication procedure could have provided a rapid

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determination of the dispute as to whether or not monies were due and which rates of remuneration applied.

Pearce v. Ove Arup Partnership Ltd & Ors [2001] EWHC Ch 455

Architect : Intellectual Property : who owned the copyright in an architectural design - had a leading architect stolen the design from someone else ? Held : No in the circumstances.

Mr Justice Jacob. Chancery Div. 2nd November 2001

Percy (G) Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep. 25

Contract formation : The court had to decide whether or not a construction contract had been concluded. The court concluded that a contract had been concluded, either as confirmed by a series of communications or at the very least on the basis of **Brogden v Metropolitan Railway** (1877) 2 A.C. 666 implied contract by performance. cf what is a "written contract" for the purposes of adjudication and arbitration.

CA. before Neill LJ, Gibson LJ and Steyn LJ : 20th July 1992.

Phillip Small v Andrew Martin [2005] EWHC 2969 (TCC)

Contractor ran into cash flow problems with a domestic contract, having seriously undervalued the works. This led to a bitter dispute between the parties following disruption to works and requests for additional payments. Eventually the contractor withdrew from site and the owner refused re-entry to complete work and consequent litigation. The paperwork presented to the court by both parties was very poor to non-existent and much of the trial was taken up with oral proofs.

The owner successfully recovered damages. However, the owner's behaviour, together with that of an associate whilst trying to pressurise the builder into paying compensation amounted to criminal harassment, for which the court made a substantial award. One is left with the distinct impression that adjudication, mediation or early litigation would have been preferable.

His Honour Judge John Toulmin CMG QC : TCC. 21st December 2005.

Pitchmastic (Dew) Plc v. Birse Construction Ltd [2000] EWCH 169 : 1998 TCC 590 02.02.2000

Out of time expert report :(Humphrey Lloyd): Application to court to serve expert report out of time refused.

TCC. HHJ Humphrey Lloyd. 2nd February 2000.

Pitchmastic v Birse No1 [2000] 19981 TCC 159Q 19.05.2000

Retention DOM /2 :(Dyson): Release of retentions and set off : Making good certificates. TCC.

Dyson J; 19th May 2000

Pitchmastic v Birse No2 [2000] 19981 TCC 159Q

Calderbank offers DOM/2 (Dyson J): Application on without prejudice offers and Calderbank payments in.

Mr Justice Dyson. TCC. 19th May 2000

Purac Ltd v. Byzak Ltd [2004] ScotCS 247

This concerned an action for immediate release of retention monies. Release as between members of consortium following certification and payment made by client was confirmed by **VA Tech Wabag UK Ltd v Morgan Est (Scotland) Ltd** where there was a right to immediate distribution. However, **Va Tech** was here distinguished. Summary enforcement was resisted on grounds of arguable issue of defects.

Per Lord Drummond *"Before I leave VA Tech Wabag, I should mention one statement in the case that I do not now think is correct. At page 1296H I stated that, in an application under section 47(2), payment of a liquid debt that has fallen due should generally be enforced without regard to any illiquid claims or rights of retention or set off or counterclaim based on illiquid claims that may be asserted to resist such payment. I now think that that is too widely expressed, and should not apply to rights of retention. The critical point about a right of retention is that it is based on the mutuality of contractual obligations, and is thus an essential part of the contract that the pursuer seeks to enforce. Any right of the pursuer to enforce the contract must accordingly be subject to that right of retention. For this purpose I do not think that it matters that the sum claimed by the pursuer is a liquid debt, whereas the claim by the defender on which retention is based is illiquid in nature. It is clearly established that the right of retention can be based on an illiquid claim: Gloag, op. cit., 623-627; McBryde, op. cit., 20-64. It should not make any difference to this rule that the pursuer is seeking enforcement of a debt by means of an order under section 47(2); that subsection is procedural in nature, and should not affect the parties' substantive rights."*

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

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Quarmby Electrical Ltd. v Trant (t/a Trant Construction) [2005] EWHC 608 (TCC)

Novation : Sub-contractor secured 4 contracts : Went into liquidation and on same day contracts novated.
Work carried out. Payment refused on grounds of no contract. Held Novation : Valid contracts.

Mr Justice Jackson. TCC. 17th March 2005.

RJBL Design Ltd v Hill Commercial Developments Ltd [(2005) Ch.Div. LAWTEL AC9100767

Petition to stop publication. Recorder held debt not denied and refused petition. Held : There was a dispute as to whether the architect was contracted to the petitioner in the first place, for the purposes of an application for winding up. This issue was not addressed. Decision set aside. Why petition for bankruptcy rather than adjudicate / litigate?
His Honour Judge Mann. Chancery Division. 22nd June 2005.

Robert Cunningham v Collett & Farmer (a firm) [2006] EWHC 148 (TCC) : Bailli

This report is concerned with an interim costs hearing. The court provides a detailed analysis of the procedure to be applied when assessing costs thrown away. *Lownds v Home Office* [2002] EWCA Civ 365; and *Bryen & Langley Ltd v Martin Boston* [2005] EWCA Civ 973 applied. A two stage process should be adopted. First, were costs disproportionate and second, assess what would be reasonable, rather than simply comparing the costs summaries of the parties.

The claimant property developer cancelled a construction contract, dismissing the contractor and the architect. The claimant was previously ordered by an adjudicator to pay outstanding fees to the architect and sought to recover his losses by commencing a professional action to recover £0.5M. Costs (the subject of this hearing) were thrown away by delays caused because the claimant's pleadings were not in good order. The claimant's first legal team asked for a postponement because the claimant might be a patient under the Mental Health Act. The claimant refuted this and appointed a replacement legal team. An agreement was brokered whereby the first legal team agreed to pay the costs thrown away by the applications for postponement. This trial was therefore concerned with the assessment of those costs, and the costs of this assessment. The court concluded that the claimant was responsible for most of the problems related to the conduct of the trial to date, noting that the final figure that would be claimed for negligence once the pleadings were put in good order, was likely to be considerably less than appeared at that time.

The trial of the negligence action is pending, so no comment can be made at the current time.

Coulson QC HHJ Peter. TCC. 9th February 2006.

Ron Jones (Burton-on-Trent) Ltd v Mrs JS & Mrs JD Hall [1998] EWCH 328

Double Jeopardy : Attempt to keep items out of jurisdiction of arbitrator and submit them to a separate arbitration : Held : Not permitted in the circumstance of the case : First arbitrator's decision final in ruling out the items.
His Honour Judge Humphrey LLoyd QC. 7th April 1998.

Rhodia Chirex Ltd v Laker Vent Eng. Ltd [2003] EWCA Civ 1859

Expert Determinator : Role of the Expert Determinator under the I.Chem E Contract.

HHJ Mackay before Auld LJ, Hale LJ, Dyson LJ : 18th December 2003

Ruttle Plant Hire Ltd v S.S. for Environment, Food & Rural Affairs [2004] EWHC 2152 (TCC)

Construction Contract : Meaning of : Farm infrastructure covered by Act : Accordingly HGCRRA payment provisions applied. In the circumstances - all issues of payment for construction work settled. Other issues distinct and not subject to the HGCRRA. Separate part of contract - so easy to distinguish.

HHJ Thornton. TCC. 29th September 2004.

S & W Process Engineering Ltd v Cauldron Foods Ltd [2005] EWHC 153

Formation of a contract - oral and written terms.

HHJ Peter Coulson. 28th January 2005

Sahib Foods Ltd v Paskin Kyriakides Sands [2003] EWHC 142 TCC

Architects liability for fire : Whilst a fire was caused by the contractor's negligence, it was the poor design by the architect which led to it spreading further.
TCC. HHJ Bowsher. 3rd March 2003

Sahib Foods Ltd v Paskin Kyriakides Sands [2003] EWCA Civ 1832

Architects liability for fire : Whilst a fire was caused by the contractor's negligence, it was the poor design by the architect which led to it spreading further.
CA. Ward LJ; Potter LJ; Clarke LJ. 19th December 2003

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Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC)

A construction contract for a substantial housing development in Central London envisage a tripartite relationship between developer (Defendant) Contractor (Claimant) and Project manager/certifier. MACE was appointed as project manager by the developer but this relationship came to an end and the developer sought to appoint itself as Project Manager. An initial point fell for decision in this case, namely as to whether or not an employer can appoint itself as Construction Manager / Contract Administrator / certifier? In a very detailed and highly structured analysis, the court held that it could not. Whilst an employee can be given that role - the employer himself cannot fulfil that role - there must be a degree of independence/professional separation. His Honour held at para 45 that :-

SJH had no power to appoint itself as construction manager. I reach this conclusion for nine reasons:

- (1) *It is such an unusual state of affairs for the employer himself to be the certifier and decision-maker that this can only be achieved by an express term. In the present case there is no express term authorising this, as there was in **Balfour Beatty**. The general words at the end of Part E of Appendix 1 to the trade contract are not sufficient.*
- (2) *The whole structure of the trade contract is built upon the premise that the employer and the construction manager are separate entities. Endless anomalies arise if the employer and the construction manager become one and the same. For example, under clause 1.6 the employer issues certificates to himself. Under clause 21 the scheme for dispute resolution becomes distorted. The employer will, by definition, be in agreement with his own decisions. The only party which might feel the need to challenge certificates or decisions would be the contractor.*
- (3) *The construction manager is under a legal duty to perform his decision-making function in a manner which is independent, impartial, fair and honest. In other words, he must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer: see Part 4 above. Whilst I reject Mr. Hughes' submission that the employer is incapable of performing this task, I do consider that this task is more difficult for the employer than it is for a professional agent who is retained by the employer. Furthermore, this task is more difficult for the employer as an entity than it is for a specific individual who is employed by the employer. A senior and professional person within an organisation can conscientiously put his employer's interests on one side and make an independent decision. See **Perini**. It is more difficult for the organisation itself to make a decision which is contrary to its own interests. The employer could of course ask a named professional employee to make the relevant decision, but the employer would still have to go on and adopt that decision as its own.*
- (4) *In the course of argument Mr. Dennison conceded that the words in Part E of Appendix 1 "**any further or other person**" cannot mean literally any other person. The term must be limited to persons who have the requisite competence. When I asked whether this limitation was express or implied, Mr. Dennison inclined to the view that the limitation was express but he wished to reserve his position. It seems to me that Mr. Dennison's concession was an entirely proper one. The phrase "**any further or other person**" cannot be read literally, it must be read subject to at least some limitation.*
- (5) *Mr. Dennison is correct that, in one sense, both the employer and the contractor have an interest in securing that the construction manager makes correct decisions and issues correct certificates. There are dicta in the authorities to this effect. On the other hand, this argument of identity of interest cannot be pressed too far. Anyone who has practised or sat in this court will have seen many cases where the stance of both employer and contractor is driven by their own commercial interests rather than by any more lofty ideal. Property developers are in business to make a profit. They do not always welcome large awards of loss and expense to the contractor, however well merited such awards may be.*
- (6) *Under the trade contract in this case, and indeed under most standard forms of construction contract, the contractor has two separate protections which reduce the likelihood of under-assessment or under-certification occurring. First, the assessment or certification is made by an identified professional person or firm who (despite being employed and paid by the employer) is nevertheless separate from the employer. Secondly, the decision-maker has a duty to act in a manner which is independent, impartial, fair and honest. If the employer suddenly becomes the assessor and certifier, the contractor loses one layer of protection. As Mr. Hughes forcefully put it in argument, a contract in which the employer acts as construction manager is very different from the contract which Scheldebouw priced at tender stage.*
- (7) *The involvement of other professionals in the construction manager's decisions is not a sufficient protection for the contractor. Neither the architect nor the cost consultant can compel the construction manager to issue a certificate which is unacceptable to him. In the case of extensions of time no certificate is required. The construction manager*

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must consult the architect, but he need not accept the architect's advice. Extensions of time are, of course, relevant not only to damages for delay but also to loss and expense.

- (8) *So far as my researches go, every case in which the certifier was a direct employee of the employer is a case in which this circumstance was known to the contractor at the outset. The contractor went into such a contract with his eyes open. The seventh edition of **Keating on Building Contracts** (edited by Vivian Ramsey Q.C. and Stephen Furst Q.C.) indicates that the contractor's knowledge may be an essential element: see the second paragraph on p. 147. The one reported case where this aspect of the facts is not entirely clear is **Panamena**. However, **Panamena** proceeded on the basis that the repairers had expressly consent to Dr. Telfer acting as certifier: see the judgment of Lord Justice Scott at p. 123.*
- (9) *As Mr. Dennison conceded in the course of argument, if his interpretation of Appendix 1, Part E is correct, the employer is entitled at any time to dismiss the entire professional team and appoint himself to act in their place. The employer would thus become the construction manager, the architect and the costs consultant. In response to my suggestion that this situation could not have been intended by the parties, Mr. Dennison characterised this as "the Armageddon scenario". The analogy with chapter 16 of the Book of Revelation is appropriate. The contract would be utterly transformed from that which Scheldebouw had priced. This possible scenario is a further reason why I reject the broad interpretation of Part E of Appendix 1 for which Mr. Dennison contends."*

The following cases amongst others are referred to in the judgement : **Frederick Leyland & Co. Ltd. v. Compania Panamena Europea Navigacion Limitada** [1943] 76 Ll.L.Rep. 113. **Panamena Europea Navigacion Compania Limitada v. Frederick Leyland & Co.** [1947] A.C. 428. **Perini Corporation v. Commonwealth of Australia** [1969] 12 B.L.R. 82, **London Borough of Hounslow v. Twickenham Garden Developments Ltd.** [1971] 1 Ch. 233, **Sutcliffe v. Thackrah** [1974] A.C. 727, **Beaufort Developments Ltd. v. Gilbert Ash NI Ltd.** [1999] AC 266, **Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd.** [1984] Q.B. 644, In **Amec Civil Engineering Ltd. v. Secretary of State for Transport** [2005] E.W.C.A.Civ. 291; **Costain Ltd. v. Bechtel Ltd.** [2005] EWHC 1018 (TCC). **Investors Compensation Scheme Ltd. v. West Bromwich Building Society** [1998] 1 WLR 896 at 912 to 913, and **BCCI v. Ali** [2001] UKHL 8; **Lubenham Fidelities and Investments Co. Ltd. v. South Pembrokeshire District Council** [1986] 33 B.L.R. 39, **Balfour Beatty Civil Engineering Ltd. v. Docklands Light Railway Ltd.** [1996] 78 B.L.R. 42.

Mr Justice Jackson. TCC. 16th January 2006.

Comment : similarly, party to a dispute or difference could not be an adjudicator/arbitrator in his own cause.

Scottish & Newcastle v GD Construction [2003] HL[2003] EWCA Civ 16

Liability for Fire : Subcontractor not liable for fire under IFC Contract – covered by joint insurance – even if caused by negligence of subcontractor. CA. Ward LJ. Longmore LJ; Mr Justice Aitkens. 22nd January 2003

Shawton Engineering Ltd v DGP International Ltd (t/a Design Group Partnership) [2005] EWCA Civ 1359

Time at large. CA. May, LJ, Jacob LJ, Lloyd LJ. 18th November 2005

Six Continents Retail Ltd v Carford Catering Ltd [2003] EWCA Civ 1790

Liability for Fire : Restaurant fire – installation of oven – manufacturer recommended a steel plate – owner advised but ignored – CA held contractor still liable – expertise.

Sir Andrew Morritt; Buxton LJ; Laws LJ; 5th November 2003

Skanska v Egger [2004] EWCH 1748

Final judgement on quantum in respect of disposal of spoil.

Snookes v Jani-King (GB) Ltd [2006] EWHC 289 (QB) : Bailii

A franchise contract (non-construction - non HGCRA) specified that claims be brought before a competent court in London. The claim was commenced in Swansea District Registry. The court held that Swansea did not have jurisdiction. The claim could not be transferred. The claim had to be withdrawn and recommenced in London. The court noted however that had the claim been commenced in London, a claim could then be transferred at the discretion of the court.

The Honourable Mr Justice Silber. QBD. Swansea District Registry. 23rd February 2006.

COMMENT : Regional jurisdiction before the UK courts is seldom an issue, but where a contract specifies the court it is important that a claimant files before the correct court, particularly where questions of limitation and time bar are concerned. There are also cost implications for getting it wrong. This is a

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potential problem for those involved in adjudication enforcement action across jurisdictions – in particular whether the appropriate court is in England and Wales or Scotland.

Stephen Donald Architects v Christopher King [2003] EWHC 1867 : [2004] EWCA Civ 52

Oral design contract : Architect unable to recover fees on a quantum meruit basis – court held that as part of a failed joint venture he has to suffer his own losses. HHJ Richard Seymour. 30th July 2003

Stanley Cole (Wainfleet) Ltd. v Sheridan [2003] EWCA Civ 1046

Legal expertise of arbiter : Can an arbiter rely on a precedent not put to the parties? Yes providing it does not lead to severe injustice. (Employment tribunal case - but equally relevant to adjudicators and arbitrators).

CA before Lord Justices Ward, Buxton and Mance. 25th July 2003.

Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd [2004] EWHC 3319 (TCC)

Unsuccessful appeal against arbitrator's finding that in the circumstances a provision for LADs was inoperable. HHJ David Wilcox. 20th December 2004.

Tesco Stores Ltd. v Costain Construction Ltd [2003] EWHC 1487

Liability for Fire : Oral Contract for work on supermarket : Implied term as the good workmanlike manner and fitness for purpose : Architect could rely on contractor.

Twintec Ltd v GSE Building and Civil Engineering Ltd [2003] EWHC 605 (TCC)

A right to retention will not be implied : there must be an express provision in a contract. An absence of a retention provision will not render a contract void for lack of essential terms.

Kirkham. HHJ Frances. 24th March 2003.

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. 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. Motion to recall denied. Interim interdict affirmed. Further, reinforced by the purpose of the HGCRA adjudication and payment procedures aimed at ensuring cash flow, the court ordered Morgan to release funds. Lord Dummond Young. Outer House, Court of Session. 30th May 2002.

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

VHE Construction Plc v. Alfred McAlpine Construction Ltd [1997] EWHC TCC 370

Existence of a contract : Novation : Letters of Intent : Yes : Blue Form. Terms determined by construction of agreement - not through conflicting evidence. HHJ Peter Bowsher. 14th April 1997.

X Ltd v Y Ltd [2005] EWHC 769

It fell to Mr Justice Jackson to determine which, if any, of three points of claim fell within the jurisdictional scope of an arbitration agreement. The clause was in the following terms “*Arbitration (English law),...[A]ll disputes, differences or questions between the parties to the Contract with respect to any matter or thing arising out of or relating to the Contract...shall be referred to the arbitration*” Jackson J set down four propositions :-

NADR CONSTRUCTION CASES SUMMARIES

- (1) The question whether a dispute falls within the arbitrator's jurisdiction turns upon the construction of the relevant arbitration clause. This is an objective exercise of contractual interpretation.
- (2) Previous decisions about the proper interpretation of different arbitration clauses may be persuasive but they do not constitute binding precedents.
- (3) There have been cases where courts have held that a dispute concerning one contract falls within the ambit of the arbitration clause of another earlier contract. Each of these decisions turns upon its own particular facts.
- (4) If an arbitration clause is drafted in appropriate terms, it may encompass a claim for contribution under the Civil Liability (Contribution) Act 1978

X and Y were parties to two separate contracts after responsibility was transferred from Z (the original contracting party) to Y. X asserted that Y had breached both contracts and sought to have a matter concerning contract one dealt with in contract two. The arbitral tribunal held that under the terms of the arbitration agreement, their jurisdiction did not extend to the first contract, which was not sufficiently related to contract 2 for it to amount to a matter arising out of or relating to contract 2. The court agreed.

Yorkshire Water Services v Taylor Woodrow [2004] EWHC 1660 (TCC)

Consideration of terms of IChemE Red Book 3rd Edition General Conditions of Contract.

Yorkshire Water Services Ltd. v Taylor Woodrow Construction Northern Ltd [2005] EWCA Civ 894

Consideration of terms of IChemE Red Book 3rd Edition General Conditions of Contract. Appeal failed.

May LJ; Parker LJ Jonathan; Gibson Sir Peter. 19th July 2005.