

ADJUDICATION: RECENT DEVELOPMENTS

by Darryl Royce, Atkin Chambers

Contracts in Writing

THE BACKGROUND

Section 107 of the Housing Grants, Construction and Regeneration Act 1996 will not engage when the written terms are incomplete in that they do not cover key obligations, or where the written terms are incomplete and additional contractual terms have been agreed orally; similarly, if the written terms are complete, but the works have been subject to significant oral variation¹. The Act, like the Arbitration Act 1996, uses the words 'by reference to terms that are in writing', not 'by reference to a previous agreement that is in writing' and does not provide for adjudication in relation to an alleged fundamental variation of a construction contract made orally and without writing². Any contention to the contrary is directly inconsistent with s. 107(1) of the Act. The existence of a construction contract usually requires agreement as to parties, workscope, price and time. Where there is no agreement as to time, so that the best that can be said is that there will be an implied term to the effect that the work will be concluded within a reasonable time, the agreement as to price is limited to the costs reasonably incurred, there is uncertainty over the identity of the parties, and the workscope is based on subsequent orders, instructions and the like which might, or might not, have been reduced to writing, it is not possible to say that all the terms, or even all the material, are set out in writing³.

Whilst adjudicators (and indeed judges) should be robust in determining whether trivial matters said to have been agreed only orally between the parties can prevent what would otherwise be a written contract for the purpose of Section 107 being a written contract, the exercise of determining what is trivial must be an objective one in relation to the particular contract and parties concerned. What may be 'trivial' in one contract may not be in another. Thus, for example, an oral agreement on a million pound project as to which of two mildly differing shades of light blue paint might be used may be trivial on one development but not on another. It is always necessary to determine whether a so-called agreement made orally was in reality expected or intended to be binding as between the parties. Thus, the parties having discussed and agreed something orally might later have reduced their agreement into writing in such a way as to supersede the earlier oral agreement. A later oral agreement may not be binding; for instance, it may lack consideration or otherwise may not be intended to be binding⁴.

As to whether the existence of implied terms converts an otherwise written construction contract into one that is no longer a written contract for the purposes of Section 107, it was manifestly not the intention of Parliament to exclude from the jurisdiction of an adjudicator an agreement solely because it contains implied terms⁵. This view is to be preferred to one that the mischief which Parliament was anxious to avoid could arise in an acute form if it were suggested that a contract, not otherwise complete, could be completed after it had been executed by the implication of terms which were said to represent the actual, but unexpressed, intention of the parties⁶. Terms are implied into contracts by operation of law. A number of different tests are propounded for the implication of terms. Thus, some terms are in effect implied into contracts by statute. Others are implied into contracts to give them 'business efficacy' or in effect to make the contracts work. There are other requirements said to exist such as reasonableness of implied terms. Terms are implied into contracts as a matter of law, albeit that some terms may be implied in the context of a factual relationship or even a factual history which exists between the parties. There is no reason to distinguish between different implied terms in the context of Section 107. Thus, the implication of any terms does not render what would otherwise be a written contract under that section into something not covered by Part II of the Act⁷.

The remaining provisions of s.107 identify other routes by which agreements can be made in writing for the purposes of Part II of the Act. The first is that of the recording by any means⁸ of an agreement made otherwise than in writing, either by one of the parties, or by a third party, with the authority of the parties to the agreement⁹. The second is that of one party alleging the existence of an agreement otherwise than in writing in an exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings, which is not denied by the other party in its response, resulting in an agreement in writing to the effect alleged¹⁰. On one reading of s. 107(5), if one party to an adjudication alleges the existence of an oral agreement and the other does not deny the existence of an oral agreement, then there is an agreement in writing 'to the effect alleged', that is, in the terms alleged by the claimant, even though the other party hotly denies that the agreement was in the terms alleged, and Parliament cannot have intended such an unjust result. It is permissible, following *Pepper v. Hart*¹¹, to look at Hansard. It appears from the Hansard Report of the proceedings of the House of Lords for 23rd July 1996 that s. 107(5) originally contained no reference to adjudication proceedings. The House of Lords accepted a Commons amendment that after the word 'submissions' there should be inserted the words 'in adjudication proceedings or'. If section 107(5) is read without the words 'in adjudication proceedings or', it is clear that the intention of Parliament was that a contract should be treated as a contract in writing if in arbitral or litigation proceedings *before* the adjudication proceedings in question an oral contract had been alleged and admitted. The words 'and not denied' should also be read as meaning that the alleged terms of the contract were not denied. By adding the words 'in adjudication proceedings or', Parliament intended to add a reference to *other preceding* adjudication proceedings. There was no intention by Parliament to provide that submissions made by a party to an unauthorised adjudication should give to the supposed adjudicator a jurisdiction which he did not have when he was appointed. Read in that way s. 107(5) has a sensible and practical intention and purpose. Disputes as to terms, express and implied, of oral construction agreements are surprisingly common and not readily susceptible of resolution by a summary procedure such as adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by adjudicators under the Act, but if in any case such room for dispute has been removed by previous formal and binding legal submissions, then the adjudicator has jurisdiction¹². However, this reasoning has been doubted. The alternative view is that the *Pepper v. Hart* approach should primarily be adopted if there is some ambiguity and there is no ambiguity in the wording: it can apply to any adjudication proceedings before, after, concurrent with or the same as those under review by the court. If there is no denial of an oral variation, the exchange of submission and response constitutes for the purposes of the Act an agreement in writing¹³.

NEW CASE

In ***Adonis Construction v. O'Keefe Soil Remediation*** [2009] EWHC 2047 (TCC), O'Keefe received on 25th October 2007 a tender enquiry from Adonis in respect of soil stabilisation works ("the Works") at Westcott Venture Park in Aylesbury ("the Site"). On 2nd November 2007, O'Keefe submitted a quotation for the Works. The quotation stated:

"suitability testing must be carried out prior to commencement of our works to prove the suitability of the site soils for stabilisation ..."

and that

"the level or amount of any liquidated or consequential damages are to be agreed prior to any contractual commitment."

Adonis did not respond to the quotation. By an email dated 28th February 2008, Mr McQuade of Adonis informed Mr Horsley of O'Keefe that Adonis had not responded to the quotation because they intended to award the Works to another sub-contractor. However, the other sub-contractor had been unable to secure PI insurance and Adonis wished to explore the possibility of O'Keefe undertaking the

Works. In the email, Mr McQuade provided the results of tests on the candidate material for stabilisation. The tests had been carried out to establish the sulphate level/swell.

By an email dated 29th February 2008, Mr Horsley confirmed to Mr McQuade that O'Keefe would be prepared to carry out the Works at the rate previously quoted and could mobilise in the week commencing 17th March 2008. On 3rd March 2008, Mr Horsley attended a pre-start meeting at the Site with representatives of Adonis. Mr McQuade was not present. At the meeting, Adonis requested that the Works be commenced on 6th March 2008. The minutes (a) described the work, (b) stated that the form of contract would be DOM 2, with amendments 1 – 8, (c) specified a contract period of 1 week and (d) expressed the contact sum of £ 38,710.80 as a lump sum.

After the pre-start meeting, by an e-mail dated 3rd March 2008, Mr Horsley confirmed to Mr McQuade that O'Keefe could mobilise on 6th March if Adonis was able to provide a copy of the sub-contract order with letter of intent. Attached to the email was an amended quotation for the Works, also dated 3rd March 2008. The quotation again contained the terms set out above. By an e-mail of 4th March Mr Horsley sent to Adonis inter alia a method statement and trusted that what he had sent was all that was necessary for Adonis to place an order. By an attachment to a later email dated 4th March 2008 Mr McQuade provided Mr Horsley with the letter of intent. The letter of intent said:

"We confirm our intention to enter into a sub-contract with you in accordance with your sub-contractors obligations contained within the following documentation ..."

Numerous documents were then specified, some of which, including the Minutes of the pre-start meeting, were to follow. The letter continued;

"The order for Soil stabilisation and associated works is to be for the fixed price of £ 38,710.8 Net, and will be Lump Sum strictly in accordance with the conditions within the JCT 98 – SFBC WITH CONTRACTORS DESIGN subcontract form DOM 2. You are to carry out these works in 1 Weeks, commencing 06/09/2008. We require receipt of your Method Statement and Risk Assessment for above named project no less than four weeks prior to commencement."

O'Keefe was invited to take the letter as *"...an instruction to proceed procurement [sic] of all necessary labour and materials to enable you to meet the on site date..."* The letter further provided:

"In the unlikely event that the sub contract does not take place you will be entitled to claim for substantiated costs up to the date of abortion. No loss of profit or consequential loss will be allowed."

With the letter of intent, Mr McQuade also provided a copy of O'Keefe's amended quotation for the Works, dated 3rd March 2008. This copy contained manuscript additions. Next to the typed words in paragraph 1.2 of Appendix 1 *"Rates are based with the limited soil information provided, we will be required to carry out on site suitability testing to test for moisture content, sulphates and general site condition 4 weeks before commencement on site..."* someone, probably from Adonis, had written *"Testing on-going from 3/3/08"*.

By a further email dated 4th March 2008, Mr McQuade provided Mr Horsley with a copy of the minutes of the pre-start meeting, which had been prepared by Adonis. Mr Horsley was asked to sign and return a copy *"which will enable us to raise our official order"*. On 4th March 2008, Mr Horsley returned the signed minutes by way of a scanned fax attached to an email. The fax cover sheet stated:

"We look forward to receiving your formal order..."

Within our quotation you will find we'd requested 14 day payment terms, which I hope will not be a problem for you. We've also carried out suitability testing on the material..."

However, as we discussed the results of these will not be available until after we've completed our works.

I confirm the plant and labour will arrive on Thursday as agreed."

In an email dated 5th March 2009, Mr McQuade stated: *"Please find attached a copy of our draft subcontract order for the above contract. The official order will be signed off and issued in the post in due course."* Attached to the email was a copy of the draft sub-contract order. This stated:

“DRAFT SUB-CONTRACT ORDER [No order number]

The appended attestation page is to be duly signed Under [sic] seal and returned to the undersigned within 7 days.”

The draft order incorporated the DOM 2 conditions with amendments and, also, as Appendix D, the signed minutes of the pre-start meeting of 3rd March 2008. These minutes were said to “take precedence” over conflicting terms in the draft order. Appendix B specified a contract sum of £ 38,710.80 and “Execution - As a deed”. It also incorporated the adjudication clause from the DOM conditions.

There were two further bespoke conditions which Adonis sought to introduce. The first was a provision that:

“All costs in relation to adjudication to be borne by the Sub-Contractor.”

(“the costs clause”).

The second was a manuscript addition (the “risk clause”) to Mr Horsley’s fax of 4th March 2008, which had transmitted the signed version of the minutes. To Mr Horsley’s note that O’Keefe’s suitability test results would not be available until after the Works were complete, Mr McQuade added :

*“Note: In the event that the test results are not compatible with the treatment carried out then any remedial works and all associated costs, **including consequential costs**, will be the sole responsibility of O’Keefe Soil Remediation Ltd – as agreed L. Horsley/S. McQuade 5.3.08.”* [Emphasis added]

There was a conversation between Mr Horsley and Mr McQuade on 5th March which, according to Mr Horsley, was inaccurately recorded in the risk clause. According to him what he said to Mr McQuade was that if the final results of the sample taken by O’Keefe showed that a different treatment was needed O’Keefe would undertake any additional treatment at its expense but it was not agreed that they would be responsible for consequential losses.

O’Keefe contended that Mr McQuade’s email of 5th March 2008 and the attached draft order were not in fact received by Mr Horsley until 7th March 2008. The date of receipt had been identified by O’Keefe’s external IT support company and was visible from a screen print of the results of a search of Mr Horsley’s email account. The draft order was never signed and returned by O’Keefe. On 6th March 2008, O’Keefe commenced the Works by mobilising. On 7th March 2008, O’Keefe commenced work at the site. The Works were completed on or around 11th March 2008.

On 22nd April 2008, Adonis sent O’Keefe a numbered and dated sub-contract order in respect of the Works. The order provided

“The appended attestation page is to be duly signed and returned to the undersigned, by the following method as a deed within 7 days”.

On 1st May 2008, O’Keefe amended the sub-contract order and returned it to Adonis. The manuscript addition made by Mr McQuade on 5th March 2008 to O’Keefe’s fax of 4th March was qualified by the words :

“Provided always that the candidate material is as described in ACL email dated 28.2.08.”

Adonis did not accept the sub-contract order as amended by O’Keefe. Adonis served a Notice of Adjudication. O’Keefe contested the jurisdiction of the adjudicator, submitting that there was no contract in writing within the meaning of the *Housing Grants Construction and Regeneration Act 1996* (“the Act”).

The adjudicator found that he had jurisdiction. The judge held that the first question that arose was whether what was sent by Adonis on 5th March 2008 amounted to an offer. He held that it would not so appear to a reasonable reader. The e-mail referred to the attachment to it as “our draft subcontract order” and stated that the official order would be signed off and issued in the post in due course. The use of that phraseology and, in particular, the word “draft” indicated not that Adonis was offering then and there to contract on those terms but that those were the terms of an offer that was to be made in

due course. The actual offer contemplated by the draft was made by the despatch of a signed and numbered sub-contract order on 22nd April.

The second question was whether the offer was capable of acceptance by conduct. The draft order provided that:

“The appended attestation page is to be duly signed under seal and returned to the undersigned within 7 days.”

The judge held that was a specification of a required mode of acceptance, which never occurred, rather than a term to be performed once the contact had been made by some other mode of acceptance. Accordingly there was no offer on the terms of the draft order and no acceptance of any such offer in the prescribed manner and no contract on the terms of the draft order.

If that was wrong, the next question was whether O’Keefe so acted as to indicate its acceptance of the offer. The judge held that it was difficult to say that starting the work was clearly referable to the draft offer as opposed to the letter of intent. That letter constituted an instruction to proceed to procurement of labour and material and contemplated that costs would be incurred as a result which, if substantiated, would be reimbursable if the sub contract did not take place up to the date of the abortion, whenever that might be. Further the start of the work might well be referable to the discussions on 5th March.

Adonis contended that, if the offer of 5th March was not accepted by O’Keefe starting the work it was, nevertheless, accepted by O’Keefe continuing it. Upon this hypothesis the work would have started in response to the letter of intent, or the oral discussions, and not to any offer contained in the draft order. The fact that work then continued after the draft order was received still did not seem clearly referable to that order, which had yet to be finalised or signed. Adonis’ alternative submission is that nevertheless there was a contract constituted by the letter of intent, the agreed minutes, and the start of work thereafter. The letter of intent refers to the price, the period, the proposed conditions and the work. The minutes also referred to the DOM 2 conditions. The difficulty with that submission was, firstly, that the letter of intent made clear that it was neither a sub-contract nor an offer to enter into a subcontract on the terms to which it refers but an indication of Adonis’ intentions (*“We confirm it is our intention to enter into a sub-contract ...”*). It expressly contemplates that a subcontract might not take place (*“... in the unlikely event that the sub contract does not take place”*). The letter of intent was followed by the draft order. It was not possible to infer that, because O’Keefe carried out the work, a sub-contract came into existence, not pursuant to any order (draft or otherwise), but pursuant to the letter of intent and under the terms which the letter of intent specified would govern the contract to be entered into pursuant to the order. The existence of such a contract would be inconsistent with the provision in the letter of intent that, if the sub-contract did not take place, no loss of profit or consequential loss would be allowed. Secondly, it was doubtful whether a letter of intent such as this was capable of constituting a *“Construction contract in writing”* within the Act; see *Hart Investments v Fidler* [2007] BLR 30. Thirdly, it seemed clear that on 5th March there was some oral agreement between the parties reflected, whether accurately or not, in the risk clause. That agreement, on this version of the contract, was not incorporated into the written record. It was well-established that, in the case of a *statutory* adjudication, the section was not satisfied if one or more of the contractual terms was not embodied in the written document relied on as constituting the construction contract: *RJT Consulting Engineers Ltd v DM Engineering [Northern Ireland] Ltd* [2002] 1 WLR 2344; *Trustees of the Stratfield Saye Estate v. AHL Construction* [2004] All ER (D) 77. The position was otherwise if there were a contractually agreed adjudication: *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC). The DOM 2 v O’Keefe conditions included an adjudication clause. But those conditions could only have been incorporated if the letter of intent was to be regarded as an offer to contract on, *inter alia*, those terms.

Adonis’s application for summary judgment to enforce the adjudicator’s decision was dismissed.

¹ *Bennett (Electrical) Services Ltd. v. Inviron Ltd.* [2007] EWHC 49 (TCC), para 28 (H.H.J. Wilcox).

² *Carillion Construction Ltd. v. Devonport Royal Dockyard* [2002] B.L.R.79, 84, para. 32 (H.H.J. Bowsher Q.C.).

- ³ *Hart Investments Limited v. Fidler* [2006] EWHC 2857 (TCC) (H.H.J. Coulson) Q.C.).
- ⁴ *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC), para. 27 (Akenhead J.).
- ⁵ *Group Connex South Eastern Ltd v MJ Building Services PLC* [2004] BLR 333, para. 24 (H.H.J. Havery Q.C.).
- ⁶ *Galliford Try Construction Ltd v Michael Heal Associates Ltd* [2003] EWHC 2886 (TCC), para. 29 (H.H.J. Seymour Q.C.).
- ⁷ *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC), para. 30 (Akenhead J.).
- ⁸ Housing Grants, Construction and Regeneration Act 1996, s.107(6).
- ⁹ Housing Grants, Construction and Regeneration Act 1996, s.107(4).
- ¹⁰ Housing Grants, Construction and Regeneration Act 1996, s.107(5).
- ¹¹ [1993] AC 593
- ¹² *Grovedeck Ltd. v. Capital Demolition Ltd.* [2000] B.L.R. 181, 185, paras 29-30 (H.H.J. Bowsher Q.C.).
- ¹⁵ *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC), [2008] B.L.R. 24, 33, para. 44 (Akenhead J.).

Identities of Parties

BACKGROUND

If the adjudicator reaches the wrong conclusion on an underlying issue as to the true identity of the contracting parties, his or her decision would only be binding and enforceable if the defendant had agreed to accept the ruling¹. Otherwise, an application for summary judgment will be dismissed².

NEW CASE

In ***Estor Ltd. v. Multifit (UK) Ltd.* [2009] EWHC 2108 (TCC)**, Estor was the holding company for the Ginger Group, which was a group of companies which operated hair dressing and beauty treatment salons. Mr Keith Warner effectively owned and ran Estor and the other Ginger companies. The group owned or franchised 10 salons in the United Kingdom and abroad. Mr Warner set up Ginger Westfield Ltd ("Ginger Westfield") for the purposes of setting up shop in the Westfield White City complex in London. The premises that were acquired required substantial fitting out works. A contractor, Hub, was employed to do these fitting out works. The price was £129,500 plus VAT and a contract ran into some seven pages but it was in a relatively simple form. The contract was signed by Mr Warner "of the Ginger Group" and the front page of the contract identifies "The Ginger Group" in effect as the employer. Hub subcontracted a sizeable part but not all of the works to Multifit. Matters did not proceed smoothly. At a meeting Hub offered to leave the job; at that stage, Messrs Khan and Singh of Multifit indicated that they would be prepared to "finish the job", but it was common ground that no agreement was reached at this meeting. Multifit submitted a quotation in writing and there was then a meeting between Mr Warner and the Multifit representatives.

There was some issue between the parties as to what was said or understood at this meeting as to who Multifit's contract was to be with. Messrs Khan and Singh said that they had done a credit check on Ginger Group Ltd and that it was adverse. This was, they said, raised with Mr Warner who rang his accountant and passed on his advice that the contract and credit facilities had to go through Estor. Later, they found that Estor had acceptable credit. Mr Warner however said that at the meeting Multifit wanted some comfort that he could pay for the work and he said that he told them that the creditworthiness of the Ginger Group as a whole would be clear from a search of Estor; he said that it was never the intention that a contract would be entered into between Estor and Multifit. He said also that he made it clear that he needed them to complete all of the remaining works.

Mr Warner replied to Multifit's quotation:

"...that's fine can you carry the work out from the [revised] quote. thank you. if have any problems just call me"

There was no hint or indication in that email as to which company was accepting Multifit's quote. Thereafter, Multifit carried out the work or at least that which it was employed to do, by the end of October 2008. Multifit was paid money for the work which it did. It was unclear as to which company paid Multifit. In November 2008, Multifit prepared a Statement of Account addressed to "The Ginger Group Ltd" which identified 5 payments from "Estor/The Ginger Grp". Estor's Bank statements identify Chaps transfers which were ambiguously represented as being to "Ginger Westfield...Multifit..." which could have meant that the payments went direct to Multifit or through Westfield. A later bank statement of Westfield showed a payment being made to Multifit by Westfield in December 2008. Multifit served on Estor its Notice of Adjudication in which it claimed £37,624.05 inclusive of VAT. The adjudicator decided that there was a contract between Multifit and Estor and that the sum claimed was due to Multifit. Estor did not pay out on the decision but issued its own proceedings seeking declarations that there was no contract in writing between Estor and Multifit and that accordingly Mr Slegg's decision was unenforceable.

Akenhead J., declining to enforce the decision, said as follows:

- "25. *I have formed the view that there is, just, what can be described as a realistic prospect of Estor establishing that it was not the company which entered into the contract with Multifit. On the one hand, there is evidence from Mr Warner which effectively denies that he agreed that Estor was to be the contracting party; it is supported by somewhat ambiguous evidence that payments to Estor were made by Westfield albeit funded by Estor. Against that, there is the credit reference which strongly suggests that Estor was intended to be the contracting party or at least possibly some kind of guarantor, coupled with the evidence of Messrs Khan and Singh that it was expressly agreed that Estor should be the contracting party; the payment regime was not necessarily inconsistent with that, with the funds being channelled through Westfield (if that is what happened). If the agreement was with Estor, it is highly probable that it was evidenced in writing by the signed credit reference application.*
26. *This issue can only be resolved by oral evidence. Essentially, I can not determine whose recollection is correct or who is telling the truth. Mr Warner's evidence about why he agreed to a credit reference for Estor is not so incredible that it can be dismissed summarily, even though one is not at all surprised that the adjudicator (apparently) without hearing oral evidence reached the view that he did."*

Where the defendant established enough to show a realistic prospect of establishing its defence on a relevant aspect of the case, leave to defend on that aspect should be given but if, as here, the Court considered that the defence was at the weaker end of the scale, it could and often should impose a condition on the leave to defend that the defending party should pay money into court. The judge held that that was the course which was appropriate. The total claim was £61,624.05 and an appropriate amount to require Estor to pay into court was £35,000. He selected that figure because at over 50% it reflected the relative scepticism on the available evidence which he felt about the strength of Estor's case on the issue of with whom the contract was and the fact that based on the documents and written evidence before the adjudicator his conclusion was not implausible in the absence of cross examination.

¹ *Thomas-Frederic's (Construction) Ltd. v. Wilson* [2003] EWCA Civ 1494, [2004] B.L.R. 23, 27, para 16 (Simon Browne L.J.).

² *Thomas-Frederic's (Construction) Ltd. v. Wilson* [2003] EWCA Civ 1494, [2004] B.L.R. 23, 30, paras. 34, & 38 (Simon Browne L.J.).

Timing

BACKGROUND

The Act requires a relevant construction contract to enable a party to give notice at any time of its intention to refer a dispute to adjudication and provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him or her within 7 days of such notice¹. Does the giving of the notice need to take place before the securing of the appointment of the adjudicator? Section 108 is not prescriptive as to the timing of any nomination. The requirement is for the contract to aim to secure appointment within 7 days of the notice of adjudication. The application to the nominator simply leads to the nomination of an individual as adjudicator. The nominated person then indicates whether or not she or he is willing to accept appointment. The referring party confirms the appointment by sending the notice of referral to the person so nominated². Thus, where the construction contract provides that where either party has given notice of his intention to refer a dispute or difference to adjudication, then any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the adjudicator within seven days of the notice of intention to refer, that provision does not stipulate that an application for nomination of an adjudicator must be made after notice of adjudication has been given. The word 'then' is used as a stylistic device to link clauses. It is not used in a chronological sense, that is, it does not mean that a party must first serve a notice then apply to the nominator. The purpose of the provision is to set out a procedure for appointment of an adjudicator. It does not stipulate that any application for nomination must be made after the notice of adjudication has been served³.

Where the contract does not comply with the statutory requirements for a procedure for adjudication, the adjudication provisions of the Scheme for Construction Contracts apply⁴. The Scheme provides that following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator, the referring party shall request the person (if any) specified in the contract to act as adjudicator, or if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator, or where neither of the above applies, or where the person specified in the contract has already indicated that he or she is unwilling or unable to act and the contract does not provide for a specified nominating body, the referring party shall request an adjudicator nominating body to select a person to act as adjudicator⁵. What is intended is that the notice of adjudication comes first. Then the referring party is to request the person specified to act as adjudicator, unless he or she has already indicated to the parties an unwillingness or inability to act⁶, or to pursue the other options.

When is the notice of adjudication given? It is submitted that the word 'give' in para. 1(1) of the Scheme does not mean 'despatch' of the notice of adjudication. Receipt might occur later. A thing is not given to another unless that other receives it. It may be sent with the intention of giving it but never received. It has then not been given. The word is unambiguous. The giving of the notice of adjudication takes place upon receipt of that notice by the other party to the construction contract. The words 'given' and 'giving' in paras. 1(2) and 2(1) should be given the same interpretation⁶. Non-compliance with the provisions of the Scheme deprives an adjudicator of jurisdiction unless the parties have submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that they would be bound by that ruling⁷.

NEW CASE

In *Vision Homes Ltd. v. LancsVille Construction Ltd.* [2009] EWHC 2042 (TCC), At 0622 on 14th May Mr Wallace on behalf of LancsVille ("LCL") faxed to Maxwell Winward on behalf of Vision a letter inviting them to agree one of three candidates to act as Adjudicator and enclosing a Notice of

Intention to Refer a Dispute. At 1636 Mr. Wallace requested the RICS to appoint Mr Bingham as adjudicator. At 1654 on the same day Mr Wallace e-mailed to Vision a slightly modified Notice of Intention to refer. The only change consisted of the addition of a claim for a declaration that Vision should pay the adjudicator's costs, fees and expense. On 19th May Mr Tony Bingham accepted nomination in respect of LCL's Notice.

Vision contended that the notice under which Mr Bingham acted was the second notice of 14th May (as was apparent from the fact that he ordered Vision to pay his costs and expenses, which was the last item of redress claimed in the second notice). Accordingly the decision, made in an adjudication where the request *preceded* the notice was invalid. LCL relied on *Palmac Contracting Ltd v Park Lane Estate Ltd* [2005] EWHC 919 (TCC). In that case, however, the court held that the relevant clause did not stipulate that an application for nomination of an adjudicator had to be made after notice of adjudication has been given. The court's decision that it was not fatal that the nomination preceded the application is not, therefore, an authority for the position under the Scheme.

Not without some misgiving the judge accepted that the adjudicator had no jurisdiction to act, as he did, under the second notice of 14th May because that notice was not followed but preceded by a request to the nominating body under 2 (1) (b) of the Scheme. It was not possible to regard the request as continuing so that it may be regarded as made both before and after the second notice. Clauses 2 (1) and 3 of the Scheme refer to a request in writing which accompanied (rather than precedes) the relevant notice of adjudication. Further the judge was persuaded, as was Judge Havery in the *IDE* case, that if the provisions which established the jurisdiction of the adjudicator were not complied with it was irrelevant whether or not the other party has suffered prejudice by that non-compliance.

The judge's misgiving arose from the fact that the alteration to the Notice to add a claim for the adjudicator's fees added something which, although not insignificant, was of limited importance compared with the dispute as a whole. In other circumstances, however, the difference between one Notice and a second may be much more significant. Where one Notice was served, a nomination was sought, a second Notice followed, and the adjudication proceeded pursuant to the second notice, the question of jurisdiction could not be decided by a determination of the degree of importance of the additional claim.

The judge did not regard Vision as precluded from taking this point notwithstanding that it had pressed for Mr Bingham to resolve the jurisdictional challenge. Vision did not agree to him having "*jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that it would be bound by that ruling*".

¹ Housing Grants, Construction and Regeneration Act 1996, s. 108(1)(a)-(b).

² *Palmac Contracting Ltd. v. Park lane Estates Ltd.* [2005] EWHC 919 (TCC), [2005] B.L.R. 301, 307, para 32 (H.H.J. Kirkham).

³ *Palmac Contracting Ltd. v. Park lane Estates Ltd.* [2005] EWHC 919 (TCC), [2005] B.L.R. 301, 307, para. 30 (H.H.J. Kirkham).

⁴ Housing Grants, Construction and Regeneration Act 1996, s. 108(5).

⁵ The Scheme for Construction Contracts (England and Wales) Regulations 1998, S.I. 1998 No. 649, Sched. 1, para.2(1).

⁵ *IDE Contracting Ltd. v. R.G. Carter Cambridge Ltd.* [2004] EWHC 36 (TCC), [2004] B.L.R. 172, 175, para 9 (H.H.J. Havery Q.C.).

⁶ By analogy with the decision in *Aveat Heating Ltd.v. Jerram Falkus Construction Ltd.* [2007] EWHC 131 (TCC), [2007] T.C.L.R. 3, para. 10 (H.H.J. Havery Q.C.), in relation to the date of referral: see chapter 3 below.

⁷ *IDE Contracting Ltd. v. R.G. Carter Cambridge Ltd.* [2004] EWHC 36 (TCC), [2004] B.L.R. 172, 175, para 9 (H.H.J. Havery Q.C.), citing *Thomas-Fredric's (Construction) Ltd. v. Wilson* [2003] EWCA 1494, [2004] B.L.R. 23.

Decisions

BACKGROUND

The Act does not expressly require an adjudicator's decision to be in writing, but this may be inferred from s-s. 115(6), which provides that references in Part II to a notice or other document include any form of communication in writing and references to service should be construed accordingly. The Scheme requires the adjudicator to deliver a copy of his decision to each of the parties to the construction contract¹.

Where there are no express words in the contract which made it clear that the adjudicator must sign his decision and the wording used makes it clear that the adjudicator within the requisite time should reach his decision and forthwith send that decision in writing to the parties, it is clear as a matter simply of contractual interpretation that the decision of the adjudicator does not as such have to be signed by him or her. All that the contract calls for is that the adjudicator reaches his or her decision and sends that decision to the parties².

The need for signature of the decision can only arise as a matter of contractual implication. However, applying the normal principles relating to the implication of terms, it is neither reasonable nor necessary for there to be a term that the decision is actually signed. Whilst it is the case that a decision signed by the adjudicator would clearly demonstrate as a matter of evidence that it was his or her decision, the contract provisions in this regard are still operable if it could be demonstrated as a matter of evidence that a decision was the decision of the particular adjudication³.

It is simply not necessary on any commercial or practicable basis to infer that a decision which clearly is that of the particular adjudicator must be signed. It is generally desirable for the avoidance of any doubt that decisions are signed. Indeed, the vast majority of decisions which have been the subject of court proceedings have been signed. That does not however detract from there being no need to infer that the parties must have intended that decisions must be signed before it can be considered to be a valid adjudication decision⁴.

A construction contract is not required by the Act to contain a provision obliging an adjudicator to give any reasons for his decision. Under the Scheme, the adjudicator, if requested by one of the parties to the dispute, should provide reasons for his or her decision⁵. An adjudicator is not required to give reasons for rejecting submissions which, on the basis of the approach he or she adopts, are irrelevant⁶.

Decisions on the duty to give reasons in a planning context are only of limited relevance to adjudicators' decisions for three reasons:

- (a) Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).
- (b) If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.
- (c) Adjudicators often are not required to give reasons at all.

If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, it had suffered substantial prejudice⁷.

NEW CASE

In *Vision Homes Ltd. v. LancsVille Construction Ltd.* [2009] EWHC 2042 (TCC) the adjudicator, Mr Bingham, held as follows:

“The Adjudicator forms the view that the parties dumped the Rule book last year. Usefully though LCL was kept on to do what it could in its crippled condition. True, the parties are willing to say that this Agreement is some form of Variation under the contract rules, which permit variations. But the obligations between LCL and Vision became completely different. It is making no sense to try to read the JCT Rule book given the major surgery to the original contract. It is the worst of all notions when the tribunal becomes tempted to manipulate clauses to somehow fit a wholly different set of events. It is also tempting to say the parties gave little or no thought to re-assembling their contract at the time of the new deal. That’s wrong. They plainly gave real thought. Dean Freeman [of LCL] did not want to end up in contractual antics. He did a good deal.

The effect of the Agreement is that LCL and Vision dumped the JCT. The remaining Works was to be done ‘as & when’ using as best they can guidance from rates and prices in the original deal. The events completely left behind the EOT machinery, out went the LAD’s. No one really knows what EOT might be due at July 2008, nor how to re-fix completion dates. Gone too is all the sophisticated machinery of partial possession, part LAD’s. Vision can’t claim LAD’s. LCL can’t claim loss and expense. Vision is to simply pay LCL a fair rate for the jobs done and LCL can come and go to site as reasonably required by Vision. At a glance it appears a mess. It is not. It is an extremely sensible arrangement given Vision thought LCL was in its death throws. Vision benefited from whatever work LCL did eventually do. So does LCL provided Vision pays up for that work.

The effects of the ‘Agreement’

- (1) The dates for completion of Sections (per JCT) fall away*
- (2) LCL is on a ‘beck and call’ arrangement*
- (3) Vision is to pay a fair price for the Works done.*
- (4) The ‘Section’ sums fall away.*
- (5) The dates for possession fall away.*
- (6) The LAD rates, arrangements and EOT are unworkable.*
- (7) LCL is to work with any other LCL company on the site doing work as required by Vision, as might a subcontractor working alongside other subcontractors.*
- (8) LCL is to carry out the Works indicated by Vision from time-to-Time as reasonably required and to a reasonable price.*
- (9) The definition ‘Completion Dates’ as explained in JCT do not apply.*
- (10) The following JCT clauses (inter alia) are unworkable: 2.3; 2.4; 2.5; 2.6 as amended; 2.23; 2.24; 2.25; 2.26; 2.27; 2.28; 2.29; 2.30; 2.31; 2.34; 2.35 and 2.36*
- (11) It is impossible to declare that ‘Practical Completion’ takes place.”*

Vision submitted that the adjudicator’s decision could not stand because it was not clear what it meant. Since it was expressed in idiosyncratic terms, such as the expressions that the parties “dumped the Rule book” or “dumped the JCT” and that “Out went the LADs”, it was not clear whether the decision was (i) that the parties abandoned the contract so that none of it was left for any purpose, but a new contract agreement or arrangement arose; or (ii) that the parties impliedly agreed to amend the contract so as to omit some work and some of its conditions; or (iii) that the new arrangements agreed to take effect in the summer of 2008 had the inevitable effect that certain contractual provisions were no longer capable of operating in accordance with their terms or could no longer be applicable.

The judge, Christopher Clarke J., accepted that just as an arbitrator's award which was uncertain on its face was unenforceable at common law – *River Plate Products NL BV v Etablissement Coargrain* [1982] Lloyds LR 628 - and under the Arbitration Act 1996 section 68 (2) (f), so must an adjudication decision be also. He did not accept that the decision was so unclear on its face that no effect could be given to it. He did not accept that Mr Bingham had held that the whole of the JCT Contract had been abandoned. According to the decision, little of it may after July 2008 have remained in effect so far as future operations were concerned. But that did not mean that it ceased to exist in any sense at all e.g. for the purpose of governing the rights and obligations of the parties in respect of work carried out before then, including the scope of the works, and to confer rights of adjudication and arbitration. What Mr Bingham did decide was what he found it necessary to decide for the purpose of determining the dispute as to whether LADs were applicable, namely the non applicability, in the light of what was had been agreed in July and August 2008, of the matters specified in paras (1), (4) (5), (6) (9), and (10) under the heading "*The effects of the 'Agreement'*". That must be on the basis that the provisions were either impossible of application in the light of the agreement or cannot, consistently with the agreement, be treated as still applying as before. In its place so far as the external work was concerned were the arrangements specified at paras (2), (3), (7) and (8).

In *Camillin Denny Architects Ltd v Adelaide Jones & Co Ltd* [2009] EWHC 2110 (TCC) there was a complaint of bias or failure to apply the rules of natural justice that no unbiased adjudicator could have reached the decision on costs which the adjudicator, Mr Calcroft, reached. It was said that he must simply have ignored extensive submissions on costs that were made on behalf of AJ. There was a further complaint that the adjudicator had failed to give sufficient reasons that some of his conclusions.

Essentially, the argument was that, because CDA had recovered just under 60% of that which it claimed, a 10% reduction in their cost entitlement was so manifestly wrong as to give rise to an inference that the adjudicator was biased or otherwise acting unfairly. The judge, Akenhead J., decided that this argument was wholly misconceived. The adjudicator in his decision over three pages had carefully considered the whole costs issue. It was clear that he had considered all the arguments put forward. He, correctly, considered that he was not bound by the CPR or the Arbitration Act 1996 but believed, fairly, that the same principles were applicable. The first question was who had been the successful party. He correctly, on any count, decided that CDA was overall the successful party: it had made a substantial recovery of just short of 60% of what it claimed. He formed the view that the claim on two invoices did not represent sums due at the time that they were sent; on one invoice, he said the claim was hopeless (save in limited respects) and the other was not particularly credible. However he could not conclude that those invoices were intentionally exaggerated; because CDA had done some work in relation to that which was invoiced they may have believed that the invoices were justified. He then considered the effects of a Part 36 equivalent offer of £60,000 plus VAT made by AJ; as CDA had recovered more than that offer, he perfectly logically disregarded it.

He decided to reduce CDA's entitlement to costs by 10%. Akenhead J. said that he could not begin to say either that was wrong or that it was so wrong that it was rise to some inference that the adjudicator must have been biased. Some judges or adjudicators might have made a greater reduction but on any count this was simply the exercise of a discretion. Just because the adjudicator got it wrong did not give rise to any entitlement to challenge the decision. On any analysis, this challenge was no more than a (thinly) disguised challenge to the correctness of the adjudicator's decision on costs. It could not be said that the adjudicator was actually or ostensibly biased. If anything, he had acted fairly and well within his discretion. Even if he was wrong on the law, facts or the exercise of a discretion, the Court would not interfere.

¹ The Scheme for Construction Contracts (England and Wales) Regulations 1998, S.I. 1998 No. 649, Sched. 1, para. 19(3).

² *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC), [2008] B.L.R. 24, 33, paras. 45-6 (Akenhead J.).

³ *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC), [2008] B.L.R. 24, 33, para. 47 (Akenhead J.).

⁴ *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC), [2008] B.L.R. 24, 33, para. 48 (Akenhead J.), followed in *CSC Braehead Leisure Ltd. v. Laing O'Rourke Scotland Ltd.* [2008] CSOH 119, [2009] B.L.R. 49, 61 para. 44 (Lord Menzies).

⁵ The Scheme for Construction Contracts (England and Wales) Regulations 1998, S.I. 1998 No. 649, Sched. 1, para. 22.

⁶ *Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd.* [2005] EWCA 1358, [2006] B.L.R. 15, 35, para. 80.

⁷ *Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd.* [2005] EWCA 1358, [2006] B.L.R. 15, 28-9 & 35, paras. 53 & 84.

Adjudicators' Fees

BACKGROUND

Neither the Act nor the Scheme requires parties to a construction contract who wish to refer a dispute to adjudication to enter into a contractual relationship with an adjudicator. However, contractual adjudication provisions generally prescribe the execution of such a contract, and it is the practice of adjudicators requested or selected in accordance with the provisions of the Scheme to stipulate the terms under which they are prepared to act, to be agreed by the parties.

The ability of an adjudicator to obtain fees depends on there being a contractual right to payment under the adjudicator's agreement with one or both of the parties. There is nothing in s.108 of the 1996 Act which gives the adjudicator a right to payment. The adjudicator's contractual right to payment does not arise under and is not affected by the terms of the decision by which the adjudicator decides which party is to pay his or her fees and expenses. That decision determines who, as between the parties, is to bear those sums but it does not affect any contractual right to payment which the adjudicator may have or provide a right to payment if he has no contractual right. It may, in practice, lead to the relevant party making payment direct to the adjudicator but it gives the adjudicator no enforceable rights to payment¹.

The process of adjudication requires a rapid appointment of an adjudicator. Under the provisions of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), s.108(2)(b) states that the construction contract shall "*provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice*". The fact that the appointment of the adjudicator is intended to be rapid means that referring party is likely to be the one who seeks the appointment and who is keen for the objective of early appointment to be met. The referring party is therefore likely to be the party which responds positively to the adjudicator's terms and conditions and may do so unilaterally if the responding party is slow to react or raises an objection to the adjudication on jurisdictional or other grounds².

In such circumstances it is not uncommon for the Adjudicator's Agreement to be entered into only with the referring party and not with the responding party. This raises questions as to the liability of the responding party for the fees and expenses of the adjudicator³.

Where one party agrees the adjudicator's terms but the other does not then, except for such terms as might require the agreement of the other party in order to become binding, the Adjudicator can enforce those terms against the party with whom he or she has a contract. There is nothing objectionable in an adjudicator being appointed unilaterally and, indeed, it is not uncommon for this to happen in arbitrations with three arbitrators⁴.

In general terms, absent any jurisdictional objections, if an adjudicator is appointed and neither party makes a contract with the adjudicator, the parties by participating in the adjudication and thereby requesting the adjudicator to act, enter into a contract with the adjudicator who acts in that capacity as a result of that request. Such a contract would be formed by conduct. There would be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator and would be jointly and severally liable with the other party to do so. There would also be an implied term that the adjudicator would act in accordance with the terms of the Adjudication Agreement between those parties⁵.

In principle, there is no reason why the position should not be similar where only one party makes a contract with the adjudicator but the other one does not. In those circumstances, the party who does

not make a contract but participates in the adjudication thereby requests the adjudicator to act and there is a contract made by conduct with the adjudicator who acts in that capacity as a result of that request. There would, similarly be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator, that the party would be jointly and severally liable with the other party to make payment and that the adjudicator would act in accordance with the terms of the Adjudication Agreement between those parties⁶.

The question of joint and several liability might give rise to some difficulties in the case where one party agrees the rates of remuneration with the adjudicator but the other party does not and has to pay a reasonable remuneration. In *Merkin on Arbitration Law* at paragraph 10.61 a similar issue is raised in relation to the statutory provision in s.28(1) of the Arbitration Act 1996 that the parties are jointly and severally liable to pay to the arbitrators' reasonable fees and expenses. How does this apply where there is an agreed sum? In *Merkin* it is suggested that it might be possible to argue that joint and several liability only applies to the amount regarded as reasonable. That seems to be the view of the DAC at paragraph 123. If one party agreed fees and the other party was liable for a reasonable fee then generally joint and several liability would apply only to the reasonable fee which could, in principle, be lower or higher than the agreed fee. However, in practice, the agreed fee is likely to be the same as or accepted to be a reasonable fee⁷.

Whilst the position as set out above would apply where there is no jurisdictional issue, such issues are frequently taken and some succeed. What then is the position? Where a party wishes to raise a jurisdictional argument, as has now become common in adjudications, it has one of two options. First, it can make an assertion of lack of jurisdiction and withdraw, taking no further part in the adjudication proceedings and leaving the adjudicator and the other party to proceed at their risk. It might then seek an urgent declaration as to jurisdiction from the court or seek to challenge any decision on the grounds that the adjudicator had no jurisdiction. In such circumstances in the absence of any agreement with the adjudicator, there would be no request for the adjudicator to do anything and it would be difficult to make that party liable for the fees and expenses of the adjudicator. Secondly, it can make an assertion of lack of jurisdiction but continue to participate in the proceedings, without prejudice to that contention. It might seek to persuade the adjudicator to make an early non-binding decision on jurisdiction. If this is in favour of the party, the adjudicator would be obliged to withdraw and the adjudication would come to an end. If the adjudicator finds that he has jurisdiction that party might continue to participate in the adjudication, again without prejudice to its right to challenge any award on the basis of a lack of jurisdiction. By participating in this way, whilst the party is not giving the adjudicator jurisdiction to make a binding decision, it is requesting the adjudicator to carry out work and make a decision. If the adjudicator makes a decision on jurisdiction or on the merits then the party would have a potential benefit. If the adjudicator decides that he or she does not have jurisdiction then that party has the benefit of the decision because the adjudication comes to an end. If the adjudicator decides he or she does have jurisdiction and then proceeds to make a decision on the merits, the party is seeking a favourable decision on the defences raised. Whether that party maintains the jurisdictional arguments may depend on how it fares in its defence on the merits. If, for instance, the adjudicator were to dismiss the claim, the party would doubtless abandon the jurisdictional argument and assert the temporarily binding nature of the adjudicator's decision⁸.

In many cases it is clear that parties raise jurisdictional arguments so that they cannot be said to have waived any such arguments but then fight the case on the merits and attempt to use the jurisdiction arguments to negotiate a favourable outcome or oppose enforcement. It is currently a regrettable feature of adjudication that, in many cases, the parties spend a great deal of time and money considering and arguing about jurisdictional matters with the effect that the adjudicator, either at an early stage or in his or her decision, also spends much time dealing with the jurisdictional points raised. The fact that a party makes a jurisdictional challenge should not in itself change the position where a party participates in the adjudication proceedings. If the adjudicator makes a decision which he or she did, in fact, have jurisdiction to make then there is no reason why the mere fact of the erroneous jurisdictional challenge should change the position⁹.

If there is a valid jurisdictional challenge and if a party has not participated in the adjudication then, on the basis of the view expressed above, that party can have no liability for the fees and expenses of the adjudicator. If, however, a party has participated in the adjudication process, albeit without prejudice to its contention that the adjudicator did not have jurisdiction, then in principle by participating and thereby requesting the adjudicator to adjudicate on the dispute, that party will generally be liable for the reasonable fees and expenses of the adjudicator on the same basis as set out above. This is a matter of contract as between the adjudicator and the relevant party. If the adjudicator did not have jurisdiction, then any decision made by the adjudicator will be null and void. This will preclude one party from recovering from the other party any sums based on the adjudicator's allocation of the fees and expenses contained in the invalid decision¹⁰.

NEW CASE

In *Estor Ltd. v. Multifit (UK) Ltd.* [2009] EWHC 2108 (TCC), an issue arose relating to whether the adjudicator's apparent inclusion in the award of his fees to be paid by Estor some of his fee for an earlier abortive adjudication was in excess of jurisdiction and, if so, did that render the whole decision unenforceable or merely that part of the decision which was in excess of jurisdiction. Akenhead J. said:

"I do not consider that the issue arises:

(i) There is no disagreement between the parties that the adjudicator had jurisdiction to decide which party should pay his fees and in what proportions.

(ii) Arithmetically, he has ordered Multifit to pay the whole of his bill of £22,907.25. Presumably and predictably he knew that Estor would not pay initially; of this, he ordered Estor to pay to Multifit £17,760, which excluded VAT. Thus, Multifit had to pay a net £5,147.25 of his bill itself. The total bill was broken down as to £19,215 plus £2882.25 VAT. Therefore, in fact he required Multifit to be responsible for £1455 net of VAT of his bill although in his decision he says that Multifit should bear only £1365 plus VAT. Thus, he appears in one sense to have put down to Estor's account £2,325 of his account for the abortive adjudication (£3,780-£1,455), which at his rate of £210 per hour equates to about 11 hours.

(iii) It seems clear that what the adjudicator did was to assess what part of his bill was abortive and charge Multifit with that. He decided that some time spent on the abortive adjudication should be capable of being the subject of his order against Estor because that time would otherwise have had to have been spent again and in the ordinary course of events that was fair. Put another way, he was saying that 11 hours' worth of his time on the abortive adjudication was hours worked which he did not have to do a second time round but which he would have had to do for the purposes of the second adjudication.

(iv) This is not an issue of jurisdiction at all. The adjudicator had a discretion under the jurisdiction which he had (subject to the issue of who the contract was with). He exercised it and allowed within the ambit of fairness a reasonable amount to be borne by the losing party. The losing party loses no more than it would have done if the abortive adjudication had not taken place. There can be no challenge about the amount of hours worked so far as this enforcement is concerned; that can be taken up with the adjudicator.

*(v) Even if I was wrong, the adjudicator's decision would still be enforceable save in respect of the identifiable part of his decision upon which on that premise he did not have jurisdiction, namely £2,325; he would simply have included a clearly identifiable element on which he did not have jurisdiction. It is no different from a decision in which two sums are awarded to a claimant and on one of them the adjudicator had no jurisdiction. The Court will usually enforce the part of the decision in respect of which he had jurisdiction. I do not in this regard consider that my observations in *Cantillon v Urvasco* [2008] EWHC 282 TCC (Paragraph 63) were wrong or need distinguishing: here, if the adjudicator had no jurisdiction over the fees for the abortive adjudication, it could be said that the dispute about that fee was a separate dispute, the decision upon which was severable and separable from the rest of the decision."*

- ¹ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) paras. 33-4 (Ramsey J.).
- ² *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) paras. 35-7 (Ramsey J.).
- ³ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) para. 38 (Ramsey J.).
- ⁴ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) para. 59 (Ramsey J.).
- ⁵ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) para. 60 (Ramsey J.).
- ⁶ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) para. 61 (Ramsey J.).
- ⁷ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) para. 62 (Ramsey J.).
- ⁸ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) paras. 63-6 (Ramsey J.).
- ⁹ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) para. 67-8 (Ramsey J.).
- ¹⁰ *Linnett v. Halliwells LLP* [2009] EWHC 319 (TCC) para. 68-71 (Ramsey J.). See also *Griffin v. Midas Homes Ltd* (2000) 78 Con LR 152, 159 (H.H.J. Lloyd QC).

Set-Offs Against Decisions

BACKGROUND

The question of whether or not a defendant employer is entitled to set off liquidated damages against the amount identified in the adjudicator's decision as due to the claimant has been considered by reference to the authorities¹. In *VHE Construction PLC v RBSTB Trust Co Limited*², the parties contracted on the JCT Standard Form With Contractor's Design (1981 edition). The employer sought to set off liquidated damages against monies payable to the contractor under an adjudicator's award. It was held that such a set off was not permissible. The Court had regard to the overall purpose of Part 2 of the Construction Act and concluded that the employer's obligation to comply with the adjudicator's decision meant: '...comply, without recourse to defences or crossclaims not raised in the adjudication.' In *David McLean Housing Contractors Limited v Swansea Housing Association Limited*³ the parties contracted on the same JCT form of contract as was used in *VHE Construction*. Following practical completion, a variety of claims by the contractor were referred to adjudication. The adjudicator awarded certain sums to the contractor. He also determined that the contractor was entitled to an extension of time which fell short of the actual delay in achieving practical completion. On the day after the adjudicator's corrected decision was published, the employer wrote to the contractor stating that it would deduct liquidated and ascertained damages. Thereafter, the employer made only a partial payment to the contractor of the sums awarded by the adjudicator. The employer withheld liquidated and ascertained damages in respect of the period of delay for which there was no extension of time. In subsequent enforcement proceedings, it was held that the employer was entitled to set off the liquidated and ascertained damages which were due. It was said that the real issue was whether the claimant was entitled to all the money the subject of the adjudicator's decision. All the money that was certified in the certificate, bar the amount in dispute on liquidated damages, had in fact been paid. Was the claimant entitled to the amount for liquidated damages? That amount now reflected the adjudicator's view about the extension of time that was sought by the claimant so the claimant was bound to accept that conclusion in the proceedings since it was part of the dispute which it referred.

There is no inconsistency between the reasoning in *VHE Construction* and *David McLean*. In each case the decision flows from an analysis of what the adjudicator had decided and from the particular circumstances of the case.

The manner in which *VHE Construction* and *David McLean* can be reconciled has been discussed in *Solland International Ltd v Daraydan Holdings Ltd*⁴. The same matter has been discussed in *Bovis Lend Lease Ltd v Triangle Development Ltd*⁵. In *Parsons Plastics (Research and Development) Ltd v Purac Ltd*⁶, the contract contained a specific clause as to set off which determined the outcome.

In *Ferson Contractors Ltd v Levolux AT Ltd*.⁷ there was a sub-contract in the GC/Works/Sub-Contract form. A dispute arose between the main contractor (Ferson) and the sub-contractor (Levolux) concerning the efficacy of a withholding notice served by Ferson. The adjudicator held that the withholding notice did not comply with s.111 of the Construction Act. Accordingly, he ordered Ferson to pay to Levolux the sum of £51,659 which was due on application for payment No 2. Ferson declined to pay this sum on the ground that it had determined the sub-contract. The ground for determination was that Levolux had suspended works as a result of non-payment. The Court gave judgment enforcing the adjudicator's award, and that judgment was upheld by the Court of Appeal. The appeal proceeded on the basis that the sub-contract had been invalidly determined. It was held that the answer to the appeal was straight forward. The intended purpose of s. 108 was plain. If Ferson were right, that purpose would be defeated. The contract should be construed so as to give effect to the intention of Parliament rather than to defeat it. If that could not be achieved by way of construction, then the offending clause should be struck down. However, it could be done without the need to strike out any particular clause. The relevant clauses should be read as not applying to monies due by reason of an adjudicator's decision.

Two principles of law can be derived from these authorities⁸:

- (1) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).
- (2) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

Whilst on the facts of *Ferson -v- Levolux* the comments on s. 108 might be argued to be obiter, the Court of Appeal set out in clear terms the principle which applies to the implementation of the intention of Parliament. The effect of those statutory provisions and of the passages in *Ferson v. Levolux* is generally to exclude a right of set-off from an adjudicator's decision. The particular issue of whether liquidated damages can be deducted when the adjudicator's decision deals with extensions of time but does not deal with the consequential effect on an undisputed or indisputable claim for liquidated damages raises a distinct question of the manner and extent of compliance with the adjudicator's decision. It does not raise a question as to the ability to set-off sums generally against an adjudicator's decision⁹.

More generally, there are a number of authorities which make it clear that a party who is ordered to make a payment pursuant to an adjudicator's decision cannot seek to avoid making such payment by setting off other claims that it has or might have. In *M J Gleeson Group Plc v Devonshire Green Holding Ltd*.¹⁰ it was held that a payment ordered by an adjudicator could not be withheld on the basis of a claim which accrued after the commencement of the adjudication. The contractual purpose was clearly the same as that which was referred to in *Levolux*. The decision of the adjudicator was binding on the parties until determined by arbitration or legal proceedings. The parties were to comply with the decision of the adjudicator and ensure that the decision of the adjudicator was given effect to, and if either party did not comply then the other party should be entitled to take legal proceedings to secure such compliance. That scheme necessarily indicated that the decision of the adjudicator was to be given effect to and the idea that the decision of the adjudicator could be defeated by a withholding notice in respect of events which occurred subsequent to the commencement of the adjudication was entirely inconsistent with the statutory purpose of providing a quick and effective remedy on an interim basis. An adjudicator's decision was meant to be enforced and complied with without subtle arguments and detailed arguments as to other provisions of the contract.

In *David McLean Contractors Limited v The Albany Building Limited*¹¹ it was held that the defendant could not set off its claim for damages for delay against a payment ordered by the adjudicator. So far as the adjudicator's decision was concerned, one had simply an adjudicator's award which was clearly given within his jurisdiction. He might have been right or he might have been

wrong in relation to the validity of the notices but that was not a point to deal with in the enforcement proceedings. That could be challenged in subsequent proceedings, if necessary. Having given the decision, the question then was: could the defendant refuse payment based on a cross-claim that it was going to be entitled to liquidated damages if it succeeded in the claim which it had put forward? The answer to this was no. There was no express provision in the adjudication clause saying 'there shall be no set-off' but that did not meet the point, which, was that if parties agreed to comply with the adjudicator's award they were saying that they would do that, and that meant they would not then refuse to do it on other grounds which might or might not turn out to be valid. That simply delayed payment. The purpose of an adjudicator's decision ordering the payment of money was to assist cash flow. It was possible to challenge the matter subsequently if the parties wished to do so. That was a clear policy and the decision in *Levolux* supported that principle. The conclusions both in *Gleeson* and in *David McLean* on the facts of those two cases were agreed with in *Interserve Industrial Services Ltd. v. Cleveland Bridge (UK) Ltd.*¹².

Where there are successive adjudications between the same parties and a decision has been given in one adjudication, can the losing party withhold payment on the basis that it reasonably expects to recover an equivalent or larger sum in the next adjudication? Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. It cannot withhold payment on the ground of its anticipated recovery in a future adjudication based upon different issues. This conclusion is reached both from the express terms of the Act, and also from the line of authority referred to earlier¹³.

These steps need to be considered before one can consider whether in effect or in actually to permit a set off of one decision against another:

- First, it is necessary to determine at the time when the Court is considering the issue whether both decisions are valid; if not or if it can not be determined whether each is valid, it is unnecessary to consider the next steps;
- If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.
- If it is clear that both are so capable, the Court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The Court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.
- How each decision is enforced is a matter for the Court. It may be wholly inappropriate to permit a set off of a second financial decision as such in circumstances where the first decision was predicated upon a basis that there could be no set off¹⁴.

Where two adjudicators' decisions are valid and enforceable, the parties and the Court are required to give effect to both decision and this necessarily involves bearing in mind that each decision should have been given effect to and complied with by the parties upon receipt of the respective decisions. Where on the one hand, an employer in breach of contract has failed to pay without set off or at all what it should have done but on the other hand, as from a later date it would have been entitled to the return of money since there would have been an overpayment (based on what the two adjudicators decided) if it had paid what was due pursuant to the first adjudication decision, the Court has a discretion however as to how any order or orders on judgement should be drawn. On balance in such a case, the orders should be drawn to reflect the net effect of the judgement. Put another way, the orders should reflect the facts that the contractor was entitled to be paid that which the first adjudicator directed should be paid together with continuing interest, that the contractor was bound to pay a sum towards the second adjudicator's fees, that shortly before the Court hearing the employer paid some money to the contractor to reflect what it considered was the balancing effect between the two decisions and that, assuming that both decisions were to be given

effect to, apart from that belated payment, there would have been a balance due to the contractor. This discretion will be exercised upon the pragmatic basis that it would be pointless, at least administratively, for the employer to hand over the net sum (allowing for the belated payment) due pursuant to the first adjudication decision to be followed by the contractor having to hand back all or the bulk of what had just been paid to it to the employer.

NEW CASES

In *Workspace Management Ltd v YJL London Ltd* [2009] EWHC 2017 (TCC) (28 July 2009), there were three adjudications between the parties. Each time the Adjudicator was Mr Malloy. In the first adjudication, he resigned because he did not feel that he had the necessary jurisdiction. In his second adjudication decision, he decided that YJL was only entitled to an extension of time down to 30th December 2005 as against a date of practical completion of 13th June 2006. As a result, there was a lengthy period of culpable delay and he found that YJL was liable to pay Workspace £285,000 by way of liquidated damages, together with £126,192 by way of repayment of loss and expense previously paid by Workspace to YJL. Some 18 months later, Workspace sought to refer a further dispute to the Adjudicator (adjudication 3) even though there was by then a full-blown arbitration between the parties dealing with delay, extensions of time, loss and expense and liquidated damages

The background to adjudication 3 was this. Workspace's architect had issued Interim Certificate 27, which was in the negative sum of £356,971 gross, which, having taken into account the £126,192 previously repaid by YJL and referred to in paragraph 3 above, required YJL to pay a further sum of £230,779 to Workspace. YJL refused to pay that amount, so Workspace issued adjudication proceedings. The Adjudicator's decision in adjudication 3 recorded at paragraph 5 YJL's case that, on a proper analysis, the sum of £123,578 was actually due from Workspace to YJL. Following a detailed valuation of the matters covered by Certificate 27, the Adjudicator's conclusion was much closer to the case advanced by YJL than to the position adopted by Workspace. The Adjudicator found that the true negative balance of the certificate, namely £77,371.70 was less than the amount which YJL had already repaid to Workspace of £126,192. As a matter of simple maths, this meant that YJL had overpaid the sum of £48,820.30 plus VAT, a total of £56,143.35. That was the specific sum which YJL had set off against Award No. 2.

The Arbitrator's award (Award No. 1) in respect of a preliminary issue was in Workspace's favour, and Workspace sought its costs of Award No. 1, said to be in excess of £300,000. The Arbitrator made an award (Award No. 2), pursuant to section 39(2)(b) of the Arbitration Act 1996, that YJL should make an interim payment on account of the costs of Award 1. That interim payment was capped at £85,000. £28,856.66 was paid, leaving £56,143.34.

The Adjudicator's decision in Adjudication 3 meant that Workspace had been overpaid by YJL in the sum of £56,143.35. Could that be set-off against Arbitration Award No. 2? Workspace argued that the Adjudicator's decision as to overpayment could not be used as a set-off against Arbitrator's Award No. 2 because the arbitration award trumped the Adjudicator's decision. Award No. 2 was final and binding and Adjudication Decision 3 was, at most, only temporarily binding.

The judge rejected these submissions for the following reasons:

1. Both decisions were binding on the other side. One did not have greater status than the other. They were both capable of being the subject of the judgment of the Court.
2. The award was described on its face as both 'provisional' and 'interim' because, the Arbitrator was still tasked with the exercise of assessing the detailed costs. Such an award should not be elevated to a status that was in some way greater than and different to the decision in Adjudication 3.
3. It would be artificial to allow Workspace to ring-fence the award simply because it is not subject to potential challenge (which an adjudicator's decision might be), in circumstances where, for reasons best known to themselves, the parties were conducting simultaneous arbitration and adjudication proceedings. It had been open to Workspace to have raised the question of Certificate 27 in the arbitration. It was Workspace who chose to commence separate adjudication proceedings in

adjudication 3. It could not now ask the Court to ignore the outcome of those proceedings merely because the result was not to its liking.

4. The mutual debts arose out of the same transaction and gave rise to an equitable estoppel. They arose out of the same building contract. They also arose out of the same underlying disputes concerned with delay. The only difference between them was that one was in respect of direct costs, that is to say the loss and expense suffered by YJL in respect of the delay, and the other was in respect of indirect costs, namely the costs of arguing unsuccessfully about one aspect of the delay disputes in the arbitration.

In *Hart (t/a D W Hart & Son) v Smith & Anor* [2009] EWHC 2223 (TCC) (3rd September 2009), Mr Simper was appointed adjudicator and gave his decision that Mr. & Mrs. Smith should pay Hart the sum of £79,900.43 in respect of Interim Certificates. Mr. & Mrs. Smith then referred a further dispute to adjudication concerning their claim that Hart failed to complete the works by the due dates and that they were entitled to a certificate for non-completion and to deduct/or be paid LADs. The adjudicator's decision in this second adjudication contained a declaration that Mr. & Mrs. Smith were entitled to certificates of non-completion. The contract administrator subsequently issued of certificates of non-completion. Mr & Mrs Smith wrote to Hart claiming liquidated damages for non-completion of the works in the total sum of £71,314.29. The question was whether Mr. & Mrs. Smith could set off that sum against the sum of £79,900.43 awarded to Hart in the first adjudication.

Mr. & Mrs. Smith contended that the debt in the sum of £71,314.29 was a natural consequence of a) the declaration made by the adjudicator and b) the issuance of certificates by Mr Hanna, the Contract Administrator, and c) the issuance of the notice of Mr. & Mrs. Smith' claim for liquidated damages to Hart by letter.

Hart denied that Mr. & Mrs. Smith were entitled to set off the sum of £71,314.29. They contended that in relation to that sum the adjudicator had not made any award or order for payment and his decision was merely declaratory. Mr. & Mrs. Smith were not entitled, therefore, to set off any such sum in relation to the first adjudication or to an award in that sum in relation to the second adjudication.

The judge, H.H.J. Toulmin, C.M.G., Q.C., came to the conclusion that Mr. & Mrs. Smith could not enforce their claim to recover £71,314.29 from Hart. Section 108(3) of the Act gave Court jurisdiction to enforce the decision of the adjudicator. What followed logically from the adjudicator's decision was a declaration that the Contract Administrator ought to issue the certificates of non-completion and nothing more. It could not be derived from the adjudicator's decision that the adjudicator decided as part of that decision that Hart was to repay the sum of £71,314.29 or any sum. Indeed, he specifically decided that he could make no such decision in that adjudication.

There was a significant difference between this claim and the circumstances where it was possible to calculate the sums which were a direct consequence of the adjudicator's award e.g. where the adjudicator decided that a party is entitled to recover a sum of money which in fact could be calculated by reference to figures accepted by the adjudicator in the course of the adjudication. In this case it would be necessary to consider the effect of contractual provisions on which the adjudicator made no affirmative finding in order to reach a conclusion that Mr. & Mrs. Smith were entitled to liquidated and ascertained damages. This might be a matter for a separate application for summary judgment or a further adjudication but it was not within the Court's jurisdiction for enforcement of the current adjudicator's award.

Even if the judge had found in favour of Mr. & Mrs. Smith on the primary issue, he would not have set off the sum claimed at the hearing against the sum awarded in the first adjudication without hearing further argument:

"It seems to me to be fundamental to the process of adjudication, for the reasons given by Jackson J in Interserve and Akenhead J in H S Works, that in multiple adjudications each decision should be capable of enforcement separately."

¹ What follows is based upon *Balfour Beatty Construction v. Serco Ltd.* [2004] EWHC 3336 (TCC), paras. 48-53 (Jackson J.).

- ² [2000] BLR 187 (H.H.J. Hicks Q.C.).
- ³ [2002] BLR 125 (H.H.J. Lloyd Q.C.).
- ⁴ [2002] EWHC 220 (TCC); 83 Con. L.R. 109, 121-2, paras 30-32 (H.H.J. Seymour Q.C.).
- ⁵ [2003] BLR 31, 42, paras. 35-6 (H.H.J. Thornton Q.C.).
- ⁶ [2002] EWCA Civ 459, [2002]BLR 334.
- ⁷ [2003] EWCA Civ 11, [2003] BLR 118.
- ⁸ *Balfour Beatty Construction v. Serco Ltd.* [2004] EWHC 3336 (TCC), para. 53 (Jackson J.).
- ⁹ *William Verry Limited v The Mayor and Burgesses of the London Borough of Camden* [2006] EWHC 761 (TCC), paras. 28-9 (Ramsey J.).
- ¹⁰ TCC Salford District Registry, 19 March 2004 (H.H.J. Gilliland Q.C.).
- ¹¹ [2005] EWHC 85 (TCC) (H.H.J. Gilliland Q.C.).
- ¹² [2006] EWHC 741 (TCC), para. 39 (Jackson J.).
- ¹³ *Interserve Industrial Services Ltd. v. Cleveland Bridge (UK) Ltd.* [2006] EWHC 741, para. 43 (Jackson J.).
- ¹⁴ *H S Works Ltd. v. Enterprise Management Services Ltd.* [2009] EWHC 729 (TCC), para. 40 (Akenhead J.).
- ¹⁵ *H S Works Ltd. v. Enterprise Management Services Ltd.* [2009] EWHC 729 (TCC), paras. 63-5 (Akenhead J.).

Judicial Intervention

BACKGROUND

The Technology and Construction Court will hear any applications for declaratory relief arising out of the commencement of a disputed adjudication. Commonly, these will concern:

- (1) Disputes over the jurisdiction of an adjudicator. It can sometimes be appropriate to seek a declaration as to jurisdiction at the outset of an adjudication, rather than both parties incurring considerable costs in the adjudication itself, only for the jurisdiction point to emerge again at the enforcement hearing.
- (2) Disputes over whether there is a written contract between the parties or, in appropriate cases, whether there is a construction contract within the meaning of the Act.
- (3) Disputes over the permissible scope of the adjudication, and, in particular, whether the matters which the claimant seeks to raise in the adjudication are the subject of a pre-existing dispute between the parties¹.

A bona fide dispute between the parties as to the existence of a contract, which might give the claiming party the right to adjudicate is not shut out: indeed, paragraph (2) above expressly covers that very situation. It makes no difference to the court's jurisdiction whether the disputed adjudication has been started or not². If the Court has the power to grant a declaration in respect of an adjudicator's jurisdiction in an ongoing adjudication, it also has the power to grant a declaration if it considers that there has been or will be a breach of natural justice which will have a significantly prejudicial effect on the responding party³. Such a jurisdiction will be exercised very sparingly. It will only be appropriate in rare cases for the TCC to intervene in an ongoing adjudication. It is important that, wherever possible, the adjudication process is allowed to operate free from the intervention of the Court. Applications of this sort will be very much the exception rather than the rule and will only be granted in clear-cut cases⁴.

Where a point arises in proceedings under CPR Part 8 concerning an ongoing adjudication, and the court is being asked to give a final and binding determination on the issue whether a party's standard terms and conditions incorporated into the contract, there can be no question of a want of jurisdiction on the part of the court. If the issue arises for final determination in the Part 8 proceedings, the court should not duck that issue. The court has the jurisdiction to consider and

determine the issue at that stage. Of course, not every issue in an ongoing adjudication will be suitable to the Part 8 procedure under the CPR: far from it. The use of Part 8 will rarely be appropriate in an ongoing adjudication, but there will be times when an issue as to, for example, which contract conditions apply, may be suitable for decision before or at the time of the ongoing adjudication⁵.

Any such application will be immediately assigned to a named judge. In such circumstances, given the probable urgency of the application, the judge will usually require the parties to attend a case management conference within two working days of the assignment of the case to him or her, and he or she will then give the necessary directions to ensure the speedy resolution of the dispute⁶.

It sometimes happens that one party to an adjudication commences enforcement proceedings, whilst the other commences proceedings under Part 8, in order to challenge the validity of the adjudicator's award. This duplication of effort is unnecessary and it involves the parties in extra costs, especially if the two actions are commenced at different court centres. Accordingly there should be sensible discussions between the parties or their lawyers, in order to agree the appropriate venue and also to agree who shall be claimant and who defendant. All the issues raised by each party can and should be raised in a single action⁷.

It has been suggested that the process of adjudication under the Act should be regarded as amenable to judicial review on public law grounds, although no decisions address the point in any detail⁸.

NEW CASE

In ***Aceramais Holdings Ltd v Hadleigh Partnerships Ltd [2009] EWHC 1664 (TCC) (8 July 2009)***, on 10 March 2009 HPL served on Aceramais a notice to adjudicate. Aceramais wrote to the adjudicator stating that there was no contract in writing within the meaning of the Act so that the adjudicator had no jurisdiction. On 16 March 2009 Aceramais issued proceedings seeking a without notice injunction to prevent the adjudication proceeding. Aceramais appeared *ex parte* and without notice on 16 March 2009. The court adjourned the application to 20 March when both parties could be heard. The court did not make any order the effect of which would have been in effect to prevent the adjudication continuing, but gave directions for a speedy trial and ordered that, pending trial, HPL might not seek to enforce the adjudicator's decision. Aceramais tried twice to adjourn the trial but neither application succeeded.

Notwithstanding Aceramais' protest, the adjudicator proceeded with the adjudication. Aceramais did not participate, even on the basis that participation was without prejudice to their right to argue later that the adjudicator lacked jurisdiction. The adjudicator decided that Aceramais owed HPL about £800,000. Aceramais did not pay this.

On 20 March 2009 the Court had ordered Aceramais to serve its list of documents and disclosure statement by 13 April 2009, failing which its claim would be struck out. Aceramais provided disclosure. HPL considered that Aceramais' disclosure was deficient and made application to the court. On 17 April 2009 a consent order was made. This provided that, unless Aceramais gave disclosure by way of a further list, disclosed specified documents or classes of documents and searched its computer equipment for documents relevant to the issue of contract formation by 27 April 2009, its claim be struck out. Aceramais made further disclosure by a list served on 27 April 2009. Paragraph 2 of the order dated 17 April 2009 required Aceramais' further disclosure list to include "a disclosure statement completed by an appropriate person as per rule 31.10 of the CPR". Aceramais failed to comply with paragraph 2 of the order dated 17 April, in that its disclosure statement was not completed by an appropriate person within the meaning of Part 31.10. The consequence of that failure was that the claim stood struck out as at close of business on 27 April.

At the trial the judge heard evidence from a number of witnesses and was taken to many documents. The principal witnesses were Mr Neil MacPherson and Mr Grant. Mr MacPherson described himself as a director of Bastia Investments Ltd, one of Arion's group companies. He gave evidence on behalf of Aceramais. Mr MacPherson was currently in prison, having been sentenced to

a prison term of three years following his conviction, (after a not guilty plea) of proceeds of crime offences. Mr Grant described himself as the contract manager for HPL. He had twice been declared bankrupt (he was now discharged). He was disqualified as a company director for a period of five years from 9 December 2005, and received a suspended prison sentence in connection with this disqualification. The judge held that Mr Grant appeared to tell the truth only if it suited him to do so and had little confidence in his evidence. A characteristic of Mr Grant's behaviour and attitude was that he had no real concept of the distinctions which must be drawn between different legal entities. He and Mrs Grant had traded through any corporate or unincorporated vehicle which suited them at the time, ignoring the boundaries which should not have been crossed between one company and another and between themselves as individuals, or partners in Hadleigh Partnership, and the various companies which they owned or controlled from time to time.

Mr Grant and Mr MacPherson met in about 2003/2004. They began to collaborate on development projects from about 2004. Some of these projects were undertaken by Mr Grant through companies in a group called Hadleigh Group Ltd. One of these companies was Coventry Timber Frame Ltd (CTF). Most of these companies had since gone into administration or some other form of insolvency. In August or September 2006, Mr Grant and Mr MacPherson began discussions about developing the site at Wellington Square. Aceramais purchased the site. Mrs Alison Scott, a solicitor, acted for Aceramais on the purchase. She was also involved throughout the development: correspondence was addressed to her or copied to her and she maintained contact with Mr MacPherson, who appeared at times to have been difficult to track down.

The only relief sought by Aceramais at the trial was a declaration that "the construction contract ... in relation to the works undertaken ... was not an agreement in writing for the purposes of section 107 of [HGCRA] and that accordingly the provisions of Part II of that Act do not apply to that construction contract". The court should deal with an application of this sort only where the case was so clear-cut that it could act quickly and in effect stop the adjudication by way of a declaration; if the case were not clear-cut, then the court should not intervene and there should be an argument at the enforcement stage.

The judge, H.H.J. Kirkham, held that Aceramais' approach was inappropriate, for three reasons:

- This was not a rare or exceptional case. The question whether there was a contract in writing and thus whether the adjudicator had jurisdiction was common place.
- The issue here was not so clear cut that the court could act quickly: this case had involved a trial with disclosure and oral evidence. Aceramais could – and should – have raised this at the enforcement stage. As Coulson J pointed out in *Dorchester*, even if the resisting party were unable to resist enforcement, it could still later litigate matters in the usual course, as adjudication was of only temporary effect.
- The parties must have spent a substantial amount of time and money in preparation before trial, yet the court had been asked to decide only a very narrow issue. The effort put into this litigation would bear little fruit. This approach was disproportionate. Even if Aceramais had established that there was no contract in writing, the court should nevertheless have been reluctant to exercise discretion in favour of making the declaration sought. An application of this sort plainly had the potential to prejudice HPL, which had the benefit of an adjudicator's award, by postponing the date on which HPL could apply to enforce that award. In this case, it had worked injustice to HPL as HPL had, until now, been prevented from seeking to enforce the adjudicator's decision. It was however likely that any enforcement proceedings could now be dealt with rapidly, given the conclusion that there was a contract in writing between the parties.

¹ Technology and Construction Court Guide (2nd. Ed.) para. 9.4.1.

² *Vitpol Building Service v Samen* [2008] EWHC 2283 (TCC), para. 14 (Coulson J.).

³ *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70 (TCC), para. 13 (Coulson J.).

⁴ *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70 (TCC), para. 17 (Coulson J.).

⁵ *Dalkia Energy & Technical Services Ltd. v. Bell Group UK Ltd.* [2009] 73 (TCC), paras. 44-5 (Coulson J.).

⁶ Technology and Construction Court Guide (2nd. Ed.) para. 9.1.2.

⁷ Technology and Construction Court Guide (2nd. Ed.) para. 9.1.3.

⁸ Bailey, *Public Law and Statutory Adjudication*, a paper delivered at a meeting of the Society of Construction Law, 3rd June 2008. See also Rana, *Adjudication and Judicial Review: an Update on the Position in England and Australia* [2006] I.C.L.R. 503.

October 2009

For further information please contact:

Darryl Royce

Atkin Chambers
1 Atkin Building
Gray's Inn
London
WC1R 5AT

Tel + 44 (0)20 7404 0102

Fax + 44 (0)20 7405 7456

www.atkinchambers.com