JUDGMENT : His Honour Judge Richard Seymour Q. C. : 21st March 2002. TCC

Introduction

1. This action arises out of a project for the construction in Norwich of a new civic community centre and library. That project (*"the Project"*) was called *"Norfolk and Norwich Millennium Project"*. The Defendant in this action, R. G. Carter Ltd. (*"Carter"*), carries on business as a building contractor and was employed by Norfolk and Norwich Millennium Company to undertake the Project.

2. Part of the works involved in the execution of the Project comprised concrete works to the substructure and building frame and various ancillary works. In this judgment I shall call those works *"the Sub-Contract Works"*.

3. Although the relevant documents have not been put in evidence before me, it is common ground that Carter entered into a sub-contract (*"the Sub-Contract"*) with the Claimant in this action, Edmund Nuttall Ltd. (*"Nuttall"*), by which Nuttall agreed with Carter to undertake the execution of the Sub-Contract Works.

4. It is common ground that the Sub-Contract incorporated the terms of the standard form DOM/1 sub-contract conditions, and in particular the provisions of clause 38A of those conditions relating to the referral to adjudication of disputes arising in connection with the execution of the Sub-Contract Works.

5. In this action Nuttall claims against Carter enforcement of the decision of Mr. David Maurice Richards dated 1 February 2002 (*"the Decision"*). Mr. Richards had been appointed by the President of Royal Institution of Chartered Surveyors to act as adjudicator in relation to a dispute between Nuttall and Carter of which notice had been given to Carter by a letter dated 14 December 2001 written on behalf of Nuttall by its solicitors, Messrs. Shadbolt & Co. (*"Shadbolt"*). By the Decision Mr. Richards determined that Carter should pay to Nuttall a sum of £834,468.90, plus Value Added Tax, amounting to £146,032.05,within 14 days of the date of the Decision. Mr. Richards also determined that Carter should pay his fees of £42,614.08 for acting as adjudicator. In the event those fees were paid by Nuttall. Thus the total sum claimed by Nuttall in this action is £1,023,115.03.

6. Payment of the sum claimed on behalf of Nuttall was resisted on behalf of Carter. In order to explain upon what grounds it was denied that Carter was liable to pay to Nuttall the sum claimed as payable as a result of the Decision it is necessary to recite something of the history leading up to the making of the Decision. However, the essential nature of the issue which I have to determine is what constitutes a *"dispute"* for the purposes of clause 38A of the standard form DOM/1 sub-contract conditions and, for that matter, for the purposes of section 108 of *Housing Grants, Construction and Regeneration Act 1996* (*"the 1996 Act"*).

The events leading up to the Decision

7. The history of the execution of the Sub-Contract by Nuttall does not seem to have been happy. There seem to have been a number of disputes and a number of references to adjudication before that with which I am concerned. While it seems that there are, or may be, differences about whether it was a term of the Sub-Contract that the Sub-Contract Works would be completed in sections, and, if so, in what sections, it appears to be common ground that the execution of the whole of the Sub-Contract Works should have been completed by 29 May 2000. It is common ground that the execution of the Sub-Contract Works was actually completed later than that date, but there appears to be a difference between the parties as to when exactly completion was achieved. For present purposes what matters is that in May 2001 Nuttall contended that it was entitled to an extension of time for completion of the Sub-Contract Works until 19 January 2001. Nuttall also claimed at that time to be entitled to payment of loss and expense in respect of the delays allegedly caused to it by Carter which were said to have prevented Nuttall completing the execution of the Sub-Contract Works any earlier than 19 January 2001.

8. Under cover of a letter dated 22 May 2001 Nuttall sent to Carter, for the attention of Mr. Tom Traynor, an application for payment of a total gross sum of £6,815,702.26 in respect of the execution of the Sub-

Contract Works and in respect of other sums which were said to be due. The application for payment in question was numbered 21. One of the elements in the application was:-

"*Claim for the recovery of costs incurred as a result of the prolongation of the Works from 29th May 00 to 19 January 01. Claim for the recovery of additional costs incurred as a result of delay and disruption suffered to the progress of the Works.*"

The claim in question (*"the May Claim"*) had been sent by Nuttall to Carter under cover of a letter dated 18 May 2001. The amount of the May Claim was £1,979,752. That sum was made up as follows:-

(i) Prolongation £474,018
(ii) Off Site Cost £108,938
(iii) Staff Thickening £242,070
(iv) Overtime £213,175
(v) Disruption £626,866
(vi) I ncreased Costs £ 4,043
(vii) Attendances £ 22,627
(viii) Overheads £212,227
(ix) Financing £ 75,788.

The way in which the claim for extension of time had been formulated in the May Claim was to list in an appendix to the claim document a considerable number of occurrences during the course of the execution of the Sub-Contract Works and to indicate which of those occurrences was said to have caused delay, and how much delay was said to have been caused.

9. Carter responded to Nuttall's application for payment numbered 21 in a formal payment notice and valuation statement sent to Nuttall under cover of a letter dated 7 June 2001. The assessment made by Carter of the sum payable to Nuttall was of a negative amount because of Carter's alleged claims against Nuttall. However, a breakdown of the calculation of the negative amount indicated that an allowance of £7,473.30 had been made in respect of the alleged claims of Nuttall.

10. Carter responded formally to the May Claim in a letter dated 23 August 2001. The letter was lengthy and made comment on each of the occurrences identified in support of the claim for extension of time. The conclusion stated in the letter was:-
"*On the basis of the information contained within the "Claim" document, we can only conclude that ENL* [that is, Nuttall] *have failed to demonstrate an entitlement to any additional extension of time to the periods for completion of the Subcontract Works beyond those previously fixed.*"

11. In a letter dated 4 September 2001 to Mr. Lancastle of Nuttall Mr. Rasmussen of Carter addressed the question of further applications for payment on the part of Nuttall and, in particular, the process of seeking to agree variations and any other additional payments. The letter included:-
"*Now that the position regarding extensions of time to your subcontract has been clarified (with confirmation that your subcontract period for completion remains 16th June 2000) it is our intention to finalise and agree with you, the value of any additional expense so incurred in connection with the extension of time granted (i.e. the 18 calendar days arising from delayed possession).*"

12. Under cover of a letter dated 30 September 2001, but apparently sent no later than 17 September 2001, as it was referred to in a letter dated 3 October 2001 written by Mr. Rasmussen to Mr. Lancastle as having been received on 17 September 2001, Nuttall sent to Carter an application for payment numbered 22. That application included in the calculation of the sum claimed £1,979,752 in respect of the May Claim.

13. Nuttall, acting by Mr. Lancastle, replied to Mr. Traynor's letter dated 4 September 2001 in a letter to Carter dated 25 September 2001. That letter included:-
"*In respect of you* [sic] *second paragraph and for the avoidance of any doubt we record that your confirmation that no further extension to the sub-contract period as stated in your letter MR/7333/24/1010 dated 23rd August 2001 is rejected.*

Your consideration of our claim document is fundamentally flawed on a number of items and your transparent attempt to deny us our clear contractual entitlement is a cause of great concern. We therefore formally record that a dispute exists between us regarding the date for Completion of the Sub-Contract Works."

14. Mr. Rasmussen replied to Mr. Lancastle's letter dated 25 September 2001 in a letter dated 3 October 2001, to which I have already referred. The letter dated 3 October 2001 included this:-
"*We have for a considerable time evaluated and included monies in your account for loss and expense arising from the extension of the subcontract period which has been awarded. Until recently, this has had to be carried out in the absence of any detailed information from yourselves. The values now included in our payment certification No. 25 are assessed from the information contained in your claim document dated 18th May 2001. Therefore, at no time, have we not complied with our contractual obligations towards you, as your letter seeks to suggest.*

We have not however, made any payment for alleged "loss and expense" for the period of time after the date that has been set for subcontract completion. You have failed to demonstrate any entitlement under the subcontract, to an extension of time for this period, nor has your claim demonstrated, that the long delay in completing the subcontract works, was any thing other than as a result of your own failures, consequently you are in default and have no entitlement to further costs.

Your letter gives no explanation of why you conclude that our recent assessment of your claim document is "flawed". Before we can respond to this allegation, you will need to explain the reasons why you believe our assessment is incorrect. Our response (to your claim) was both detailed and reasoned, and the conclusions reached therefore considered and justified. There is nothing we have received from you to date, that would lead us to change this conclusion.

That you have constructed from spurious premises, a large voluminous claim document, does not in its self, lead to the conclusion that you have any entitlement to further monies for loss and expense. You do not. Your claim document is both incorrect in its extent and its detail. "

15. Mr. Traynor also replied to Mr. Lancastle's letter dated 25 September 2001 in a letter dated 3 October 2001. Mr. Traynor was perhaps a little more conciliatory in tone. He wrote:-
"*Having thoroughly considered the contentions raised in your claim document and the circumstances under which the works were carried out, we are satisfied that our decision then not to grant any further extension of time, is correct. This being the case, we feel that your sweeping rejection of this decision is unreasonable and premature, especially as there has been no opportunity afforded to date, to investigate whether any common ground exists between our two parties.*

We are willing therefore to meet with you to discuss the issues surrounding this decision. Please contact either the undersigned or Chris Snowling to arrange a convenient time."

16. Nuttall responded to Mr. Rasmussen's letter of 3 October 2001 in a letter dated 26 October 2001 in which it was said that *"we will submit our detailed response at the appropriate time."* There was no immediate reply to Mr. Traynor's letter of 3 October 2001, for in a letter dated 5 November 2001 to Mr. Lancastle Mr. Traynor asked for confirmation *"if you are willing to meet to discuss these matters further."* That letter drew forth from Mr. Lancastle a response dated 21 November 2001 in which he said that Nuttall had not received Mr. Traynor's letter dated 3 October 2001, and went on:-
"*We are surprised by your enquiry regarding a meeting to discuss these matters. In view of the contents of your letters dated 23rd August 2001, 4th September 2001 and 3rd October 2001, please advise what has now changed to warrant further discussions.*"

17. In the interim, without any further application from Nuttall, Carter prepared another valuation of the Sub-Contract Works which was sent to Nuttall under cover of a letter dated 13 November 2001. In that valuation an amount of £12,512.56 was allowed in respect of Nuttall's claims, but the overall valuation was still negative. Under cover of a letter dated 6 December 2001 Carter sent to Nuttall a further valuation of the Sub-Contract Works, numbered 27, which was still negative overall and again included an amount of £12,512.56 in respect of Nuttall's claims. The latter valuation seems to have been prompted by the decision in an adjudication earlier than that with which I am concerned.

18. In a letter dated 26 November 2001 to Mr. Lancastle Mr. Rasmussen proposed dates for a meeting to discuss Nuttall's account in relation to the Sub-Contract Works. In a reply dated 30 November 2001 Mr. Lancastle indicated a willingness to meet to discuss Nuttall's account, but sought details of the costs which Carter contended that it had incurred as a result of alleged delays on the part of Nuttall. That request seems to have prompted Mr. Rasmussen to say in a letter dated 4 December 2001, responding to Mr. Lancastle's letter of 30 November 2001:-
"*We can only conclude from the response your letter makes, that you have no intention of taking part in a meeting to pursue further agreement of this account.*"

19. Against the background which I have set out Shadbolt wrote on behalf of Nuttall the letter dated 14 December 2001 to which I have referred. That letter began as follows:-
"*We act on behalf of Edmund Nuttall Limited ("Nuttall") and refer to Nuttall's agreement with RG Carter Limited ("Carter") for the carrying out of the sub-structure and super-structure works on the above project* [that is, the Project].

As you know, the Agreement between Carter and Nuttall incorporates the Standard Form of Sub-Contract for Domestic Sub-Contractors 1980 Edition (May 1998 Edition incorporating Amendments 1) 1986; and 2 and 3 (1988); 5, 6, 7 and 8 (1989); and 10 (1998) ("DOM/1 1998 Edition).

A dispute has arisen between Nuttall and Carter as a result of Carter's failure to grant Nuttall a proper extension of time pursuant to clause 11 of the DOM/1 1998 Edition. Not only has Carter failed to grant Nuttall a proper extension of time but it has also failed properly to ascertain the time-related prolongation costs to which Nuttall is entitled. It has also resulted in Carter withholding from Nuttall substantial amounts in respect of set-offs and contra-charges for delays which Carter alleges Nuttall has caused to completion of the Project and to hand-over dates of Nuttall's works to following trades.

Carter's failures, as set out above, have led to a substantial under-valuation of Nuttall's work, most recently reflected in Carter's valuation statement number 27 dated 6 December 2001. Nuttall therefore dispute that valuation statement number 27 is a proper valuation of the works. In this Adjudication Nuttall seeks a re-valuation of Carter's valuation number 27 in respect of items related to prolongation, notably prolongation costs and prolongation related set-offs. Nuttall reserves its rights in respect of all other items in the valuation.

We hereby give you notice, on behalf of Nuttall, of its intention to refer the above dispute to Adjudication under clause 38a of the DOM/1 1998 Edition, which forms part of the Agreement between Nuttall and Carter."

The letter went on to set out the relief claimed on behalf of Nuttall. This included:-
"*(i) (a) A declaration that, pursuant to clause 11.3 of the DOM/1 1998 Nuttall is entitled to an extension of time of 235 days to the revised Completion Date for the works (making the new Completion Date 19 January 2001) or, alternatively, for such other period as the Adjudicator considers appropriate.*

(b) Alternatively, a declaration that, pursuant to clause 11.7 of the DOM/1 1998 Edition, Nuttall is entitled to an extension of time of 235 days to the revised Completion Date for the works (making the new Completion Date 19 January 2001), or, alternatively, for such other period as the Adjudicator considers appropriate…

(iii) (a) An order that Carter should pay to Nuttall the sum of £1,476,212.87 (or such other sum as the Adjudicator may consider appropriate) in respect of Carter's valuation number 27 corrected to take into account Nuttall's prolongation and associated costs and time-related set-offs, plus VAT, plus interest pursuant to clause 21.3.4 of the DOM/1 1998 Edition (or such other clause as may be relevant) within 7 days of the date of the Adjudicator's Decision.

(b) Alternatively, an order that Carter should pay to Nuttall the sum of £1,286,385 (or such other amount as the Adjudicator may consider appropriate) in respect of damages for breach by Carter of the express and/or implied terms of the Contract."

20. It was common ground that Shadbolt's letter dated 14 December 2001 was a Notice of Adjudication for the purposes of clause 38A of the standard form DOM/1 sub-contract conditions, if there was extant at the date it was written a *"dispute"*. The letter was followed by a Referral Notice which was served on 4 January 2002. The Referral Notice was accompanied by a document entitled *"Norfolk and*

Norwich Millennium Project Substructure and Superstructure Works Report on Programming and Excusable Delay Entitlement" dated 19 December 2001 prepared by Mr. Anthony Caletka on behalf of Nuttall. In that document (*"the Caletka Report"*) was set out a claim for an extension of time for the execution of the Sub-Contract Works of 235 days, the same as that made in the May Claim, but the alleged justification for such extension of time was quite different from the justification put forward in the May Claim. For the purposes of the hearing before me Mr. Traynor made a witness statement to which he attached, amongst other things, a graphical representation of the differences between the two justifications. That demonstrated that Mr. Caletka in the Caletka Report was seeking to rely on occurrences listed in the appendix to the May Claim to which I have referred and there indicated as having no delaying effect, as being significant causes of delay, while abandoning most of the matters relied on in the May Claim as being alleged causes of delay. Mr. Traynor's graphical representation also showed that Mr. Caletka was seeking to rely on a fair number of matters in support of the contention that Nuttall was entitled to the extension of time which it claimed which had not featured in the May Claim at all. The sums claimed in the adjudication as the loss and expense to which Nuttall was entitled were also different from those claimed in the May Claim, or mentioned in the letter dated 14 December 2001, to some degree. The total sum claimed was £1,253,495.76, rather than the £1,979,752 claimed in the May Claim or the sums set out in the letter dated 14 December 2001. The composition of the total was also rather different. The comparison is as follows:-

Item	**May Claim**	**Caletka Report**
Prolongation	*£474,018.00*	*£531,284.68*
Off Site Cost	*£108,938.00*	*£113,722.79*
Staff Thickening	*£242,070.00*	*Nil*
Overtime	*£213,175.00*	*£213,175.00*
Disruption	*£626,866.00*	*Nil*
Increased Costs	*£ 4,043.00*	*£41,946.89*
Attendances	*£ 22,627.00*	*Nil*
Overheads	*£212,227.00*	*£277,528.00*
Financing	*£ 75,788.00*	*£ 75,788.00*

The basis of the Decision

21. Mr. Richards was persuaded, against the objection of Carter that he should not consider the Caletka Report as it was a new claim which Carter had not seen before it was annexed to the Referral Notice, that it was appropriate for him to consider the Caletka Report and to reach his decision on the basis of it.

The submissions of the parties

22. Mr. Ian Pennicott, who appeared on behalf of Nuttall, submitted that the dispute which was submitted to adjudication was a dispute as to whether Nuttall was entitled to an extension of time for completion of the Sub-Contract Works of 235 days, as to what amount in respect of loss and expense Nuttall was entitled as a result of the extension of time to which it was found to be entitled, and as to the extent to which, in the light of the extension of time to which it was found Nuttall was entitled, it was open to Carter to set off against sums to which Nuttall was entitled the amounts of its own claims. He submitted that the nature of the dispute was not affected by the fact that for the purposes of the adjudication before Mr. Richards Nuttall sought to advance arguments, and to rely on facts, different from those relied on in the May Claim. Mr. Pennicott accepted in his skeleton argument at paragraph 11 that, as between the May Claim and the Caletka Report:-

"*(ii)…different periods were claimed in relation to sections of the works but the overall period claimed remained identical.*

(iii) ….the delay analysis evidence submitted to the Adjudicator (in the form of Mr. Caletka's report) adopted a different methodology from that previously presented albeit that the same overall conclusion was arrived at."

In relation to the financial claims, Mr. Pennicott accepted at paragraph 13 of his skeleton argument that:-

"*…in the Adjudication claim three heads of claim previously advanced were not pursued; the quantum of three heads of claim was subject to a small increase and one head of claim (for which the Adjudicator, in the event, did not award Nuttall anything) was increased substantially.*"

However, Mr. Pennicott submitted that these matters did not affect the nature of the dispute referred to adjudication. He relied on the decision of H.H. Judge Anthony Thornton Q.C. in ***Fastrack Contractors Ltd. v. Morrison Construction Ltd.*** [2000] BLR 168, and in particular paragraphs 23 and 30 of that judgment.

23. Mr. Martin Bowdery Q.C., who appeared on behalf of Carter, submitted that the Decision was not binding upon Carter because, as he put it at paragraph 1 of his written submissions:-
"*At the date of the Notice of Adjudication being the 14th December 2001 and/or at the date of service of the Referral Notice being the 4th January 2002 the matters detailed within the Notice of Adjudication and/or the Referral Notice had not been brought to the attention of R G Carter and R G Carter had not been given the opportunity of considering and then either admitting, rejecting or seeking clarification of these substantially new claims and as such there was no dispute at the date of the Referral Notice.*"

24. Mr. Bowdery also sought to rely, amongst other decisions, upon the decision of H.H. Judge Thornton Q.C. in ***Fastrack Contractors Ltd. v. Morrison Construction Ltd.***, but in particular on paragraph 27 of that decision.

25. It was common ground before me that the jurisdiction of an adjudicator to make a decision binding upon the parties to the adjudication depends either upon the terms of the contract by which provision is made for adjudication or, in default of appropriate contractual terms, upon the terms of the 1996 Act and the Scheme for Construction Contracts set out in the Schedule to *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 1998 No. 649. In particular, it was accepted before me that the jurisdiction of an adjudicator derives, at least in a case like the present, from the Notice of Adjudication. Put simply, the adjudicator has jurisdiction to decide a *"dispute"* which is the subject of a Notice of Adjudication, but he has no jurisdiction to decide something which is not covered by the relevant Notice of Adjudication. It seems to me that what is or is not the subject of a Notice of Adjudication depends upon proper construction of the relevant notice in accordance with the principles of construction enunciated by Lord Hoffman in ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** [1998] 1 WLR 896 at pages 912H to 913F.
"*The principles may be summarised as follows.*

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars: the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see **Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd**. *[1997] AC 749.*

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **Antaios Compania Naviera SA v. Salen Rederierna AB** *[1985] AC 191,201:*
"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

26. However, in construing a Notice of Adjudication the nature of the enquiry is not simply what do the words used mean, when properly understood, but what is the *"dispute"* which is the subject of the notice. In order to address that issue it is necessary to consider what are the indicia of a *"dispute"* for the purposes of the 1996 Act and any contractual provision which is intended to take the place of the provisions of the 1996 Act and the Scheme for Construction Contracts by specific agreement.

27. Mr. Bowdery reminded me of the comments of Lord Denning MR in ***Monmouthshire County Council v. Costelloe & Kemple Ltd.*** (1965) 5 BLR 83 at page 89 as to what constituted a *"dispute or difference"* fit to be referred for determination in accordance with the disputes resolution procedure incorporated in the form of contract in issue in that case. Lord Denning said:-
"*The first point is this: was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractors. Until that claim is rejected you cannot say that there is a dispute or difference. There must be a claim and a rejection in order to constitute a dispute or difference.*"

28. Mr. Bowdery also reminded me that H.H. Judge Gilliland Q.C. in ***Cruden Construction Ltd. v. Commission for the New Towns*** [1995] 2 Lloyd's Rep 387 had referred to Lord Denning's remarks in ***Monmouthshire County Council v. Costelloe & Kemple Ltd***. as of assistance in relation to the question whether a dispute had arisen fit to be referred to arbitration. H.H. Judge Gilliland Q.C. had himself said, at page 393 of the report of his case:-
"*The words "dispute or difference" are ordinary English words and unless some binding rule of construction has been established in relation to the construction of those words in cl. 35 of the JCT contract I am of opinion that the words should be given their ordinary every day meaning. "*

29. A question which H.H. Judge Thornton Q.C. had to consider in ***Fastrack Contractors Ltd. v. Morrison Construction Ltd.*** was what was the meaning of the word *"dispute"* in the context of adjudication. That, of course, is exactly the issue which arises before me in this case. The passages upon which Mr. Pennicott and Mr. Bowdery relied in the judgment of H.H. Judge Thornton Q.C. were as follows:-
"*23. In some cases, a referring party might decide to cut out of the reference some of the pre-existing matters in dispute and to confine the referred dispute to something less than the totality of the matters then in dispute. So long as that exercise does not transform the pre-existing dispute into a different dispute, such a pruning exercise is clearly permissible. However, a party cannot unilaterally tag onto the existing range of matters in dispute a further list of matters not yet in dispute and then seek to argue that the resulting "dispute" is substantially the same as the pre-existing dispute…*

27. A "dispute" can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion. This is clear from a consideration of two decisions, one concerned with arbitration and the other with the dispute resolution procedure that is required to have been gone through in many civil engineering contracts before arbitration can be commenced. In the arbitration field, the Court of Appeal confirmed in **Halki Shipping Corporation v. Sopex Oils Ltd**. *[1998] 1 WLR 726 that a "dispute", the existence of which is the statutory pre-condition of a party being entitled to enforce an arbitration clause and to have legal proceedings stayed for arbitration under the Arbitration Act 1996, has a wide meaning. The term includes any claim which the opposing party has been notified of which that party has refused to admit or has not paid, whether or not there is any answer to that claim in fact or in law. In the civil engineering field, the Court of Appeal in* **Monmouthshire County Council v. Costelloe & Kemple Ltd**. *(1965) 5 BLR 83 held that clause 66 of the fourth edition of the ICE Conditions of Contract,*

which only allowed for arbitration where there was a dispute or difference that had already been referred to and decided by the engineer, required there to have been a claim by one party and its rejection by the other before a dispute or difference could be referred to the engineer. The Court of Appeal held that a rejection of a claim does not necessarily occur when the claim is submitted to the engineer or during subsequent exchanges of views in relation to that claim. A dispute only arises when the claim is rejected in clear language. An obvious refusal to consider the claim or to answer it can, however, constitute such a rejection…

30. It is first necessary to consider the nature of the jurisdictional dispute that arises when a party contends that there is no underlying dispute that can be referred to an adjudicator. If it is contended that there is no dispute at all since, for example, the whole of the subject-matter of the proposed adjudication has not been claimed, notified or rejected, the dispute raises a genuine jurisdictional dispute since, if that challenge is made out, there is no statutory power to appoint the adjudicator. If, on the other hand, the essence of the complaint is that what has been referred is broadly the same dispute as pre-existed the challenge but that there have been amendments of detail and degree, the challenge is not to jurisdiction since within the matters referred is a common core of disputed material which can legitimately form the subject-matter of a potentially valid adjudication. It would then be for the adjudicator, assisted by the referral notice, to identify that common core and adjudicate upon it whilst deciding that the residue should be dismissed or should not be determined at all. The second alternative is possible since the Scheme only requires the adjudicator to decide "the matters in dispute" (paragraph 20) and this residue would not consist of matters "in dispute"."

30. Mr. Bowdery drew to my attention an unreported decision of H.H. Judge Humphrey Lloyd Q.C. handed down on 15 June 2001, ***Sindall Ltd. v. Solland***. In the course of his judgment in that case H.H. Judge Lloyd Q.C. said:-

"*For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation has ended and that there is something which needs to be decided..*

…Instead Sindall asked MEA to look at a mass of information to which MEA had not been previously referred or specifically referred. Even if MEA had not said that it needed more time it would not have been required to provide an answer within seven days. A person in the position of the Contract Administrator must be given sufficient time to make up its mind before one can fairly draw the inference that the absence of a useful reply means that there is a dispute."

31. Mr. Bowdery also drew to my attention another unreported decision of H.H. Judge Lloyd Q.C., handed down on 21 July 2001, ***K & D Construction v. Midas Homes Ltd.,*** in which H.H. Judge Lloyd Q.C. expressed sentiments similar to those expressed in ***Sindall Ltd. v. Solland.***

Consideration and Conclusions

32. It seems to me that the real question in the present case is not whether there was a *"dispute"* between Nuttall and Carter as at 14 December 2001 when Shadbolt wrote the Notice of Referral letter, but whether the dispute upon which Mr. Richards adjudicated was that which was the subject of that letter. If it was, the Decision is valid and binding and it is appropriate that it should be enforced by order of the Court. On the other hand, if Mr. Richards adjudicated on a *"dispute"* which was not, on proper construction of the letter dated 14 December 2001, the subject of that letter, he had no jurisdiction to decide that dispute, the Decision is invalid and this action should be dismissed.

33. As I have indicated already in this judgment, the central issue is how to identify the *"dispute"* which was the subject of the letter dated 14 December 2001. That involves the need to consider what are the indicia of a *"dispute"*. The effect of Mr. Pennicott's submissions came close, it seemed to me, to contending that a *"dispute"* should be identified by reference, at least principally, to what was being claimed. Thus, it was enough, submitted Mr. Pennicott, that the extension of time being sought by Nuttall was always 235 days, and irrelevant that the facts and arguments advanced in the Caletka Report in support of that claim were completely, or at any rate significantly, different from the facts and arguments relied upon in support of the claim in the May Claim. Again, so far as the financial claims were concerned, Mr. Pennicott's submissions seemed to me to come close to amounting to an assertion that it did not matter that some elements of the claims had been reformulated so as to claim different amounts from those claimed in the May Claim because the overall amount sought was less.

34. In my judgment a *"dispute"* is something different from a *"claim"*. In ***West Wake Price & Co. v. Ching*** [1956] 3 All ER 821 Devlin J had to consider the meaning of the word *"claim"* in the context of a policy of insurance. At page 829E-G of the report Devlin J said this:-
"*I think that the primary meaning of the word "claim" – whether used in a popular sense or in a strict legal sense - is such as to attach to it the object that is claimed; and is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based. In the OXFORD DICTIONARY "claim" is defined as first, " A demand for something as due; an assertion of a right to something"; secondly "Right of claiming; right or title (to something or to have, be, or do something; also on, upon the person, etc., that the thing is claimed from). "*

Thus it seems to me that, while a *"dispute"* can be about a *"claim"*, there is rather more to a *"dispute"* than simply a *"claim"* which has not been accepted.

35. In ***Cruden Construction Ltd. v. Commission for the New Towns*** H.H. Judge Gilliland Q.C., in the passage which I have quoted, expressed the view that *"dispute"* was an ordinary English word and, in the context with which he was concerned, should be given its ordinary meaning. With the example of Devlin J to follow it is instructive to consider the meaning of the word *"dispute"* as defined in *Shorter Oxford Dictionary, 4th edition.* Leaving aside a meaning said to be rare, the principal definitions are these:-
"*An oral or written discussion of a subject in which arguments for and against are put forward and examined.*
An instance of disputing or arguing against something or someone, an argument; a controversy; esp. *a heated contention, a disagreement in which opposing views are strongly held.*
The act of disputing or arguing against something or someone; controversy, debate "

36. In my judgment, both the definitions in *Shorter Oxford Dictionary* and the decisions to which I have been referred in which the question of what constitutes a *"dispute"* has been considered have the common feature that for there to be a *"dispute"* there must have been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind. It may be that it can be said that there is a *"dispute"* in a case in which a party which has been afforded an opportunity to evaluate rationally the position of an opposite party has either chosen not to avail himself of that opportunity or has refused to communicate the results of his evaluation. However, where a party has had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a *"dispute"* between the parties is not only a *"claim"* which has been rejected, if that is what the dispute is about, but the whole package of arguments advanced and facts relied upon by each side. No doubt, for the purposes of a reference to adjudication under the 1996 Act or equivalent contractual provision, a party can refine its arguments and abandon points not thought to be meritorious without altering fundamentally the nature of the *"dispute"* between them. However, what a party cannot do, in my judgment, is abandon wholesale facts previously relied upon or arguments previously advanced and contend that because the *"claim"* remains the same as that made previously, the *"dispute"* is the same. The construction of the word *"dispute"* for the purposes of the 1996 Act and equivalent contractual provisions, in my judgment, is not simply a matter of semantics, but a question of practical policy. It seems to me that considerations of practical policy favour giving to the word *"dispute"* the meaning which I have identified. The whole concept underlying adjudication is that the parties to an adjudication should first themselves have attempted to resolve their differences by open exchange of views and, if they are unable to, they should submit to an independent third party for decision the facts and arguments which they have previously rehearsed among themselves. If adjudication does not work in that way there is the risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been possible. There is also the risk that a party to an adjudication might be ambushed by new arguments and assessments which have not featured in the *"dispute"* up to that point but which might have persuaded the party facing them, if only he had had an opportunity to consider them. Although no doubt cheaper than litigation, as Mr. Richards's fees in the present case indicate, adjudication is not necessarily cheap.

37. Against the background of what seems to me to be the meaning of the word *"dispute"* for the purposes of the 1996 Act and clause 38A of the standard form DOM/1 sub-contract conditions, I return to the question of the proper construction of Shadbolt's letter dated 14 December 2001.

38. Mr Bowdery did seek to persuade me that by 14 December 2001 the May Claim was no longer the subject of any *"dispute"* because it was, as he put it, *"a dead duck"*. For that to have been the position it would have been necessary for Nuttall to have accepted that it would not pursue the May Claim. There was no clear evidence put before me that that was Nuttall's position. The highest it could be put on the evidence was that Mr. Caletka had obviously been working on the Caletka Report for some time before that report was submitted with the Referral Notice on 4 January 2002, so that perhaps Nuttall had decided to abandon the May Claim and proceed with whatever Mr. Caletka came up with, whatever it was. However, the Caletka Report was not, apparently, completed until 19 December 2001 and there is no reason, on the evidence put before me, to suppose that Nuttall had taken any position on what it would do with the Caletka Report once it became available before Nuttall had had any opportunity to consider the Caletka Report. Objectively construed it seems to me that that to which the letter dated 14 December 2001 referred in identifying the *"dispute"* to be referred to adjudication was the May Claim. That claim was unresolved, as was apparent from the correspondence passing between Nuttall and Carter to which I have referred earlier in this judgment. It was not *" a dead duck"*. Viewed objectively it was very much a live mallard, even if, unknown to anyone save perhaps Mr. Caletka, it was about to be transformed into the swan of the Caletka Report.

39. In the result, in my judgment, what was referred to adjudication by Shadbolt's letter dated 14 December 2001 was the *"dispute"* as to the May Claim, comprising the package of facts relied upon on each side in support of the respective positions of Nuttall and Carter, and the arguments which had been rehearsed. That package did not, it seems to me, comprehend any of the fruits of the reconsideration of the May Claim later set out in the Caletka Report. Those fruits, once Carter had had an opportunity to consider the new facts relied on and the new arguments, could potentially ripen into a new *"dispute"*, but they were not part of the *"dispute"* which existed as at 14 December 2001.

40. It follows from what I have said earlier in this judgment that what Mr. Richards decided in the Decision was not something which had been referred to him for decision. The Decision was thus made without jurisdiction and is unenforceable. This action fails and is dismissed.

Ian Pennicott (instructed by Shadbolt & Co. for the Claimant)

Martin Bowdery Q.C. (instructed by Greenwoods for the Defendant)