JUDGMENT : His Honour Judge Gilliland : 20th April 2001. Salford District Registry. TCC.

1. This is an application to enforce summarily under Part 24 the decision of Mr Peter Curtis, who was appointed as adjudicator respect of a dispute between the claimant contractor and the defendant employer. The dispute involved questions whether the claimant was entitled to an extension of time, and, as a consequence, whether the claimant was entitled to additional payment for loss and expense.

2. The defendant opposed the claim. There were issues before the adjudicator as to the length of period of any extension of time. The adjudicator had had before him, as set out in the defendant's statement of case, what, in effect, was a counterclaim in respect of which it was alleged that the claimant had been in delay itself, critical delay, in breach of contract and that the defendant was entitled to set off a substantial sum of money. The amount, as set out in the defendant's counterclaim or statement of case by way of defence, was in excess of £300,000. The claimant's claim was for some £900,000.

3. The adjudicator made his award after full submissions of case before him. Submissions were addressed to him on jurisdiction relating to certain matters. He also had meetings with counsel and he visited Manchester to discuss programming and cost issues. It would appear from his decision that he took legal advice with permission of the parties and sought legal advice from counsel on the jurisdictional issues that had been raised by both parties.

4. The decision of the adjudicator can be expressed by saying that he upheld the claimant's contention for an extension of time of 22 weeks to 30th June 2000. That was the period set out in the claimant's notice requiring adjudication. The claimant had, to its statement of case, set out a somewhat longer period. The adjudicator clearly determined under paragraph 5.1.1 of his decision that there was a dispute. That was one of the jurisdictional issues which had been raised. Secondly, he determined in paragraph 5.1.2 that the scope of the adjudication was determined, or limited, as he put it, by reference to the notice of adjudication and was not to be ascertained by reference to the referring party's statement of case in which the extended period of time beyond 22 weeks had been claimed. He also held in paragraph 5.1.3 that he had no jurisdiction to deal with the respondent's counterclaim. That appears to be a reference to the sum of money which the claimant seeks to get off against the amount awarded.

5. In paragraph 5.1.3, under the heading, of "Jurisdiction", he said: *"Scope of the adjudication. Whether or not the adjudicator has jurisdiction to deal with the responding party's counterclaim. I have decided that I do not have jurisdiction to deal with the responding party's counterclaim,"*

6. At 5.2 he dealt with the relief sought by the referring party in the notice of adjudication, and he held first, as I indicated, that the claimant was entitled to an extension of time for 22 weeks, to 30th June 2000. He directed that there should be such an extension of time for completion of the trade contract.

7. He then turned to consider the question of quantum, and he dealt with the quantum in paragraph 5.2.3 as follows. Referring to the declaration that was sought by the referring party, he declared that the referring party was entitled to the sum of £601,061.53, plus VAT. It is common ground that VAT is applicable. He gave a breakdown of the £601,061.53 between site overhead costs, site supervision costs, disruption, costs and loss of head office overheads. The disruption costs came, on his ascertainment, to some £324,582.30. He says specifically:
"I have made no decision on the referring party's claim for Additional Cost of Labour from July to November 2000."

8. That clearly was a reference to the fact that the scope of the adjudication was determined by reference to the original notice rather than to the extended period claimed for. Then he made an order that the defendant should pay the £601,000 and directed interest, nil.

9. The defendant seeks to resist summary enforcement of the award, essentially on the basis that the adjudicator failed to deal with the defendant's claim to set off the 300-odd thousand pounds referred to in the defendant's statement of case arising from the alleged breach by the claimant of its obligations under the contract to proceed and carry on diligently with the work. It is submitted by Mr Raeside that the adjudicator has simply not dealt with an essential and important part of the defendant's case, and that accordingly this court should not enforce the judgment summarily.

10. Mr Darling, on behalf of the claimant, makes two points. First, he says, it is not shown on a fair reading of the decision of the adjudicator that the adjudicator did not consider the respondent's claim in respect of the set-off. Secondly, Mr Darling submits that, even if it be the case that the adjudicator did not consider the respondent's claim, nevertheless, that was a matter which was within the scope of the adjudicator's jurisdiction, and the court should give effect to the decision of the adjudicator which is, by statute, expressly binding until set aside subsequently by arbitration or by court proceedings.

11. I should say that court proceedings have been started by the defendant in the present case with a view to overturning the adjudicator's decision. In the proceedings the respondent is seeking to reduce the extension of time to 10th June from the 30th, and is also seeking to recover in respect of five weeks' culpable or critical delay to the project caused by the alleged breach by the defendant of its obligations under the contract to proceed with the work. That is the same 300-plus thousand pounds which was claimed as a set-off or counterclaim before the adjudicator. It is clear that those matters will be dealt with in due course by the court unless the parties can resolve their differences by some other means.

12. So far as the question of whether the adjudicator did give consideration to the defendant's set off is concerned, it seems to me that one cannot, if one looks at the decision, be at all certain that the adjudicator did disregard the respondent's claims. It is possible, consistently with the form of the adjudication, that the adjudicator did consider them but rejected them, rightly or wrongly. It seems to me there is, strictly speaking, nothing on the face of the award to indicate that the adjudicator did not give consideration to the claimed set-off. By agreement the adjudicator was not obliged to give reasons for his decision and he did not do.

13. It is possible that the adjudicator did not consider the respondent's cross claim. I say that because of paragraph 5.1.3 of his declaration where he specifically said that he had no jurisdiction to deal with the respondent party's counterclaim. One possible interpretation of that is that the adjudicator took the view that he could not deal with the claim for some £300,000 indicated in the defendant's statement of case.

14. It is right to say that there had been specific submissions made to him in the written submissions placed before him in relation, and I think it is right to say that the question whether he could deal with what I have termed the claim for £300.000 had been raised. Submissions were made to him on behalf of the claimant that he could not deal with or give effect, to the respondent's claims because appropriate notices had not been given and so on. I do not need to go into the details of the matter. But it seems to me that, in those circumstances, it is possible that the adjudicator did take the view that the claim could not be dealt with for reasons which had been submitted to him, e.g. the lack of notice.

15. On the one hand it is possible, having regard to paragraph 5.1.3, that the adjudicator took the view that he had, as he says, no jurisdiction to deal with the responding party's counterclaim, and by that he was intending to refer not just to the claimant for relief sought by the respondent, but to the substance and merits of the case which he regarded as in the nature of a counterclaim.

16. The adjudicator, it seems to me, did (and this is probably the highest it can be put) take the view that the scope of the adjudication was defined by the notice of referral or notice of adjudication. That is set out in paragraph 5.1.2, that he took the view he could not deal at all with the substantial counterclaim for some 300-odd thousand pounds. Mr Raeside invites me to hold that the adjudicator did not consider the respondent's counterclaim. As I say, it seems to me one cannot say for certain that that is what he did. One may suspect that he did that. But then the question arises, even assuming that it is right that that was the view which he took, can this court properly intervene in the circumstances of this case?

17. The general rule in relation to adjudication decisions is that they are binding until set aside and the approach which this court has adopted is that they should be enforced summarily because the whole purpose of adjudication is to provide a quick and effective remedy for the payment of money on a provisional basis.

18. Mr Raeside submits, however, that in the present case the defendant has suffered substantial injustice, in that effectively the real reason why it was refusing to make any payment in respect of the claimant's

claims was simply not dealt with by the adjudicator, and it would be quite wrong, it is submitted, to enforce the award in these circumstances where the adjudicator has failed to take account of or ignored an important matter of defence. Mr Raeside has drawn my attention to the well-known statement of Dyson J in **Bouygues (UK) Limited v Dahl Jensen (UK) Ltd** [2000] BLR 49, 54, at first instance, where Dyson J said: "If the mistake [of the adjudicator] was that he decided a dispute that was not referred to him, then his decision was outside his jurisdiction and of no effect".

19. Mr Raeside submitted that the converse was also true. Thus if, by mistake, an adjudicator failed to deal with a matter which had been squarely placed before him, then that decision likewise should be of no effect, and that the court can properly intervene under an application made under Part 24 and refuse to give effect to the decision insofar as the matter has not been dealt with.

20. In the present case it is accepted that the adjudicator's award in the sum of £600,000 cannot be challenged. What is sought to be done before me today is to deduct or set off from the £600,000 the £300,000 which the defendant says is a claim which was before the adjudicator and which was not in substance, he submitted, challenged before the adjudicator. I am not sure that that is entirely right to say the respondent's claim was not challenged, but accepting that that is the case, what Mr Raeside has submitted is that the adjudicator's award should only be enforced for the net balance. This is thus a case where a party opposing summary enforcement nevertheless accepts that the award is good in part but not, in full, and I am asked not to enforce part of the order.

21. Now, as far as adjudication awards are concerned, the approach of the court in relation to not enforcing the award has been to look not at the merits of the decision, but at the question of jurisdiction. If an adjudicator makes an award which is outside his jurisdiction, then it is of no effect and will not be enforced by the court. If, on the other hand the award was within his jurisdiction, then the court will normally give effect to that award.

22. It seems to me that Mr Raeside's submission in the present case must involve the proposition that if it be the case that the adjudicator ignored or failed to take account of an issue of substance put forward by the defendant in the present case that is a matter which goes to jurisdiction. I am bound to say that it seems to me that that is not a matter which goes to jurisdiction. Rather it is a matter which goes to the conduct of the proceedings. The adjudicator may have been wrong or he may have erred in what he did, but it is an error which is, in principle, within his jurisdiction. He has simply made a decision which is incorrect.

23. An adjudicator's decision is not like an arbitrator's award where the court has power to interfere in pursuance of a statutory power under the Act. This is a case where the statute says the adjudicator's award is binding until set aside in subsequent proceedings.

24. If it be correct that the adjudicator took the view that he had no power to deal with a particular claim, then that is not a matter in my judgment which goes to his jurisdiction. I say that in this case because it is common ground this adjudication was governed by the TeCSA Adjudication Rules 1999 Version 1.3. Rules 11 and 12 are quite clear and unambiguous it seems to me, by paragraph 11 it is provided:
"The scope of the adjudication shall be the matters identified in the notice requiring adjudication, together with
(i) any further matters which all Parties agree should be within the scope of the adjudication. [That is not relevant in this case]; (ii) any further matters which the Adjudicator determines must be included in order that the Adjudication may be effective and/or meaningful."

25. If it be the case that the adjudicator did not deal with the matter of the set-off, it is clear that 11 (ii) does not assist the respondent, because the adjudicator must have determined that this was not something which had to be included within the scope of the adjudication in order that the adjudication could be effective and/or meaningful. The submission is that he simply ignored it and that he has not determined that it should be included. Under paragraph 11 the scope is governed by the notice, except as extended by agreement or by matters which the adjudicator considers or determines must be included.

26. Under paragraph 12 it is expressly provided: *"The Adjudicator may rule upon his own substantive jurisdiction and as to the scope of the Adjudication."*

27. Now, it seems to me on the face of paragraph 11 and 12 that it is a matter entirely for the adjudicator to decide which of the matters he will decide in the course of the adjudication. He has a complete discretion over the scope of the adjudication and can make a decision as to what is within the scope of the adjudication. He has obviously to have regard to the notice, but his decision as to what is comprised within the notice is a matter which is by contract given to him to decide.

28. Similarly, so far as jurisdiction is concerned, if he decides that something is within his jurisdiction, that is binding. The principle which Dyson J set out in **Bouygues** [2000] BLR 49, 54 does not apply to adjudications governed by the TeCSA Rules. If, by mistake, he decides that something is within his jurisdiction when technically on the proper construction of the notice of referral it is not, then the Rules, it seems to me, are quite clear when they provide that he may rule on his substantive jurisdiction. That is a matter for the adjudicator to decide and it is not a matter for this court on a summary application to deal with. If the adjudicator decides that something is not before him and that he ought not to deal with a particular matter for whatever reason, that it is a matter which, it seems to me, the adjudicator had been given by contract the right to decide. It is not for this court on a summary application to rule that his decision is not to be regarded as binding until set aside. It seems to me that his decision is binding until set aside, and this court cannot properly intervene and substitute what it may think might have been the right course or the right decision for the adjudicator to have made on the particular matter. That is a matter entrusted entirely, it seems to me, to the adjudicator. I can appreciate that the defendant may feel that its case has not been properly dealt with by the adjudicator, but that is not, it seems to me, a ground on which this court should intervene. The decision is binding until set aside.

29. The court ought to give effect to the statutory provision, and not seek to whittle it down by finding reasons for intervening and saying that the decision ought not to be regarded as binding. It seems to me that the approach taken by his Honour Judge Lloyd in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** (unreported), but a copy of which can be found on the Internet (www.adjudication.co.uk/cases/kns.htm), is the approach which the court ought to adopt in a case like this. As I have already indicated, this case has come similarities with the KNS case. That was a case where an award was said to be good in part and the court was asked to amend the award. That, it seems to me, is what I am being asked to do in the present case. It seems to me that just as His Honour Judge Lloyd said in paragraph [sic] of his judgment, the court should accept the award as it stands and not seek to vary it ("*The parties have to accept the decision 'warts and all'; they cannot come to the court to have a decision revised to excise what was unwanted and to replace it with what was or is thought to be right unless the court is the ultimate tribunal").*

30. I take the view that it is not right for the court to try and dismantle or reconstruct a decision. It seems to me that a party cannot pick and choose amongst the decisions given by an adjudicator, assert or characterise part as unjustified and then allege that the part objected to half been made without jurisdiction. That is not permissible under the TeCSA Rules. Either the adjudicator has jurisdiction or he does not. If he had jurisdiction, it seems to me that his decision is binding even if he was wrong to reach the conclusion he did. I take the view this award ought to be enforced in the sum found by the adjudicator and that it is not right to seek to set off the £300,000-odd which the defendant seeks to deduct from the award. I propose to make a summary order.

(Judgment concluded)

Mr Darling Q.C. appeared on behalf of the Claimant
Mr Raeside Q.C. appeared on behalf of the defendant.