

JUDGMENT : His Honour Judge Mackay : 1st February 2001. TCC.

1. This case concerns a claim by the Claimant that a previous adjudication should be set aside on the basis that the adjudicator had no jurisdiction to rule in this case. The Claimant was the unsuccessful party (the paying party) to the adjudication. The adjudication was carried out under the provisions of the Housing Grants, Construction and Regeneration Act 1996 and pursuant to Section 1(I) of the Scheme for Construction Contracts (England and Wales) Regulations 1998. The Defendants (the payee party) were the successful party to the adjudication and are seeking to uphold the adjudication and to obtain monies obtained as a consequence of the adjudication as a judgment debt and an application has been made for judgment.
2. The Claimant is a contractor who sub-contracted work at Rugby to the Defendant. The Defendant applied for interim payment 10 times during the course of the work. Application number 10 was the subject of 2 successive referrals to adjudication by the Defendant and the Claimant objected to the jurisdiction of the adjudicator on various grounds. The first adjudication was resulted in a set back for the Defendant in that no money was awarded. The second adjudication resulted in an award in the Defendant's favour.
3. The Defendants attempted to enforce the second adjudication award by winding up proceedings in Scotland. In the course of those winding up proceedings the status of the second adjudication award was a major issue. Before the hearing of the winding up petition the Claimants say they had been content to wait until the Defendants took proceedings and apply for summary jurisdiction before raising in court its contentions as to the jurisdiction of the adjudicator. There was a considerable delay in matters and the Claimants brought this action and asked for declarations in respect of the adjudication awards. The Defendants counter claimed for a judgment enforcing the awards. The matter came before me on the 6th December 2000 where I made an order setting out a timetable and also provision for a payment into court of the sum in dispute.
4. The Claimants served a particulars of claim and attempted to have an amended particulars of claim brought before the court and in a previous judgment delivered in this case I rejected the Claimants amended particulars of claim which, amongst other things, alleged that the adjudicator did not have any jurisdiction by reason of a compromise between the parties and I ordered that the matter should be tried solely on the issue raised in the particulars of claim which I held was properly served within the prescribed period and the matter came on for trial before me by way of argument.
5. The grounds upon which the Claimants challenged the jurisdiction of the adjudicator and the validity of the award has been focused into the simple ground:
6. The dispute referred in the second adjudication "is substantially the same as the one which has been previously referred to adjudication and in respect of which a decision has previously been taken in that adjudication, within the meaning of paragraph 9(2) of this Scheme for Construction Contracts (England and Wales) Regulations 1998". Paragraph 9(2) provides:
"9(2) A an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that adjudication".
7. The Claimant put its argument as an issue of jurisdiction. The Claimant said that adjudication under the Act is a way of achieving quick answers to questions during the course of the contract so that the contract can go forward. Those answers are enforceable in the short term so that the contract can proceed under a no-cash flow or other difficulties but they are open to review by arbitration or in the courts in the long term. The Claimants said that there was no final issue estoppel or "res judicata" arising out of an adjudication decision. The decision has temporary finality only. 9(2) is, according to the Claimants, an essential part of ensuring the temporary finality of all adjudication.
8. What the Claimant says is that the second adjudication related to the same subject matter as the previous adjudications. It claimed a small reduction as to the figures, various words requesting the adjudicator to award lower sums if he sees fit, some changes to the interest claim, some small changes to the claim for costs of the adjudication and greater detail on the make up of some claims but none of these claims are new claims not included in the previous adjudication. What the Claimant says is that the adjudicator, who was faced with the same argument during the second adjudication, was incorrect

in not resigning and although he said it was a different point he did not go on to consider whether or not a dispute over awarding the full sum on an application and a dispute over awarding a slightly smaller sum is "substantially the same dispute" in the 2 adjudications.

9. The Claimants say that a subcontractor who can claim a large sum and fails, for whatever reason, cannot re-shape his claim very slightly in the light of the award and claim a smaller sum and seek a second adjudication.
10. In response the Defendant's counsel referred directly to the notices of referral and the decisions in the 2 adjudications. In paragraph 5 of the Defendants referral notice (page 35 of the bundle of documents) it states "the Applicant therefore claims immediate payment of the balance of the sum due under Application number 10 and earlier Applications of £139,227.13 less the part payment received on 23rd May 2000 (by the Applicant) of £28,639.57 ie £110,587.56 plus interest pursuant to contract (Clause 40.2 of the General Conditions of Contract referred to in paragraph 2 hereof - page 60)".
11. In the adjudication (page 45 of the bundle of documents) the adjudicator, Mr Little, stated:
 1. *There is, I conclude, only one substantive issue that I'm required to determine in this Adjudication. That issue is, by the terms of the referral notice, whether Colt is entitled to be paid the sum claim to arise out of the Application 10 for interim payment in the sum of £110,586.56.*
 2. *Although Colt have by their subsequent submissions upon Holt's response to the Referral, invited me to make numerous assessments of value in the alternative, concerning the degree of completion and the alleged arbitrary deductions and set off applied by Holt against Application 10, I was not invited to do so by the Referral Notice.*
 3. *I find myself in agreement with Holt's contention that my jurisdiction in this matter extends only to the consideration and determination of the above issue and I do not consider I have power to venture into deciding matters of alternative valuation and completion, suggested by Colt, in their comments upon Holt's Response to the Referral Notice".*
12. The Adjudicator rejected the counter claim of the present Claimants which he concluded was without merit and he found that the Defendants claim for immediate payment of £110,587.56 fails.
13. The second application for adjudication under the relevant act is to be found in the bundle of documents starting at page 6 with regard to the notice. This was an application made on the 14th August 2000 and the referral notice sets out the terms of the contract and the applications and goes into some detail with regard to the breakdown of figures. It concludes at paragraph 7.

"The Applicant therefore claims immediate payment of the balance of the sum or sums due under Application number 10 and earlier Applications calculated by the Applicants to total £97,309.77 or alternatively, such other sum or sums as the Adjudicator shall decide to be fair and reasonable in the circumstances of the claim(s) set out in clause 6 above, plus interest pursuant to the contract...on the delayed payment of £28,69.51 not made until 23rd May 2000, the sum of £24,836.07 wrongly withheld and on such other sum or sums as the Adjudicator shall decide to be fair and reasonable in respect of each element of this claim together with the costs of this adjudication as well as any other costs that the adjudicator may decide is fair and reasonable to award to the Applicant".
14. It is clear that the Scottish Solicitors acting on behalf of the present Claimants wrote to the adjudicator contending that he should resign his appointment as an adjudicator on the same grounds as argued before me. At paragraph 12 (page 20 in the bundle of documents) the adjudicator indicates that the solicitors advised him that in the event that he was not minded to resign they would on behalf of the person claiming seek to have the point determined by the court. He said that having considered the points raised on behalf of the present Claimants he wrote to the parties on the 25th August 2000 confirming to them that he accepted the solicitors for the Claimants submission that he should not re-consider the matter of any entitlement to the Defendants to the sum claimed of £110,587.56 because he had already decided that they were not. In paragraph 14 he states *"however I also advise them that the matter of whether Colt were entitled to any other sum was, in my opinion, a further and discrete issue which did not arise in the earlier referral and on that basis I conclude that it was an issue I should decide. I further informed the parties that if they wished to have the point determined by the Court, they should proceed to do so, but that I did not mean my intent to stop or defer the process".*

15. The adjudicator went through all the amounts involved in the application and adjudication and he stated at paragraph 2 of his decision (page 28 of the bundle of documents) that giving credit for the payments made by Holt to the date of the decision the amount that the Defendants were entitled to was £72,939.56 net of VAT. The Claimants in fact counter claimed in that adjudication and that counter claim was rejected.
16. The present Defendants argue the case on the basis of the meaning of the word "dispute". The adjudicator must resign where the dispute is the same or substantially the same as one which is previously been referred to adjudication. What the Defendants say is that although the issues may be the same in 2 disputes, if the disputes are different disputes arising out of the same building contract or the same set of figures put differently then there are 2 different disputes and they are therefore not the same or similar and an adjudicator is entitled to make awards therein. The Defendants say that the adjudicator was entitled to take the view that he did. The Defendants say that the first adjudication related to a specific claim for a specific amount which the adjudicator held was not recoverable. The second adjudication related to a much more flexible claim for valuations on different aspects of this contract and the adjudicator held that they were entitled to recover the sum which he awarded. The Defendants say that the adjudicator's second decision was based firmly on that other dispute - what sum was Colt entitled to? (Para 14 of the decision).
17. The Defendants contend that support for the correctness of the adjudicator's decision can be found in the case of **VHE Construction v RBSTB Trust Co Ltd** (2000) BLR198. This is a case of His Honour Judge Hicks QC a Technology and Construction Judge in London. In that case there were two adjudications both of which concerned application for a building contract. Under the first the notice of referral was not sufficiently wide to empower the adjudicator to review or revise the value of the application and he ordered payment in full; the second adjudication concerned a review and revision of the application itself and led to a reduction in the amount payable. It was held that the second dispute was not the same as the first.
18. The commentary by the learned editors of the law reports is interesting. The commentary states that the case serves a confirmation that it is acceptable for adjudicators to give what is in effect declaratory relief which can have the effect of crystallising into an enforceable obligation on the part of the payee to pay. The first adjudication award recognised that a particular payment was due upon the servicing of an appropriate VAT invoice. Following that first adjudication a VAT invoice was presented and accordingly payment fell due; subject to the events which happened in this particular case, that payment obligation will be summarily enforceable. The second adjudicator was prevailed upon to open up, review and revise the application for payment upon which the first adjudication was based. Since both adjudicators were properly appointed and because both had jurisdiction to decide issues referred to them, both decisions were binding and enforceable. Accordingly Judge Hicks had to rationalise the effect of both decisions by finding that the first adjudicator's decision binding but the consequence of enforcing that decision would mean that the successful payee Claimant would immediately become liable to repay a substantial part in consequence of the binding nature on the second decision.
19. The commentary goes on to say that the subsequent adjudicator should, generally consider himself or herself bound by the decision of the first adjudicator. Whether the second adjudicator is bound will depend precisely upon the nature of the dispute referred to the first adjudicator and the basis upon which the first adjudicator made his or her decision. This, according to the Defendants, effectively illustrates the nature of the adjudication process and also effectively illustrates the fact that it is the precise dispute between the parties which is the important matter not any historical record or correlation of circumstance.
20. There was also mentioned the case of **Sherwood and Cason Limited v McKenzie Engineering Limited** reported briefly in the Construction Industry Law Letter in February 2000. This case was cited to me in support of the Claimant's arguments with regard to the issue as to whether or not I should try the one or two issues on the question of jurisdiction relating to this case. The purpose of the Defendant citing the case was to point out that there was a difference in that case to this case in that the court was

concerned with a final and not an interim valuation. The decision of His Honour Judge Thornton QC was that the court should, in appropriate circumstances, conduct an inquiry as to whether or not the two separate disputes are substantially the same. He said that the court is not concerned to investigate the merits of the disputes let alone resolve them. He said that in conducting that inquiry, the court would give considerable weight to the decision of the adjudicator and would only embark on a jurisdiction enquiry in the first place where there were substantial grounds for concluding that the adjudicator had erred in concluding that there was no substantial overlap. "In this present case I have made an inquiry as to the nature of any overlap but the fact that I have made such inquiry must not be taken as an indication that I consider that the adjudicator had erred or indeed there are substantial grounds for considering that the adjudicator had erred".

21. In the case of **Fast Track Contractors Ltd v Morrison Construction Ltd** (2000) BLR168 Judge Thornton QC was dealing with two adjudications. At page 176 the Learned Judge states "it is to be noted that HGCRA refers to a *"dispute"* and not to *"disputes"*. Thus, at any one time, a referring party must refer a single dispute or be it that the Scheme allows the disputing parties to agree, thereafter, to extend the reference to cover *"more than one dispute under the same contract"* and *"related disputes under different contracts"*. During the course of a construction contract many claims, heads of claims, issues, contentions and courses of action will arise. Many of these will be, collectively or individually disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. First the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference. In other words the "dispute" is whatever claims, heads of claim, issues, contentions or course of action as are then in dispute which the referring party is chosen to crystallise into an adjudication reference. A vital and necessary question to be answered when a jurisdictional challenge is mounted is what was actually referred? That involves a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the underlying factual background from which it springs and which will be known to both parties. In that case the adjudicator's decision was upheld.
22. I have come to the conclusion that the Defendants are correct. I consider that whilst the references to the adjudicator may have related to the same matters arising out of contractual relations between the parties they did not relate to the same dispute. There was nothing similar in the disputes. They were about different things. They may have been about the entitlement to claim in respect of the same work but the notices of referral were crucially different and in my view the adjudicator was correct in reaching the decision that he did. It follows therefore that the Claimants are unsuccessful in their application for declaratory relief. It follows therefore subject of course to argument, that the Defendants are entitled to judgment in relation to the sums awarded in respect of the second adjudication. It also follows that the Defendants have won completely on the issue of the contract, the adjudication and also to a more limited extent on the procedural questions arising out of this claim and the conduct of the Claimants by reason of delay, late service and prejudice (which I dealt with in my previous judgment). I cannot therefore see any reason why the Claimants should not have to pay the costs of the entirety of these proceedings. However this matter will be re-listed in my list of Friday 26th January 2001 (or such other date as may be convenient to the parties which lies near that date) and I hope that I will then be presented with an agreed order (which may be sent beforehand to automatically vacate the hearing) or I will hear argument as to the precise wording of the order and any consequential matters including costs.
23. In closing may I do what I did at the termination of the oral argument namely to thank Counsel for both sides for the expeditious and careful arguments which they addressed to me which shortened the time taken on this interesting case.

Counsel for the Claimant - Mr R Clay
Counsel for the Defendant - Miss Delia Dumaresq