

JUDGMENT : His Honour Judge Richard Seymour: 22nd June 2001. TCC.

1. In this action the claimant, Mecright Ltd ("Mecright"), claims against the defendant, TA Morris Developments Ltd ("Morris"), payment of a sum of £36,471.23, together with interest thereon. The sum claimed is said to be due to Mecright pursuant to the decision ("the Decision") of Mr. KL Scott dated 22nd January 2001. The Decision was purportedly made by Mr. Scott as adjudicator appointed under the provisions of the Housing Grants Regeneration and Construction Act 1996 ("the 1996 Act"). The application now before me is on behalf of Mecright for summary judgment for the sum which is claimed in the action.
2. It seems not to be in dispute that Morris was engaged to undertake construction work at a site at Wyrley Brook Retail Park, Vine Street, Bridgtown, Cannock, Staffordshire, part of which involved the design, fabrication, supply and erection of structural steelwork, roof decking and wall cladding at Unit 3 at that retail park. The latter work I shall, in this judgment, call "the Subcontract Works". No documents relating to the formation or terms of the contract between Morris and Mecright in respect of the execution of the Subcontract Works have been put before me.
3. However, it is common ground that the contract did not comply with the requirements of section 108 of the 1996 Act.
4. So far as is material for present purposes, section 108 of 1996 Act is in the following terms:

"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose 'dispute' includes any difference.

(2) *The contract shall...*

 - (a) *enable a party to give notice at any time of his intention to refer a dispute to adjudication;*
 - (b) *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;*
 - (c) *require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;*
 - (d) *allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;*
 - (e) *impose a duty on the adjudicator to act impartially; and*
 - (f) *enable the adjudicator to take the initiative in ascertaining the facts and the law.*

(3) *The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.*

(5) *If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."*
5. By section 114(4) of the 1996 Act, it is provided:

"Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."
6. The Scheme for Construction Contracts is the Scheme set out in the schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649. In this judgment I shall call that scheme "the Scheme". Part 1 of the Scheme includes the following provisions which are presently material:

"1.(1) Any party to a construction contract (the 'referring party') may give written notice (the 'notice of adjudication') of his intention to refer any dispute arising under the contract, to adjudication.

(3) *The notice of adjudication shall set out briefly—*

 - (a) *the nature and a brief description of the dispute and of the parties involved,*
 - (b) *details of where and when the dispute has arisen,*
 - (c) *the nature of the redress which is sought, and*
 - (d) *the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).*

7.(1) *Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the 'referral notice') to the adjudicator.*

- 8.(1) *The adjudicator may, with the consent of all parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.*
20. *The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. ...*
- 23.(2) *The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."*
7. Morris took the view in November 2000 that Mecright had failed to proceed with the execution of the Subcontract Works in a reasonable and workmanlike manner. In a letter to Mecright dated 24th November 2000, Mr. RJ Mills of Morris wrote, so far as is relevant, as follows:
- "Following our letter dated 15th November 2000, we confirm that, despite having issued a 7 day notice to remedy the matters outlined in the above, you have failed to proceed with your Subcontract Works in a reasonable and workmanlike manner, and failed to propose and/or execute any initiatives to recover lost time, and/or remedy the breaches of subcontract. We confirm, pursuant to the express conditions of your Conditions of Order clause 7(1) that your subcontract is cancelled forthwith."*
8. By a notice ("the Notice"), dated 11th December 2000, Morris informed Mecright of its intention to refer to adjudication a dispute, and to seek in relation to that dispute a remedy, formulated as follows:
- "The dispute has arisen out a subcontract between the referring party and the respondent, by which the respondent agreed to carry out the design, fabrication, supply and erection of the structural steelworks, roof decking and wall cladding at Unit 3, Wyrley Brook Retail Park in Cannock in consideration of the lump sum price of £73,950.*
- The subcontract documents comprise, inter alia, the domestic subcontract DOM2 Conditions of Contract, which is incorporated by reference into the subcontract, the referring party's conditions of order, the main contract specifications and drawings, and the referring party's programme of works reference 174 REV A. Time was of the essence. Relevant copies are attached.*
- By reason of the respondent's non-performance and repudiatory breach of subcontract the referring party cancelled the respondent's subcontract by way of a letter sent by recorded delivery on 24th November 2000 (copy attached). A dispute has arisen out of these same facts.*
- The referring party seeks, firstly, a declaration from the adjudicator that the subcontract was cancelled in accordance with the subcontract, and, secondly, recovery of damages from the respondent arising out of the cancelled subcontract."*
9. After Mr. Scott was appointed adjudicator, Messrs Schofield Lothian ("Schofields"), who at that time acted on behalf of Morris, prepared a referral notice in accordance with paragraph 7 of Part 1 of the Scheme and sent it to Mr. Scott. Included within that referral notice was a section entitled "Financial Relief". In that section, the question was addressed what sum was due to Mecright in respect of the execution of the Subcontract Works as part of an evaluation of the sum that it was alleged was due to Morris.
10. In the response to that document, prepared on behalf of Mecright by Messrs Nelsons, solicitors, who also act on behalf of Mecright in this action, Mecright sought, amongst other things,
- "payment to Mecright of £58,374.60 pursuant to paragraph 36 above. However, as since the application was made Mecright were instructed to cease work, the application is reduced to £48,602.52, i.e. the value of the final accounts submitted on 27th November, in order to prevent a situation of overpayment"*.
11. In a letter dated 3rd January 2001 to both Schofields and Messrs Nelsons, Mr. Scott wrote, so far as is presently material:
- "On the question as to whether or not the actions of the referring party has resulted in damages being suffered by the respondent party, which it will claim in this adjudication, I would ask Nelsons to advise me under which provisions of the Scheme they intend to pursue this claim.*
- In providing me with this information I ask that I am also provided with the reasoned argument in support. This is to be provided to me by no later than 5 pm Monday 8th January 2001."*

12. The reply given in a letter dated 8th January 2001, by Messrs Nelsons on this point was:

"The damages sought by Mecright are already introduced into this adjudication by TA Morris Developments Ltd at paragraph 84 etc of the Notice of Referral. Further, TA Morris Developments Ltd analysed the claim submitted by Mecright in their letter to TA Morris Developments Ltd of 27th November. Accordingly, pursuant to section 107(1), TA Morris Developments Ltd (the referring party) have referred to you this particular part of the dispute."
13. In a facsimile transmission to Mr. Scott dated 12th January 2001, Jocelyn Taylor of Messrs Nelsons corrected the reference to section 107 of the 1996 Act (which was plainly inappropriate) to paragraph 7(1) of Part 1 of the Scheme. I have to say that that reference seems to me to be equally inappropriate. It also struck Mr. Scott that way, for in a letter to Schofields and Messrs Nelsons dated 12th January 2001 he wrote:

"I have say that Nelsons appear not to be directing me to the relevant part of the Scheme upon which they rely, together with their arguments as to why I should take their client's claim into account in this adjudication. This was requested by me in my letter of 3rd January 2001. Quite simply, unless Nelson provide me with a sufficient argument in support of their proposition then I shall proceed as stated in my fax earlier in the day and consider the point on the information, as amended, received by me from Nelsons. That includes a reference to paragraph 84 etc of the referral and paragraph 7 of the Scheme.

I did give a deadline of 8th January 2001 for the receipt of information referred to in my letter of 3rd January 2001. I am willing to allow an extension up to 5 pm Monday 15th January 2001, and I will allow Schofield Lothian until 5 pm close of business Wednesday 17th January 2001 to submit a reply. Beyond that I shall not accept any further submissions."
14. In a letter to Mr. Scott dated 17th January 2001, Messrs Nelsons elaborated the position of Mecright in relation to the question whether Mr. Scott should deal with Mecright's claim for payment in the adjudication as follows:

"As you know, we have referred already to paragraph 7(1) of the Scheme for Construction Contracts and submit that TAM have referred the issue as to our client's final account to you in their referral notice. It is clear that the termination of the subcontract in question had financial repercussions for both our client and TAM. Obviously dependent upon your decision, you are in a position to deal with those financial consequences. If TAM are successful, then you will no doubt go on to consider the costs to which they have been put of employing others, subject to the reservations which we have put in relation to those costs in our reply. If, on the other hand, Mecright succeed, consideration of their final account should follow. After all, there is only one dispute between the parties, ie the termination of the subcontract. It would also be evidently sensible for you to go on to consider the financial repercussions of TAM's actions. If, on the other hand, you believe the consideration of the financial matters to be a separate dispute between the parties (which we do not actually agree with), we would refer you to paragraph 8(1) of the Scheme for Construction Contracts. TAM, in their referral notice, have raised the issue of Mecright's final account and have dealt with their position on it. By our Reply, we deal with that, and accordingly the parties have given their consent to you to adjudicate upon the positions adopted."
15. In a witness statement dated 3rd April 2001, Mr. Nick Stocks a director of Schofields, said in relation to the letter dated 17th January 2001 written by Messrs Nelsons:

"Clearly Nelsons had served their submission on jurisdiction out of time. They should have been served on 15th January. Instead they were served two days late and only one hour and eight minutes before the final cut off date for any further submissions set by the adjudicator. I expected the adjudicator to ignore these submissions. The late receipt of the submission was contrary to the adjudicator's own directions, and I believed that it would have been unfair of the adjudicator to consider and take account of Mecright's submissions without giving me the opportunity to respond."
16. The Decision included the following recitals:

'2.04. The referral notice was duly served on 22nd December 2000, receipt of which was acknowledged in my letter to the parties' representatives dated 2nd January 2001.

- 2.05. *The Response was duly served by fax on 11th January 2001, with the hard copy being served on 12th January 2001, receipt of which was acknowledged in my letter to the parties' representatives dated 12th January 2001.*
- 2.06. *Thereafter, I received a fax from Schofield Lothian Ltd, dated 16th January 2001, seeking my permission to submit a Reply to the Response. This was accepted by me, and the Reply was duly served on 17th January 2001, receipt of which was acknowledged in my letter to the parties' representatives dated 18th January 2001.*
- 2.07. *Following an exchange of correspondence between me and the parties' representatives dealing with various matters concerning the adjudication, including the provision of statements of truth by certain individuals, but particularly dealing with my jurisdiction to decide the parties' costs in the adjudication, I received confirmation of that jurisdiction by letters from the parties' representatives dated 15th January 2001 and 8th January 2001 respectively.*
- 3.00. *Now I, having read the referral notice, the Response, the Reply and after having considered them, including all the arguments and evidence of both parties, including the statements of truth, make this my adjudication decision."*
17. At paragraph 4 of the Decision, Mr. Scott identified the issues for his determination as:
- " Issue 1 - Whether or not the referring party was entitled to cancel its subcontract with the respondent party.*
- Issue 2 - If my decision on issue 1 is in the affirmative, then is the referring party entitled to:*
- (i) employ alternative resources to complete the respondent party's subcontract work and to deduct the cost of employing those alternative resources from any monies due to the respondent party?*
 - (ii) recover monies from the respondent party for proper execution of the Subcontract Works by others, should the cost of completing those Subcontract Works be more than the total of the respondent party's original quotation?*
 - (iii) recover the sum of £39,005.13 plus VAT from the respondent party, representing the additional costs over the respondent party's original quotation, and such other sums I may decide?*
 - (iv) recover from the respondent party the cost of liquidated damages, currently assessed in the sum of £6,000 plus VAT, or such other sums as I may decide?"*
18. In relation to what he identified as issue 1, Mr. Scott's decision at paragraph 5.02 of the Decision was:
- "I decide that, notwithstanding the fact that I find that the referring party's standard condition did form part of the agreement between the parties and that those standard conditions did contain a right to cancel, the referring party failed to apply the conditions on cancellation properly and correctly. That failure, together with the referring party's actions in instructing the respondent party to cease works prior to the issue of its purported notice of cancellation, amounted to a repudiation of the subcontract by the referring party, thereby disentitling it to cancel the subcontract. In the light of that decision, the answer to each of the subissues in issue 2 was that Morris had no entitlement."*
19. Paragraphs 5.15 to 5.18 inclusive of the Decision are in the following terms:
- "5.15. By instructing the respondent party to cease works on 16th November 2000, the referring party repudiated the subcontract.*
- 5.16. The referring party shall pay the respondent party the sum of £26,541.05, plus VAT as may be appropriate, for works carried out under the subcontract at the date of, and as a consequence of, its repudiation of the subcontract. Said payment is due and payable forthwith.*
- 5.17. The referring party shall bear its own costs in the adjudication and shall bear and pay the respondent party's costs in the adjudication, which I determine to be £3,718, plus VAT as may be appropriate. Said payment is due and payable forthwith. Payment of costs incurred other than the respondent party's costs is not payable by the referring party.*
- 5.18. The referring party shall bear and pay the reasonable fees and expenses reasonably incurred by me in this adjudication, which I determine to be £1,841.81, inclusive of the VAT, amounting to £274.31. Said payment is due and payable forthwith."*

20. Morris apparently did not pay Mr. Scott's fees and expenses, so Mecright paid them. Morris did not pay any of the sums mentioned in paragraphs 5.16 or 5.17 of the Decision. The sum claimed in this action is the total of the amount set out in paragraphs 5.16 to 5.18 of the Decision plus VAT on the amounts of £26,541.05 and £3,718.
21. Mr. Sean Brannigan, who appeared on behalf of Morris, sought to advance two grounds upon which he submitted Morris was not bound to pay the sums claimed in this action. The first was that, so he contended, Mr. Scott had had no jurisdiction to award sums against Morris. If that submission is well founded, it seems to me that it provides a complete answer to the claim made in this action. The second ground of defence, so Mr. Brannigan submitted, was that the Decision was unenforceable because there had been a breach of natural justice in the procedure followed in the adjudication. I consider these matters in turn.
22. Mr. Brannigan submitted that, in the case in which the adjudication provisions of the Scheme apply as implied terms of the relevant contract between the parties, the jurisdiction of the adjudicator derives from the terms of the notice of adjudication referred to in paragraph 1 of Part 1 of the Scheme. In support of that submission, he drew to my attention the decision of His Honour Judge Humphrey Lloyd QC in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd**, in particular at paragraph 21 and the decision of His Honour Judge McKay, in **Holt Insulation Ltd v Colt International Ltd**. The submission was not contested by Mr. Abdul Jinadu, who appeared on behalf of Mecright, who himself relied upon the decision in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** and, indeed, the same paragraph as Mr. Brannigan and also referred me to the decision of His Honour Judge Anthony Thornton QC in **Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168, which was mentioned by His Honour Judge Lloyd QC in his judgment in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd**. The real difference between Mr. Brannigan and Mr. Jinadu was whether the issues of whether Morris had been guilty of a repudiation of the contract between itself and Mecright, and, if so, to what sum Mecright was entitled in respect of the execution of the Subcontract Works recovered by the Notice.
23. Although Mr. Brannigan and Mr. Jinadu seem to have been in agreement that the jurisdiction of an adjudicator operating under the terms of Part 1 of the Scheme derives from the notice of adjudication referred to in paragraph 1 of that Part, and although at one level that is correct, it should not be overlooked that paragraph 20 of that Part expressly provides that an adjudicator "may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication, or which are matters under the contract which he considers are necessarily connected with the dispute".
24. Grammatically, the language used suggests that what the adjudicator may do is to take these other matters into account in determining the dispute or disputes otherwise referred to him for decision. However, it seems to me that, upon proper construction, what the words which I have quoted mean is that, first, the adjudicator can decide any matters which the parties to the adjudication agree after all the initial notice of adjudication should be within the scope of the adjudication but were not originally; and second, that he can decide any matter arising under the relevant contract which he considers is necessarily connected with the dispute. As what is contemplated in relation to first of these alternatives is that something which was not originally within the scope of the adjudication is brought within it by the agreement of the parties and that the adjudicator is entitled, but not bound, to decide such matters, it must follow that the matters are other disputes.
25. If that is correct, again, in my judgment, it follows that the matters under the contract which he considers are necessarily connected with the dispute mentioned next in paragraph 20 are other disputes which are aspects of or the resolution of which is necessary to resolve the dispute or disputes the subject of the notice of adjudication.
26. The terms in which the dispute which Morris desired to refer to adjudication was expressed in the Notice were somewhat general. As His Honour Judge Lloyd QC said in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** at paragraph 21:

"A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought, it takes the risk that its bluff may be called in an unexpected manner."

27. In **Fastrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168 at 177, His Honour Judge Thornton QC emphasised:
"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."
28. In the present case the essence of the dispute described in the notice was, first, whether in the circumstances Morris had been entitled to determine in its contract with Mecright, and, if so, what sum Morris was entitled to be paid by Mecright in consequence of the determination.
29. It was, I think, obvious that if the answer to the question 'was Morris entitled to determine the contract' was negative, that, of necessity, involved a finding that the determination had been wrongful. A finding to the latter effect was, in my judgment, unarguably a decision in relation to the dispute referred. It would follow, it seems to me, from a finding that Morris had acted wrongfully in determining its contract with Mecright that Mecright was entitled to at least nominal damages.
30. For the purpose of advancing its own case as to the sum which it contended it was entitled to be paid by Mecright, Morris put Mr. Scott in a position in which he felt able to assess what sum Mecright was entitled to in respect of the execution of the Subcontract Works.
31. I accept the submission of Mr. Brannigan that how much Mecright was entitled to be paid in respect of the execution of the Subcontract Works or as a result of a wrongful determination of its contract by Morris was not, on a proper construction of the Notice, covered by the dispute referred. I therefore find that the challenge to the Decision on the ground that Mr. Scott had no jurisdiction to decide that a sum was due to Mecright in respect of the execution of the Subcontract Works succeeds.
32. Before leaving this part of the case, I should comment upon Mr. Jinadu's submissions that, first, the scope of the dispute referred could be ascertained not simply from the Notice but also from Morris's referral notice submitted under paragraph 7 of Part 1 of the Scheme, and second, that, by virtue of referring to how much was or might be otherwise due to Mecright in the referral notice, Morris was to be taken to have agreed that Mr. Scott should make a decision on that point.
33. I reject each of those submissions. As His Honour Judge Lloyd QC pointed out in paragraph 21 of his judgment in **KNS Industrial Services Ltd v Sindall Ltd**, in a passage with which I respectfully agree:
"The further documents which come into existence following the notice of adjudication (such as the referral which is defined in clause 38A.4.1 of DOM 1) do not cut down or, indeed, enlarge the dispute (unless they contain an agreement to do so)."
34. The basic scheme of adjudication, in accordance with the Scheme, is that what is referred is a single dispute. Paragraph 8 of Part 1 of the Scheme provides for an adjudicator, with the consent of all parties, to deal with more than one dispute at a time, although he is bound to do so. That provision seems to be directed principally, at an agreement made at the stage before adjudication procedure really gets underway, for, as I have already pointed out, paragraph 20 seems to deal with the position if an agreement is made to expand the scope of an adjudication once it is in progress.
35. Nonetheless, at whatever stage the consent or agreement of all parties is relevant, it seems to me that such consent or agreement must be express, and is not to be implied from conduct or in some other way. Adjudication is intended as a summary process. There is implicit within it a risk of injustice; but Parliament has considered that risk to be acceptable because an adjudication is of limited temporal effect and only of an interim nature. While, as I have pointed out, my view and that of other judges is that those who describe a dispute which they wish to refer to adjudication in vague terms have only themselves to blame if the scope of what has been referred appears to be wider than what they may have thought, it seems to me to be wrong in principle to expose those involved in an expeditious process such as adjudication to the requirement to take care to express themselves during the process in such a way that it cannot be said that, by words or conduct, they have unintentionally consented or agreed to some process other than that upon which they were initially engaged. This risk is eliminated

if, as seems to me to be right, any consent or agreement for the purposes of the Scheme has to be express.

36. The other ground upon which Mr. Brannigan sought to resist Mecright's application for summary judgment can be taken more shortly. Mr. Scott said in his letter dated 12th January 2001 that he would not consider further submissions from Messrs Nelsons unless submitted by 5 pm on 15th January 2001. Messrs Nelsons made submissions, amongst other things in relation to jurisdiction, in a letter dated 17th January 2001. There is no evidence that Mr. Scott took any account of those submissions. He had said that he would not, and the Decision in the recitals indicated that all he had taken into account in reaching his conclusions were the original referral notice under paragraph 7 of Part 1 of the Scheme, the response to that notice and the reply to that response, together with the submissions of the parties as to statements of truth and as to his jurisdiction to deal with costs. There is thus no evidence that Mr. Scott paid any attention to Messrs Nelsons' letter dated 17th January 2001. Had he been minded to pay any attention to the letter, then, as it was obviously sent to him later than he had indicated it should be, it seems likely that he would have extended Schofields' time for a response. However, the evidence of Mr. Stocks is that he took the view that Mr. Scott would ignore Messrs Nelsons' letter dated 17th January 2001 and he did not try to submit any response to it. That was a voluntary decision on his part. Morris was not deprived of the opportunity to reply to Messrs Nelsons' letter dated 17th January 2001. Morris' representatives took the view that they did not need to reply. There has not, in my judgment, been any breach of the requirements of natural justice. The application for summary judgment fails and is dismissed.
37. I think that it follows from my conclusion that the claim in the action is doomed to fail, and so I would also strike out the particulars of claim and dismiss the action.

Mr. ABDUL JINADU (instructed by Nelsons, Sterne House, Lodge Lane,-Derby DE1 3WD) appeared on behalf of the Claimant

SEAN BRANNIGAN (instructed by Shadbolt & Co, Chatham Court, Leobourne Road, Reigate Surrey RH2 7LD) appeared on behalf of the Defendant