

Before His Honour Judge Seymour QC. TCC. 9th April 2001.

Mivan (main contractor to NMEC for works to the Faith Zone, Millenium Dome) subcontracted electrical works to Lighting Technology Projects Ltd (LTP). In the absence of payment provisions the Scheme for Construction Contracts applied.

As work progressed LTP made a series of payment applications which were not fully complied with. Post completion of the sub-contract LTP issued a notice of adjudication to recover the balance on each of the applications. The referral was supported by full documentation. Mivan countered that as a consequence of re-evaluation there had been an over-payment and hence no monies were due. LTP responded that in the absence of withholding notices, the application sums became due. The adjudicator agreed with the claimant and ordered Mivan to pay the balance.

Mivan subsequently issued a notice of adjudication to recover the alleged overpayment. LTP objected on the grounds of double jeopardy – the matters raised were substantially the same as those in the first adjudication, and invited the adjudicator to resign. He however declined to deal with the jurisdictional issue and subsequently found in Mivan's favour.

LTP refused to repay, asserting that the decision was a nullity and unenforceable. If Mivan wanted a final settlement of the valuation issue, they had to go to litigation (or arbitration if applicable). Mivan commenced enforcement proceedings. LTP resisted on the grounds that there was "*no arguable prospect of success.*"

The court therefore had to determine what had been referred to the first and second adjudication and whether or not they were substantially the same or distinct issues.

Mivan contended that the first adjudication concerned procedural issues in respect of interim accounts, not the value of the accounts (ie not with the merits of LTP's claim) and was distinct from the valuation of the Final Account.

LTP contended that the first adjudication was concerned with the value of all the works arising out of the sum of the interim applications. LTP sought to distinguish between the notice and the global content of the referral documents which contained all relevant invoices. In reality the first adjudication was concerned with the final account. In order to compare the two adjudications it was necessary to more than simply compare the two notices.

The Court was not persuaded. Seymour J stated *'It seems to me to be plain as a matter of construction of the notice of adjudication in the first adjudication that the dispute was the narrow one whether the invoices identified were payable as to the balance by Mivan or not having regard to an asserted failure to comply with ss109-113 because the formulation of the dispute referred to withholding notices contrary to the Act. It is plain that however matters subsequently progressed before [the first adjudicator] and despite Mivan's failed attempt to broaden [the dispute to concern the amount due under the sub-contract] the dispute referred did not encompass what was [properly due]'*.

That being the case, the second adjudication, as per the notice, was a separate and distinct dispute. Accordingly, the second adjudicator's decision was enforced by way of summary judgment.