JUDGMENT : HIS HONOUR JUDGE THONRTON Q.C. TCC : 4th January 2000.

1. Introduction

1. The claimant ("Fastrack") seeks summary judgment pursuant to Part 24 of the CPR following a decision in its favour by an adjudicator in relation to a dispute purportedly referred to him by virtue of section 108 of the Housing Grants, Construction and Regeneration Act ("HGCRA") and paragraph 7 of The Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") . The defendants ("Morrison") are a joint venture who were main contractors of the construction project in-question, had engaged Fastrack as subcontractors and were respondents to the adjudication, albeit that Morrison had protested and contested the jurisdiction of the adjudicator from the outset. The grounds for resisting this application remain those initial jurisdictional grounds which I will elaborate once I have set out the essential background facts. The adjudicator was Mr D.S. Simons and the decision in question is dated 1 July 1999. The principal sum claimed, being the unpaid part of the sum awarded by that decision, is £85,401.98.

2. Morrison were the main contractors constructing the new Leisure World and Arena complex in Coventry. Fastrack was engaged as the brickwork subcontractor. This subcontract was dated 26 August 1988 and it incorporated a document recording the minutes of a pre-order meeting between the parties and also incorporated Morrison's standard subcontract terms and conditions as amended by two further documents being those entitled "Amendment to Morrison's Subcontract Terms and Conditions" and "Amendments to Subcontract Terms and Conditions for Fastrack Contractors Ltd." The subcontract agreement also contained a list of Fastrack's rates. No bills of quantities or drawings were incorporated into the subcontract but the scope of the work involved all the required brickwork for the project except that required in the carpark. The subcontract period was defined as being approximately 20 weeks after the commencement of the work.

3. The subcontract conditions, so far as material, provided for valuation and payment and for the omission of work by Morrison if Fastrack failed to proceed with the work so as to comply with Morrison's progress under the main contract. These provisions read as follows:

A. Valuation and Payment

1. Minutes of the pre-order meeting

"20 Payments and Valuation

20.1 The frequency of interim payments will be fortnightly

20.2 The subcontractor's written application for payment must be received 4 days prior to the Main Contract valuation date.

20.3 A list of agreed applicable valuation dates will be advised to the subcontractor by M.C.L. Quantity Surveyor.

2. Addendum to terms and conditions of subcontract order

"113(i) The Subcontractor shall render payment applications to M.C.L. on dates as required or otherwise agreed by M.C.L. for inclusion in valuations submitted under the Principal Contract. Applications, together with such supporting documentation and information as M.C.L. shall reasonably require, shall be submitted in 'duplicate, quoting the subcontract titled and subcontract order number.

(ii) Subject to M.C.L .receiving from the Subcontractor applications for payment in accordance with clause 13(i) then payments will be due to the Subcontractor 30 days after the value of the Subcontract works is included in an interim certificate issued to M.C.L. under the Principal Contract ("the Due Date"). The final date for the making of any payments to the Subcontractor shall be 15 days from the Due Date ("the Final Date for Payment") provided always that the entitlement of the Subcontractor to payment shall be subject to performance of the obligations of the Subcontractor in terms of the Subcontract to the satisfaction of M.C.L. acting reasonably ...

(iii) Not later than 5 days after the Due Date M.C.L. shall give notice to Subcontractor specifying the amount (if any) of payment he has made or propose to make, specifying what the payment relates to and the basis on which the amount is calculated. ...

(vii) If the Subcontractor shall cause M.C.L. loss by reason of any breach of this or any other Contract between the parties or by any act or by any breach of statutory duty giving rise to a claim for damages or indemnity or contribution by M.C.L. against the Subcontractor or M.C.L. shall become entitled to payment from the Subcontractor under this or any other contract between the parties then without prejudice to and pending final ascertainment or agreement between the parties as to the amount o€ such loss, indemnity, contribution or payment the Subcontractor shall forthwith pay or allow to M.C.L. such sum as M.C.L. shall bona fide estimate as the amount of such loss, indemnity, contribution or payment such estimate to be binding and conclusive upon the Subcontractor until such final ascertainment or agreement. Any notice of intention to withhold payment shall be given by M.C.L. to the Subcontractor not later than 1 day before the Final Date for Payment.

B. Determination and removal of work

1. Minutes of pre-order meeting

"21.3 Without prejudice to any other rights or remedies which M.C.L. may possess, if the Subcontractor fails to proceed with and/or complete the Subcontract works within the overall duration stated in section 5.2 hereof or reasonably in accordance with the progress of the main contract works, then M.C.L. may thereupon by 7 days notice omit any areas of the Subcontract works that M.C.L. deem necessary, and either complete such areas of the works themselves or sub-let such areas of the works to a third party as seen fit."

2. Addendum to terms and conditions of subcontract order

"Determination of Subcontractor's-Employment

12(i) M.C.L. may without prejudice to any other of its rights or remedies summarily determine the Subcontractor's employment under this Subcontract in respect of the whole or any portion of the Subcontract Works if the Subcontractor:

(a) fails within seven days from the giving of the notice in accordance with Clause 28 [concerned with the service of notices] from M.C.L. to proceed diligently with the Subcontract Works to the reasonable satisfaction of M.C.L. and at all times in such a manner as will not, in the opinion of M.C.L. prejudice the completion of the whole or any portion on the Principal Contract Works. ...

(c) Fails within seven days from the giving of notice in accordance with Clause 28 from M.C.L. to comply with any of the obligations on the part of the Subcontractor herein contained. ...

(g) Fails to complete and deliver up the whole or any portion of the Subcontract works by the completion date or dates specified by any such amended completion date or dates as may be authorised by M.C.L.

(iii) upon determination the Subcontractor shall not be entitled to compensation therefore and shall not remove any of his equipment, materials or property on the Site and , notwithstanding anything contained in these conditions, shall be entitled to no further payment until completion of the Subcontract works by M.C.L. or by others, whereupon the Subcontractor shall become entitled to payment for Subcontract Works executed by the Subcontractor subject always to the right of M.C.L. to set off all losses, expenses and damages suffered or which may be suffered by M.C.L. by reason of such determination and subject further to any other right to set off which M.C.L. may have. ..."

4. Work started on 8 August 1998_ The 20-week subcontract period envisaged by the subcontract order would, in consequence, have ended on 30 December 1998. The subcontract period was prolonged for reasons which were and remain in dispute. Fastrack alleged that there were serious delays caused by materials, work areas and information not being made available to suit Fastrack's programme and progress whereas Morrison alleged that the delays were caused by Fastrack's inability and unwillingness to work to the prevailing programme and so as to conform to the progress of the other work being carried out on site. Morrison issued a programme on 14 January 1999 which provided for the completion of Fastrack's subcontract at the end of March 1999. On 9 February 1999, Fastrack informed Morrison that the suggested programme for the towers was impossible since 10 lifts of brickwork would be involved. This work could not, in consequence, be completed until 5 March at the earliest. Soon afterwards, Fastrack applied for an extension of time of 11 weeks. These matters were responded to by Morrison, on 24 February, complaining of poor progress and informing Fastrack that they were going to take some of Fastrack's work away and give it to others. Fastrack immediately

replied, on 25 February, by disputing Morrison's entitlement to take such action and threatening proceedings for loss of profit and damages under the HGCRA if Morrison employed others to carry out its work.

5. On 26 February, Fastrack submitted interim application no. 12 for interim payment. This was in the gross sum of £347,838.40. Morrison then served a notice under clause 21.3 dated 2 March which stated that Morrison was going to monitor Fastrack's work for 7 days. Any failure by Fastrack to show satisfactory progress might lead to the omission of part of Fastrack's work. Following that, on 10 March, Morrison served a notice of payment relating to interim application no 12. This reduced several of the heads of claim included within the payment application. The final date for payment was 20 March 1999. No payment was made. Meanwhile, on 10 March 1999, Morrison informed Fastrack that third parties were to be engaged to expedite and progress part of the works_ These steps were stated to be being taken pursuant to clause 21.3 of the document containing the minutes of the pre-order meeting. This notice precipitated a letter from Fastrack's solicitors addressed to Morrison dated 12 March which informed Morrison that its letter of 10 March 1999 was without contractual justification and amounted to a breach of the subcontract. The letter was treated by Fastrack as its acceptance of Morrison's repudiation of the subcontract. Fastrack then withdrew from site. On 16 March, as its riposte to Fastrack's withdrawal, Morrison served a Notice of Determination which stated that Morrison would omit part of the subcontract works in the event of Fastrack's failure to show a satisfactory improvement in its progress.

6 On 17 March, Fastrack submitted interim application no. 13 to Morrison for interim payment. This was in the gross sum of £383,873.97. On 25 March, Morrison responded with a notice of set-off in respect of its alleged entitlement to damages and the additional completion costs of the subcontract_ The sum claimed as a set-off was £226,177.00 which was well in excess of the combined net sums claimed in both interim applications 12 and 13.

7. Two adjudications followed. The first, with which I am not concerned, was initiated by Fastrack's notice dated 1 April 1999. This application led to an adjudication and a decision dated 13 May 1999. The dispute referred related to interim application no. 12, less the individual heads of claim within that application concerned with prolongation and loss and expense, and the sums deducted from the claimed heads of claim by Morrison's notice dated 10 March 1999. The net claim was for £73,889.14 and the decision awarded Fastrack £35,199.70. This decision led, immediately, to Fastrack's notice seeking a second adjudication dated 14 May 1999. The adjudicator was appointed on 18 May 1999 by the Chartered Institute of Arbitrators, the Referral Notice was dated 24 May 1999 and, following an agreed extension to the timetable, the adjudicator's decision was dated 1 July 1999. By that decision, the adjudicator decided that a further net sum of £120,601.68 was due to Fastrack. This sum, it is now accepted, included the sum of £35,199.70 decided upon by the first adjudicator and paid thereafter. Thus, Fastrack confines its application to enforce the second adjudicator's decision to the net sum of £85,401.98.

8. Following this decision, Fastrack has gone into liquidation and these enforcement proceedings are brought by the liquidator. The sum decided upon by the first decision has been paid but no part of the sum decided upon by the second decision has yet been paid.

9. The sum claimed in the second adjudication was appreciably higher than the gross sum forming interim application no. 13. The total sum claimed was set out in the notice of adjudication as 483,357.48 but was marginally reduced in the subsequent Referral Notice documentation to £478,959.93. The principal differences between interim. application no_ 13 and the sum claimed in the adjudication are set out in paragraph 12 below. It is these differences which have led Morrison to contend, from the moment it first received the notice of adjudication, that there was no current dispute that could be referred to adjudication and that the adjudicator, in consequence, lacked jurisdiction to hear and determine the suggested dispute referred to him by Fastrack. If those contentions are correct, the inevitable conclusion is that the adjudicator's decision is unenforceable as having been rendered without jurisdiction.

2. The Statutory Scheme

10 The relevant provision of the HGCRA reads as follows:

"108(1.) A party to a construction contract has the right to refer a dispute under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference."

The contract did not provide for adjudication that complied with the requirements of the HGCRA so the Scheme applied. The relevant provisions of the Scheme are as follows:

"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.

(2) the notice of adjudication shall be given to every other party to the contract.

(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).

2. (1) Following the giving of a notice of adjudication

(c) ... the referring party shall request an adjudicator nominating body to select a person to act as adjudicator.

(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.

3. The request referred to in paragraphs 2 ... shall be accompanied by a copy of the notice of adjudication.

7.(1) Where an adjudicator has been selected in accordance with paragraph 2 ..., 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.

(2) A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.

8. (1) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.

9. (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.

(4) ... where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. ...

13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute,

17. The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.

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."

3. The Notice of Adjudication and the Referral Notice

11 The terms of the Notice of Adjudication and the Referral Notice need to be considered with some care.

A. The Notice of Adjudication

The material parts of this read as follows:

"We hereby give you notice of our intention to refer to adjudication disputes that have arisen between ourselves in connection with our subcontract with you to carry out brickwork and brickwork at the Leisure World project in Coventry.
The disputes to be referred are the issues as to the Referring Party's rights to payment of the sums set out below less amount already paid or such other sums as the Adjudicator shall find payable under the following headings/descriptions:
Measured work; scaffold variations; other variations; dayworks; storm damage; prolongation costs and loss and expense arising from delay and disruption caused to the subcontract works by the Respondents breaches of contract; a fair and reasonable extension of time for completion of the subcontract works; loss of profit as a result of the repudiation; additional overheads; such other sums as the Adjudicator deems appropriate."

B. The Referral Notice

The material parts of this read as follows:

"A. Introduction

1. This Referral Notice contains references to three documents which form the Appendices to it: Appendix 1: Statement of Case Appendix 2: Counsel's opinion Appendix 3: Witness statement of Andrew Jack

2. ... Fastrack's claim relates to a contract with the Joint Venture ... for the carrying out of various works ... at the New Arena and Leisureworld at Spon Street, Coventry.

C. The Referring Party's Claim

7. Fastrack's claim is that the Joint Venture repudiated the Contract, Fastrack accepted such repudiation, and is entitled to its losses as a result of the repudiation.

9. Fastrack's claim is that:

9.1 The Joint Venture was not entitled under the contract or otherwise to take the majority of the subcontract works away from Fastrack; and

9.2 The taking away of the majority of the subcontract works from Fastrack by the Joint Venture constituted a repudiation; and

9.3 The repudiation was accepted by Fastrack; and

9.4 Fastrack should be entitled to the sums set out below as a result of that repudiation.

12. Fastrack therefore claims:

1. *The sums claimed in the Statement of Case;*
2. *Additional overheads ...*
3. *Interest ...*

The statement of case set out in great detail the factual history of the subcontract and Fastrack's contentions as to why the actions of Morrison in removing part of the work were repudiatory. It also set out all supporting documentation in support of the valuation of the work carried out up to the purported acceptance of Morrison's suggested repudiation and of the claims for loss and expense and lost profit. The total sum claimed was, with a small immaterial sum having been deducted, the same as that claimed in the notice of adjudication.

4. The Parties' Contentions and the Adjudicator's Decision

12. Morrison's objection to the jurisdiction of the adjudicator was intimated as soon as it received the notice of adjudication and has been maintained consistently at each stage since then. Morrison's starting point is that the only dispute in existence at the time that the notice of adjudication was served concerned the contents of interim application no. 13. There were, it was contended, significant differences between the sums claimed for 6 specific heads of claim in that application and the equivalent heads of claim referred to in the notice. These may be seen from the following table:

Head of Claim	Interim Application 13	Notice to Adjudicate
Measured Works	232,815.00	250,364.70
Variations	57,964.07	58,894.27
Scaffolding - Extras	20,243.20	17,318.70
Hire Charges Scaffolding -	6,738.00	8,564.91
Preliminaries	19,836.00	24,648.80
Disruption	7,200.00	22,555.50
Damages Due to Repudiation	6,220.00	10,864.50

13. Morrison's contention was that if a dispute concerns a precise basis of claim and a precise amount, the notice of adjudication and the subsequent adjudication must be concerned with that basis of claim and amounts and with no others. Morrison argued that, unless there was that consistency, there could

have been no dispute since the previous dispute would have been superseded by a new claim which would not have ripened into a dispute given that Morrison would not have had an opportunity to consider, disagree with or reject the new claim. The argument continued as follows: only when a party has had that opportunity to deal with a claim can it ripen into a dispute. Since an adjudicator can only be appointed to resolve a dispute, this adjudicator was appointed without jurisdiction. An adjudicator purportedly validly appointed but in fact appointed without jurisdiction cannot rule upon the validity of his own appointment. The court should now, in consequence, decline to enforce his decision.

14. Morrison first spelt out its jurisdictional objections in its Statement of Case served on Fastrack and the adjudicator on 4 June 1999. This raised 3 arguments: that there was no jurisdiction to determine the issues raised by the notice of adjudication; the claim for damages for breach of contract was misconceived since Morrison had not repudiated the subcontract; and that the figures claimed were excessive, inaccurate and irrecoverable as damages. The statement of case concluded:

"that no dispute had arisen at the date of the notice of adjudication so that there is no jurisdiction to make any decision and any decision will be a nullity, and that there is no jurisdiction to decide any question of jurisdiction, so that there should be an adjournment of the adjudication pending resolution of that question."

15. Morrison maintained its contention that the adjudicator both lacked jurisdiction and also the jurisdiction to determine whether he had jurisdiction and appeared at the adjudication, and presented submissions to the adjudicator, under protest and having expressly asserted that it was not waiving these points or extending the jurisdiction of the adjudicator to enable him to resolve questions of jurisdiction.

16. Fastrack took a diametrically opposite line at each stage of Morrison's argument. Fastrack's argument was helpfully summarised in 3 propositions submitted by its counsel, Mr Simon Hargreaves. These were:

1. Morrison must show that the matters referred to adjudication were not previously in dispute.
2. The test is: "Were the matters referred to adjudication materially different from the pre-existing dispute so as not to be the same dispute?"
3. "Materiality" will encompass both of the following: (i) the dispute itself - so that a brand new head of claim would obviously fail the test; and (ii) the presentation of the dispute - so that a claim which was presented wholly differently would likewise fail the test.

17. Fastrack also maintained that the adjudicator both could and did decide that he had jurisdiction and that that decision was correct but, in any case, not open to challenge by Morrison as part of these enforcement proceedings.

18. The adjudicator delivered a full, well-structured and careful decision with accompanying reasons on both the jurisdictional challenge mounted by Morrison and on the detailed merits of each head of claim. His decision as to the jurisdictional challenge may be summarised as follows:

1. The challenge to jurisdiction mounted by Morrison was based on the allegation that the claim made in the adjudication was materially different from that made prior to the Notice of Adjudication. Moreover, Morrison contended that the adjudicator did not have the right to determine his own jurisdiction.
2. Both these contentions were rejected.

These conclusion were supported by this reasoning:

"... it would be wrong to proceed to a substantive decision where it contained new issues not previously put to [Morrison], or was materially different to claims disputed prior to the adjudication. However, there is no such impediment.

The issues presented in the Referral Notice are materially the same as those presented in [Fastrack's] Valuation No. 13, sent to [Morrison] on 17 March 1999. 1 am satisfied that in the period prior to the Adjudication the Referring Party has merely:

(a) Completed measurements and addressed errors, etc.,

(b) Re-calculated the quantum alleged to arise from [Morrison's] breaches of contract, delays and disruption, presumably with the benefit of advice. These elements were disputed in principle,, prior to the Adjudication.

Whilst [Fastrack] has the right to review its claim and recalculate quantum values prior to formal submission., I also recognise that [Morrison] should have a fair opportunity to consider any amendments. ...

As to my right to deal with the. matter of jurisdiction, I find it strange that [Morrison] included their contentions on jurisdiction in their Statement of Case, thereby inviting a decision. Also, according to section 108(2) of the [HGCRA], I am to " ... take the initiative in ascertaining the facts and the law ...". I have no difficulty in applying this requirement to ascertaining the pre-existence of a referred dispute."

5. The Law

5.1. The Jurisdiction of the Adjudicator

19. An adjudicator derives his jurisdiction from his appointment. That appointment is governed by the statutory provisions of the HGCRA which, as can be seen from the extract of section 108(1) set out in paragraph 10 above, require there to be a dispute that has already arisen between parties to a construction contract. It follows that the appointing procedure under the statutory adjudication Scheme relevant to this adjudication must also relate to such a dispute. Thus, the notice of adjudication; the selection of a person to act as an adjudicator by an adjudicator nominating body; the indication from the selected adjudicator of his willingness to act; and the referral notice must all relate to that same pre-existing dispute. Any selection, acceptance of appointment or subsequent adjudication and decision which are not confined to that pre-existing dispute would be undertaken without jurisdiction. Of course, in such a case, it would have to be determined whether the whole adjudication process and purported decision or only that part relating to matters not covered or embrace by the pre-existing dispute were invalid and not authorised by the HGCRA and Scheme procedures. That determination would depend on the facts and relevant wording of the suggested dispute, notice of adjudication, appointment, acceptance and referral notice and on the application of the relevant adjudication or Scheme rules to those facts and that wording.

5.2. The Requirements of a "Dispute"

20. It is to be noted that the HGCRA refers to a "dispute" and not to "disputes". Thus, at any one time, a referring party must refer a single dispute, albeit 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 claim, issues, contentions and causes 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. Thus, 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 causes of action that are in then in dispute which the referring party has 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.

21. Fastrack suggested that the reference that I am concerned with consisted of a number of disputes, each of which was one of the individual heads of claim that had been referred. Fastrack also suggested that the dispute that could be referred to an adjudication pursuant to the HGCRA need not be identical to the pre-existing dispute, it need be no more than a dispute which was substantially the same as that pre-existing dispute.

22. Neither of these contention of Fastrack is sustainable. The statutory language is clear. A "dispute", and nothing but a "dispute", may be referred. If two or more disputes are to be referred, each must be the subject of a separate reference. It would then be for the relevant adjudicator nominating body to decide whether it was appropriate to appoint the same adjudicator or different adjudicators to deal

with each reference. Equally, what must be referred is a "dispute" rather than "most of a dispute" or "substantially the same dispute".

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.

24. Even this prohibition will not always apply since the Scheme gives the adjudicator two powers: to take the initiative in ascertaining the facts and the law necessary to determine the dispute; and to resign if the dispute varies significantly from the dispute referred to him in the referral notice and, for that reason, the adjudicator is not competent to deal with the varied dispute. These powers show that it is possible that a dispute that has validly been referred to adjudication can in some circumstances, as the details unfold during the adjudication, become enlarged and change its nature and extent. If this happens, it is conceivable that at least some of the matters or issues referred to adjudication by the referring party which were not previously encompassed within a pre-existing dispute could legitimately become incorporated within the dispute that has been referred during the process of its enlargement whilst the adjudication proceeds.

25. These considerations do not lead to the conclusion that Morrison's submissions are correct, namely that only the precise sums previously claimed may be referred to adjudication; that no additional or lesser sum may be claimed; and that if a different sum is claimed, the consequence is that the whole reference, in its entirety, is without any jurisdiction. A claim can often be made without its quantification having been finalised or even attempted. The subsequent dispute can then be in the form: "what sum is due?" as opposed to "is £x due?"

26. Thus, whether or not the reference is wholly or partly lacking in jurisdiction will depend on the nature and extent of the dispute that has purportedly been referred to adjudication by the referring party. A particular dispute may be correctly characterised as being in this form: "what sum is due for a particular interim payment?" or "what sum is due for a particular item of work?" or "what sum is due at the Final Account stage?" without any particular or finalised sum being included as part of that claim. Alternatively, the dispute may be correctly characterised as being one concerning the question of whether or not a particular specified sum is due. In the first type of dispute, it would not necessarily follow, if a larger sum had been included in the notice of adjudication than the sum previously claimed in the relevant application, that no dispute had yet arisen. There would be three alternative possibilities in such a situation: that the whole sum referred could be adjudicated upon (the dispute being a general one as to what sum is due and the sums contained in the notification of the dispute and the notice of adjudication being no more than particulars of the overall dispute) ; that the sum referred should be split by the adjudicator and only the sum previously claimed adjudicated upon (the dispute being as to whether that particular sum was due) ; or that no part of the sum referred could be adjudicated upon (since the nature and extent of the subject-matter of the reference had transformed it into something different from the pre-existing claim).

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, once 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 Spex Oils Ltd. [1998] 1 W.L.R. 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 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.

28. These cases help in showing that a claim and its submission do not necessarily constitute a dispute, that a dispute only arises when a claim has been notified and rejected, that a rejection can occur when an opposing party refuses to answer the claim and a dispute can arise when there has been a bare rejection of a claim to which there is no discernable answer in fact or in law.

29. However, the essential first step in considering whether there is jurisdiction to appoint an adjudicator under the HGCRA is to identify what the content of the suggested dispute. Only then is it possible to consider whether the claiming party has fulfilled the necessary precondition of a submission of the underlying claims to the other party followed by that party subsequently rejecting them.

5.3. When a Jurisdictional Challenge Arises on the Grounds that there is no Dispute

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 subjectmatter 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".

31. If a party challenges the entire jurisdiction of the adjudicator, as Morrison does, it has four options. Firstly, it can agree to widen the jurisdiction of the adjudicator so as to refer the dispute as to the adjudicator's jurisdiction to the same adjudicator. If the referring party agrees to that course, and the appointed adjudicator accepts the reference to him of this second dispute, the jurisdiction of the adjudicator could then be resolved as part of the reference. The challenging party could, secondly, refer the dispute as to jurisdiction to second adjudicator. This would not put a halt to the first adjudication, if that had already led to an appointment, since the adjudicator has a statutory duty, unless both parties agree otherwise, to decide the reference in a very short timescale. The challenging party could, thirdly, seek a declaration from the court that the proposed adjudication lacked jurisdiction. This option is of little utility unless the adjudicator has yet to be appointed or the parties agree to put the adjudication into abeyance pending the relatively speedy determination of the jurisdiction question by the court. The Technology and Construction Court can, for example, resolve questions of that kind within days of them being referred to it. Fourthly, the challenging party could reserve its position, participate in the adjudication and then challenge any attempt to enforce the adjudicator's decision on jurisdictional grounds. That is the course adopted by Morrison.

32. The adjudicator can, of course, investigate any partial or entire jurisdictional challenge. He could, if he was satisfied it was a good one, decline to adjudicate on the part of the reference he regarded as lacking jurisdiction. Alternatively, he could decide that the challenge was a bad one and proceed with the substance of the adjudication. That is what happened in this adjudication. However, unless the parties have vested the jurisdictional dispute in the hands of the adjudicator in addition to the underlying dispute, the adjudicator cannot determine his own jurisdiction and the challenging party

may seek to avoid enforcement proceedings by showing that the sum claimed was decided upon without jurisdiction. The court would give appropriate weight to any findings of fact relevant to that jurisdictional challenge but would not be bound by them and would either have to hear out the challenge with evidence or, if that was not necessary, determine the challenge and either enforce or decline to enforce the whole of part of the adjudicator's decision depending on the decision reached as to jurisdiction. The role of the court in a jurisdictional challenge summarised here is supported by recent decisions in the Technology and Construction court, particularly the decision of my own in Sherwood & Casson Ltd. v Mackenzie, unreported, 30 November 1999; The Project Consultancy Group v The Trustees of the Gray Trust, unreported, 16 July 1999, Dyson J.; and dicta in Macob Civil Engineering Ltd. v Morrison Construction Ltd., [1999] Building Law Reports 93, Dyson J.

6. Morrison's Jurisdictional Challenge

33. Morrison's challenge is based on the proposition that the dispute decided by the second adjudicator concerned the sums claimed as being due following interim application no. 13. However, that was not the dispute referred by Fastrack to the second adjudicator. The sequence of events that occurred must be considered carefully. Interim application no. 12 was followed by the events giving rise to the alleged repudiation and its acceptance. These, in turn, were followed by interim application no.13 and Morrison's set-off notice. Fastrack then elected to conduct a limited adjudication confined to the sum due following interim application no. 12. Fastrack could have referred all disputes embraced in both adjudications into one reference to adjudication at that stage but chose not to do so. The HGCRA would appear to allow such a splitting up of disputed claims. It may be, on an appropriate occasion, that a court will need to consider whether there is a doctrine analogous to the abuse of process doctrine in court proceedings which requires a referring party to refer all disputed questions to the same adjudicator but that question did not arise in this case. Once Fastrack obtained its favourable decision in that limited adjudication, it then referred all remaining disputed questions to the second adjudication that were still outstanding.

34. It is clear from Fastrack's notice of adjudication that the dispute being referred was a complex one that concerned a number of questions: whether Morrison had repudiated the subcontract; whether that repudiation had been validly accepted by Fastrack; whether Fastrack was entitled to damages for that repudiation; if so, whether those damages included the balance of the value of work that had been carried out prior to the repudiation but which had not yet been paid for; whether loss, expense and other consequential loss as yet unpaid for could be recovered; and whether Morrison was entitled to assert a set-off greater than Fastrack' s claim on the grounds that Fastrack was required to pay the additional costs of completing the work with other brickwork contractors. These underlying disputed questions were embraced within the notice of adjudication. This is clear if the notice is considered against the factual background I have summarised from which it springs and if it is also read in conjunction with the referral notice and its statement of case which are properly to be considered as constituting particulars of the dispute purportedly referred.

35. The wording of the notice of adjudication is in wide terms and includes the general reference of:
"disputes that have arisen ... issues as to [Fastrack's] rights to payment of the sums set out below ... or such other sums as the adjudicator shall find payable under the following headings ... caused ... by [Morrison's] breaches of contract; ... loss of profit as a result of the repudiation ... such other sums as the adjudicator deems appropriate."

All these disputed issues had arisen separately to the issue of interim application no. 13 and all were in dispute by the date that the notice of adjudication was served. These disputed issues had been referred by Fastrack to Morrison, had been rejected by Morrison and had therefore ripened into disputes by the time that second notice of adjudication was served. This can be seen from the terms of Morrison's clause 21.3 notice of 10 March 1999; Fastrack's solicitor's letter in response dated 12 March; Morrison's notice of determination dated 16 March 1999; and Morrison's notice of set-off dated 25 March 1999.

36. It is doubtful that Fastrack could have recovered anything if it had confined its notice to the sum due under interim application no.13 since the subcontract had, by then come to an end given Fastrack's

prior acceptance of Morrison, s repudiation. Thus, the interim payment procedures had been replaced by an overall entitlement to damages of the balance of sums already due plus such loss of profit as had occurred by virtue of the repudiation. However, assuming a valid claim for interim payment pursuant to interim application no.13 could have been, and had been, referred, the adjudication would not have lacked jurisdiction since the dispute would have been in the form: what sum is due? rather than in a form seeking specific sums, some of which had never been notified to Morrison. This is again clear from the underlying disputed questions, the wording of the payment provisions of the subcontract already set out and the general wording of the referral notice.

37. If both these constructions of the referral notice are incorrect, there would then survive a third, and very limited, basis for considering the reference as being within jurisdiction. This is that the reference is properly to be considered as being confined to the sums claimed in interim application no. 13. on this basis, only those parts of the specific sums claimed that had not been claimed within the preceding application would be incapable of being adjudicated upon. Thus, only a limited part of the adjudicator's decision would be unenforceable.

38. If follows that the adjudicator had full jurisdiction to determine and decide all the questions he decided. That conclusion is one that the adjudicator came to himself, although he was very fair in that he was careful to confine his decision to those parts of the dispute which had been raised before and were not new. However, he also, correctly, decided that the additional elements added by the referral notice and accompanying statement of case, were no more than additions resulting from the finalisation of the remeasurement process, the correction of errors and the particularisation of Fastrack's primary case as to what sum was due as damages for the repudiation by Morrison of the subcontract.

7. Conclusion

39. Fastrack is entitled to summary judgment for £85,405.98 and interest from 1 July 1999, the date of the adjudicator's decision, until the date that the order following this judgment is entered for that sum at to above Fastrack's bank's minimum lending rate. The parties have sensibly agreed to forego a formal handing down of this judgment which is to be treated as if handed down in open court. The parties are to submit their written submissions as to costs within 14 days of receiving this judgment, Fastrack is to send its submissions to Morrison and the court within 7 days and Morrison is to send its submissions to Fastrack and the court within 14 days.

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