JUDGMENT : HIS HONOUR JUDGE DYSON : TCC : 14 April 2000

1. This application raises a short but important issue as to the propriety of a reference to adjudication pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") of a dispute which, at the time of the reference, is already the subject of pending court proceedings. It is contended on behalf of the defendant that in such circumstances it is not open to a party to refer a dispute to adjudication, and that any decision which an adjudicator purports to make should not be enforced by the court. The claimant seeks to obtain summary judgment under Part 24 of the CPR of the sums which the adjudicator decided were due to it. The facts of the present case are as follows.

2. In late June 1999, the claimant entered into a contract with the defendant to provide electrical and other work at 17 Cornwall Gardens, London SW7, for the sum of £33,871. The contract included a provision to the following effect: "Disputes arising from this contract which cannot be resolved amicably shall be referable to adjudication, in accordance to (sic) the conditions set out within the Construction Act 1996 (sic)". The defendant refused to pay two invoices that were submitted for stage payments. On 26 October 1999, the claimant issued proceedings in the High Wycombe County Court seeking judgment for the amount of the two invoices. On 8 December, the claimant obtained judgment in default of defence. On 7 January 2000, the defendant succeeded in its application to have the judgment set aside. It was given unconditional permission to defend. The question of a possible reference by the claimant of the disputes to adjudication was raised before the District Judge. The order made by the court included a stay of the proceedings for 28 days "for adjudication to be considered". On 14 January, the claimant gave notice of appeal against this decision. The appeal is due to be heard on 24 May.

3. Meanwhile, on 13 January, Messrs Henry Cooper Consultants wrote on behalf of the claimant to the defendant stating that the claimant wished to refer to adjudication the disputes arising from the non-payment of the two invoices which were the subject of the county court proceedings. On 18 January, Mr Pey Kan Su was nominated as adjudicator by TeCSA (the nominating body approached by the claimant). On 20 January, the defendant's solicitors replied to the letter of 13 January. They said that, by starting proceedings in the county court, the claimant had "waived their right to arbitrate" (sic). They added that while proceedings were pending in the county court, the claimant could not commence an arbitration: "such action is an abuse and entitles our clients to apply for an injunction restraining such arbitration". The references to "arbitration" should, of course, have been references to "adjudication".

4. At the end of January, as a result of disagreement about fees, Mr Pey Kan Su resigned as adjudicator without making a decision. On 2 February, the defendant applied for an injunction to restrain the claimant from proceeding with the adjudication. The application was due to be heard on 15 February, but had to be adjourned for want of court time. It has never been heard.

5. On 21 February, the claimant issued a fresh notice of adjudication and applied to TeCSA for the appointment of a new adjudicator. On 22 February, Miss Victoria Russell was appointed. She published her decision on 10 March. She ordered the defendant to pay £17355 plus VAT, interest and costs. The defendant did not participate in the adjudication, despite being invited by the adjudicator to do so on two occasions. In the result, and quite understandably, the adjudicator decided the issues that had been referred to her solely on the basis of the material that had been supplied by the claimant.

6. On 23 March, the claimant issued the present application for summary judgment in respect of the sums ordered to be paid by the adjudicator. On 10 April, the defendant took the unusual course of serving a defence in the present proceedings. At paragraph 6, it pleaded:

   "The defendant has delivered a fully particularised Defence and Part 20 Claim in the County Court action. It is now being vexed, harassed and put to unnecessary expense by the pendency of two actions in respect of the same subject matter, and seeks the protection of the Court against such double vexation".

The relevant provisions of the Act

7. It is not in dispute that the contract between the parties was a "construction contract" within the meaning of section 104(1). Section 108(1) confers the right to refer a dispute arising under the contract for adjudication under a procedure complying with the section. Subsection (2) provides that the contract shall *"(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication"*. Subsection (3) provides:

   "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. The parties may agree to accept the decision of the adjudicator as finally determining the dispute."

   Subsection (5) provides that *"if the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply"*.

   The contract between these two parties did not comply with section 108(1) to (4). Accordingly, the provisions of the Scheme applied. So far as relevant, the Scheme provides:

   "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.....

   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."

The submissions

8. On behalf of the defendant, Mr Davies advances two principal arguments. First, he submits that the court should not countenance two concurrent proceedings in respect of the same cause of action. Since the county court proceedings were started before the adjudication, the court should have granted an injunction to restrain the claimant from proceeding with the adjudication. It was not the fault of the defendant that it was unable to obtain an injunction. In these circumstances, the court should not now be willing to give the claimant judgment and enable it to enforce the decision of the adjudicator.

9. Mr Davies relies on a long line of authority in support of his submission that the court should not assist a party to pursue the same relief in respect of the same cause of action before different tribunals. In McHenry v Lewis [1882] 22 ChD 397, 400, Sir George Jessel MR said: "....where the two actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will do".

10. In the same authority, Bowen LJ said at page 408: "Where there is more than one suit being carried on in the Queen's Courts, it is obvious that the case is wholly different. The remedy and the procedure are the same, and a double action on the part of the Plaintiff would lead to manifest injustice."

11. Mr Davies has drawn my attention to other examples of the court staying concurrent court proceedings in respect of the same issue or cause of action, such as Royal Bank of Scotland Ltd v Citrusdale Investments Ltd [1971] 1 WLR 1469. He also relies on authorities where the question has been whether to allow arbitration proceedings to continue when the dispute which is the subject of the arbitration is the same as that which is the subject of proceedings that have been started in court. He places particular reliance on Doleman & Sons v Ossett Corporation [1912] 3 KB 257. In that case, an action had been started on a contract which contained an arbitration clause. No application to stay the proceedings for arbitration had been made. Nevertheless, subsequently to the commencement of the action, and without the consent of the plaintiff, an arbitrator made an award on the very subject-matter of the action. It was held by a majority in the court of appeal that the court was seized of the dispute, and that it was by its decision alone that the rights of the parties were to be settled. Accordingly, the arbitrator was functus officio. Fletcher Moulton LJ said (page 269) that there could not be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. If the matter were otherwise, there would be a race between the court and the other tribunal as to which should be the first to give its decision. This would be "ousting the jurisdiction of the court in a most ignominious way". Farwell LJ (at page 274) made the same point.

12. The second submission of Mr Davies is that, by starting proceedings in the county court, the claimant waived or repudiated the benefit of the adjudication provisions contained in the contract. He relies on

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Lloyd v Wright [1983] 1 QB 1065, and in particular what Dunn LJ said at page 1074H: "It was not seriously suggested in this court that the judge was wrong in holding that the issue of a writ by the plaintiff, coupled with an application for directions to Master Gowers on November 25, constituted a repudiation of the arbitration agreement itself".

13. Mr Davies contends that, once a party has waived or repudiated a clause which provides for some form of dispute resolution as an alternative to court proceedings, it can no longer rely on that clause without the consent of the opposing party. If it purports to do so, it may be restrained from proceedings by injunction.

14. Mr Brannigan's submissions on behalf of the claimant are short and simple. He emphasises the fact that section 108(2) provides that the contract provides that a party can give notice at any time of his intention to refer a dispute to adjudication. Adjudication is a special creature of statute, and the jurisprudence relied on by Mr Davies in support of his first argument has no application. The 1996 Act clearly contemplates that there may be two sets of proceedings in respect of the same cause of action, and there is nothing in the Act which indicates that they may not proceed concurrently. As for Mr Davies' second argument, Mr Brannigan submits that the commencement of proceedings in court does not amount to a waiver or repudiation of the right to refer the subject of those proceedings to adjudication. Here too he relies on the fact that the 1996 Act permits a party to refer a dispute to adjudication at any time. He also raises a doubt as to whether it is correct to regard the right to refer a dispute to adjudication as a contractual right which is capable of being waived or repudiated. This is because the right to refer a dispute to adjudication is imposed on the parties by the 1996 Act.

Decision

15. I shall start with Mr Davies' first argument. I fully accept that there is a well-established line of authority to the effect that party A should not normally make the same claim against party B in different proceedings. To allow A to do this is oppressive and unjust to B, and gives rise to the risk of inconsistent findings by different tribunals on the same issue or issues. This principle is most typically applied in relation to concurrent proceedings in different courts. It is also applied, however, in relation to concurrent court and arbitration proceedings. As is clear from decisions such as **Doleman v Osset**t and **Lloyd v Wright**, the court will not countenance both tribunals deciding the same matter. If the court assumes or accepts the role of making the decision, then an arbitrator does not have the jurisdiction to do so: see, for example, per Hobhouse J in **Cie Europeene v Tradax** [1986] 2 LLR 301, 305.

16. But I cannot accept the submission of Mr Davies that there is a close analogy between the position of an arbitrator and that of adjudicator. It is trite law that an arbitrator has no jurisdiction except that which the parties choose to confer upon him by their agreement to refer their disputes to arbitration. Typically, an arbitrator will have the same jurisdiction to decide disputes as a court. In the paradigm case, the power of the arbitrator (as that of the court) is to determine the dispute that has been referred to it, such determination being final and binding on the parties, subject to a possible challenge in the courts. Where a dispute falls within the scope of an arbitration clause, the claimant may refer it to arbitration, or, in breach of the arbitration clause, he may refer it to the court. If he takes the latter course, the proceedings may be stayed for arbitration. The defendant may, however, decide not to apply for a stay. He may prefer to allow the court to determine the dispute. The court will not, however, allow him to have the dispute determined both by an arbitrator and the court. In the typical case, the claimant is required to choose the tribunal before which he wishes to bring that issue.

17. When one turns to adjudication, however, the position is different. Let us consider the facts of this case. It is true that the issues that were referred to the county court were the same as those that were referred to the adjudicator, namely, whether the claimant was entitled to be paid the amounts claimed by the two invoices. The decision of the adjudicator, however, was not final. It was only of temporary effect: see paragraph 23(2) of the Scheme. A decision of the county court, if made, will be final and binding for all time, subject only to any subsequent challenge in the higher courts. The consequence of paragraph 23(2) of the Scheme is that the decision of the adjudicator cannot give rise to any estoppel.

Once the county court has given judgment, then, unless overturned on appeal, its decision does give rise to an estoppel. Likewise in relation to the final award of an arbitrator.

18. In my view, the principles deriving from the authorities to which I have referred have no application to adjudications. Section 108(2)(a) of the 1996 Act expressly states that a party may refer a dispute to an adjudicator "at any time". It is true that the words "at any time" do not appear in paragraph 1(1) of the Scheme. But it is plain from section 108(5) that it was intended that the relevant provisions of the Scheme should be consistent with the requirements of section 108(1) to (4) of the Act. I do not consider that the omission of the words "at any time" from paragraph 1(1) of the Scheme is of any significance. Nor did Mr Davies suggest that it was. Parliament had litigation and arbitration proceedings very much in mind when drafting the Act. As I said in **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] BLR 93, 97:
"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."

19. If Parliament had intended that a party should not be able to refer a dispute to adjudication once litigation or arbitration proceedings had been commenced, I would have expected this to be expressly stated. The relationship between adjudication on the one hand and litigation and arbitration on the other, was what informed the content of section 108(3) of the Act. The aggrieved claimant should not have to wait many months, if not years, before his dispute passed through the various hoops of a full blown action or arbitration.

20. In my view, there is no obvious reason why Parliament should have intended to draw a distinction between cases where litigation or arbitration proceedings have been started before a dispute is referred to an adjudicator, and those where the proceedings have been started only after an adjudication has been completed. The mischief at which the Act is aimed is the delays in achieving finality in arbitration or litigation. Why should a claimant have to wait until the adjudication process has been completed before he embarks on litigation or arbitration? If he is in a position to start proceedings, it is difficult to see why he should have to wait until a provisional decision has been made by an adjudicator. The normal rule that concurrent proceedings in respect of the same issue or cause of action will not be countenanced is justified on the grounds that (a) it is oppressive to require a party to defend the same claim before different tribunals, and (b) it is necessary to avoid the risk of inconsistent findings of fact. But it is inherent in the adjudication scheme that a defendant will or may have to defend the same claim first in an adjudication, and later in court or in an arbitration. It is not self-evident that it is more oppressive for a party to be faced with both proceedings at the same time, rather than sequentially. As for the risk of inconsistent findings of fact, on any view this is inherent in the adjudication scheme. The answer to Mr Davies' first submission has been provided clearly and unequivocally by section 108(2)(a). Parliament has decided that a reference to adjudication may be made "at any time". I see no reason not to give those words their plain and natural meaning.

21. Mr Davies points out that, if his first submission is wrong, it is possible to conceive of absurd situations arising. For example, he suggests that the hearing in the county court may be adjourned part heard for several weeks. The judge may have made adverse comment on the claimant's case. The claimant might decide to use the period of the adjournment to refer the dispute to adjudication in the hope of obtaining a favourable provisional decision from the adjudicator. As I said in the course of argument, if an extreme case of this kind were to occur and the claimant were to succeed before the adjudicator, the most likely outcome would be that the defendant would not comply with the adjudicator's decision. If the claimant then issued proceedings and sought summary judgment, the court would almost certainly exercise its discretion to stay execution of the judgment until a final decision was given in the county court proceedings. In any event, the fact that it is possible to conceive of far-fetched examples like this does not deflect me from the view that I have already expressed.

22. I turn to Mr Davies' second submission. I accept that a party may waive or repudiate an arbitration agreement. The issue of proceedings in court will usually amount to a waiver of his right to have the dispute that is the subject of the court proceedings determined by arbitration. The opposing party

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may, of course, compel him to abandon the legal proceedings by applying for a stay under section 9 of the Arbitration Act 1996.A party must nevertheless choose whether to perform his contractual obligation and refer a dispute which falls within the scope of an arbitration clause to arbitration; or whether to commit a breach of contract and refer the dispute to the courts. He cannot do both: he is put to his election. The 1996 Act makes it quite clear that these considerations do not apply in relation to a decision whether or not to refer a dispute to adjudication. I do not propose to go over ground that I have already covered when dealing with Mr Davies' first submission. There is no question of a party being put to his election or committing a breach of contract if he refers a dispute both to adjudication and to the court or an arbitrator. They are not mutually exclusive routes to dispute resolution. The 1996 Act clearly contemplates that, unless the parties agree to accept the decision of the adjudicator as final, it will be overtaken by the final decision of an arbitrator or the court or by the agreement of the parties. For the reasons that I have given earlier, I do not accept that the Act requires a reference to adjudication to be made before litigation or arbitration proceedings are commenced, or that such proceedings cannot be started until after an adjudication has been completed. If that is right, it is impossible to hold that, by starting court proceedings, a claimant has waived his right to refer a dispute to adjudication.

Should there be a stay?

23. The arguments to which I have referred are the only ones relied on by Mr Davies in opposition to this application for summary judgment under Part 24 of the CPR. The only remaining issue is whether I should grant a stay of execution pending the final determination of the county court proceedings. I have decided not to grant a stay for the following reasons. If the claimant's appeal on 24 May is successful, then the judgment in the full amount claimed will be restored. On that basis, the defendant would have suffered no real prejudice as a result of being required to pay that amount now, rather than in a few weeks' time. If it is unsuccessful in its appeal, the parties will be faced with a contested multi-track case. It seems likely that it will take about 2 days to try. No-one has been able to indicate when the hearing is likely to take place. Judging by the delays that have occurred so far, it is possible, if not probable, that the trial will not take place until the early autumn. On that basis, I see no reason why for several months the claimant should be kept out of the money that the adjudicator decided it should receive. To keep the claimant out of this money for several months would be contrary to the plain intent of the 1996 Act. I should add that there is no evidence that, if the defendant is successful in defending the county court proceedings, the claimant will be unable to repay the sum awarded by the adjudicator. Had the position been otherwise, and there was a real doubt as to the claimant's ability to repay if it loses in the county court, I would probably have granted a stay of execution pending the final determination of the county court proceedings.

Conclusion

24. In the result, this application for summary judgment succeeds. I will invite counsel to work out the figures.

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Adrian Davies (instructed by Messrs Fenwick and Co for the Defendants)