

JUDGMENT : HIS HONOUR JUDGE GILLILAND QC : TCC : 12th APRIL 2000

1. This is an application by the Claimant, Tim Butler Contractors Limited, under Part 24 of the CPR to enforce a decision of an adjudicator, Mr Dale, under a construction contract entered into between the parties dated 27th July 1998.
2. By his decision dated 22nd October 1999 Mr Dale decided:
 - (i) Part 2 of the Scheme for construction contracts applied to the contract (Part 2 deals with entitlement to payment, the dates for payment and the entitlement to instalment payments).
 - (ii) The Defendant should, within 7 days, pay £10,441.05 plus VAT.
 - (iii) The Defendant should pay costs amounting to £1,900.
 - (iv) The Defendant do pay the adjudicator's fees in the sum of £1,775 plus VAT.
 - (v) The Defendant was ordered to comply peremptorily with the decision.
3. The Defendant paid the adjudicator's fees but did not pay the remainder of the Award.
4. Mr Dale was appointed under a construction contract. There is no dispute that the contract was a construction contract under s104(1) of the Housing Grants Construction and Regeneration Act 1996.
5. Under S108 of the Act provision is made for a system of adjudication. This is a new system established by the Act. S108(1) provides: "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."
Sub-section 3 provides that: "*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.*"
6. Under sub-section 3 the decision is given a binding force but it is not conclusive of the rights of the parties and the parties can proceed to arbitration or litigation.
7. Sub-section 5 provides: "*If the Contract does not comply with the requirements of sub-sections 1 to 4 the adjudication provisions of the scheme for construction contracts apply.*"
8. It is quite clear that the contract did not make provision for adjudication and the adjudication provisions of the scheme therefore applied.
9. There is no dispute that Mr Dale was appointed pursuant to the scheme. The dispute referred to adjudication was whether the Claimant was entitled to be paid on two applications for payment. The contract arose in correspondence. There are a number of letters between the parties in June and July 1998. The Claimant agreed to carry out construction work on the Defendant's buildings in Kendal for £26,118.59. Work started on or about 27th July 1998. The documents giving rise to the contract are typical of many informal construction contracts. They started with a quotation and the relevant documents are exhibited at "LB1" to the witness statement of Louise Bates.
10. The first document was a letter dated 2nd June 1998 whereby the Claimant quoted £25,318.59 for 7 items of work. The second letter dated 17th July 1998 from the Claimant enclosed a programme of works. The document referred to as a programme is a typical document in bar chart form. Work was to commence on 27th July of the week commencing 26th July. It is common ground that the 27th was a Monday. The programme shows that the works were to be completed on the week of 16th August.
11. The next relevant document is an order from the Defendant dated 24th July 1998. Items are specified in the order. The document is dated 24th July and signed by the Defendant. The contract price is £26,118.59 and this is the total of the original quoted price together with £800 in respect of the extra volume of fill stated in the 17th July letter.
12. The position is clear that there was an agreement on price but the Claimant was not satisfied in relation to the tender documents and referred to concerns asking for agreement in its letter dated 24th July 1998. The Claimant attached to that letter its terms and conditions. The terms and conditions included, at item 9:
"Payment interim valuations pre-agreed : 90% material on site : 28 day payments : 5% retention reducing to 2½% on completion of our works"

13. On 27th July a further fax was sent from the Defendant confirming the Defendant's agreement to the Claimant's terms and conditions.
14. On 27th July the Claimant wrote to the Defendant identifying the documents in its possession.
15. Further on 27th July the Defendant forwarded its order which was a confirmation of acceptance.
16. There is no doubt that the contract was entered into on 27th July and the work started that day. During the works the Claimant made application for interim payment and the Defendant paid on that application but on two subsequent applications the Defendant did not pay. The second interim application dated 30th November 1998 was in the sum of £10,153.69. The position is that the Defendant withheld any payment. The further application dated 11th August 1999 was in the nature of a final payment. It was in the usual form that the gross sum is claimed. No payment was made against that application. Following receipt of the applications the Defendant gave no notice under the Act to withhold payment. On 22nd September 1999 the Claimant gave notice to refer to adjudication. The Claimant relied in its notice of reference to paragraph 9 of the terms and conditions and also to section 110(1) of the Act.
17. Section 110 provides:
 - (i) Every construction contract shall
 - (a) provide an adequate mechanism for determining what payments become due under the contract and when and
 - (b) provide for a final date for payment in relation to any sum which becomes due.the parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
 - (ii) Every construction contract shall provide for the giving of notice by a party not later than 5 days after the date on which a payment becomes due from him under the contract or would have become due if
 - (a) the other party had carried out his obligations under the contract and
 - (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more of the contractsSpecifying the amounts (if any) of the payment made or proposed to be made and the basis on which that amount was calculated.
 - (iii) If or to the extent that a contract does not contain such provisions as is mentioned in sub-sections 1 or 2 the relevant provisions of the scheme for construction contracts apply."
18. The relevant provisions of the scheme are in Part 2 which deal with payment. What is to be noted in relation to Part 2 is that Part 2 provides at paragraph 1:

"Where the parties to a relevant construction contract fail to agree

 - (a) the amount of any instalment or stage or periodic payment for any work under the contract or
 - (b) the intervals at which or circumstances in which such payments become due under that contract or
 - (c) both of the matters mentioned in sub-paragraphs (a) and (b) abovethe relevant provisions of paragraphs 2-4 below shall apply."
19. Relevant construction contract is defined in the scheme at para 12 as "Any construction contract other than one
 - (a) which specifies that the duration of the work is to be less than 45 days or
 - (b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days."
20. That exclusion reflects S109 of the Act which confers entitlement to instalments. S109 provides "A party to a construction contract is entitled to payment by instalments, staged payments or other periodic payments for any work under the contract unless
 - (a) it is specified in the contract that the duration of the works is to be less than 45 days or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days."
21. The dispute which was referred to adjudication was whether the Claimant was entitled to staged payments. The adjudicator considered that Part 2 applied. The adjudicator was persuaded that the contract was a relevant construction contract. A copy of his decision is before the Court. The adjudicator approached the matter as appears in paragraph 10 of his Award:

"The primary issue with regards to this dispute is whether under s109(1)(a) and (b) of the Act the referring party is entitled to interim payment."

22. The Adjudicator considered the matter and concluded that the correspondence did not give rise to a contract which specified that the period of work was less than 45 days. He also concluded that there was no agreement that the duration of the works was to be less than 45 days. He looked at the correspondence and concluded, at page 5, that:
"The documents which have been referred to me by both parties as forming the contract show the parties were in agreement only as to price, the terms and conditions and the date of commencement. The documents do not evidence agreement on the duration of the works." And later: *"Nor is there any evidence within the documents provided to me by the parties' agreement to the programme duration of 4 weeks."*
23. This is an application to enforce the Award. The Defendant submits that the Adjudicator was clearly wrong and that the error was an error of law and that this is a case which should not be enforced by the Court. The issue depends on the proper construction of the provisions of the 1996 Act in relation to the binding effect of Adjudicators' Awards. The start of the enquiry is at s108(3) which provides that the Award is binding. In the present case there is no express or implied provision and accordingly the scheme is relevant. The relevant provisions are in paragraph 23(2) which provides:
"The decision of the Adjudicator should 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.
24. This mirrors the Act. The Decision of Mr Dale is by statute and scheme binding on the parties until the dispute is determined by arbitration, litigation or agreement. The Defendant submits that because Mr Dale erred in concluding that Part 2 applied and because this involved a misconstruction of s109, on what is a relevant construction contract, the decision is not a decision within s108 or paragraph 23(2). If it is a decision, it is binding. Only if it is not is it not binding.
25. Mr Uff submitted that the question of proper construction of statute was a matter of jurisdiction. The submission which Mr Uff developed with care was that in deciding and making an error the Adjudicator was acting outwith the scope of his authority entrusted to him by statute or contract. Mr Uff conceded the decision has temporarily binding quality by paragraph 23(2) and the Court will not investigate the correctness of the decision until trial, but jurisdiction is a separate matter and is not temporary binding. Mr Uff referred to the decision of Lord MacFadyen in *Homer Burgess* on 10th November 1999. There is a distinction between disputes under a construction contract and other disputes as to whether they arose under the construction contract. The case Lord MacFadyen dealt with was undoubtedly a construction contract on some work but there was a dispute as to whether some work was within the Act, i.e. it was plant. The Adjudicator held that the whole of the contract was a construction contract. The matter came before Lord MacFadyen and he held that the Adjudicator had erred in law and the effect of the error was that he had improperly regarded as a construction contract something which was not a construction contract and the Adjudicator therefore did not have jurisdiction to make the awards because it fell within one of the exceptions. In giving Judgment at page 11, Lord MacFadyen held that the jurisdiction of an Adjudicator was confined to the construction contract. As I say, that proposition seems to be unassailable. It does not apply here. There is no dispute whether the contract was a construction contract. Here it was common that it was a construction contract. If the measure of the competency of an adjudicator is a measure of the right to refer a dispute to adjudication then clearly it was permissible to refer the dispute regarding staged payments to adjudication. This was argued fully before him.
26. Mr Uff also referred to the House of Lords case in *Anisminic Ltd v. Foreign Compensation Commission*. This is a well known decision regarding jurisdiction of statutory bodies. The relevant statute provides that any decision was not to be questioned. The question was whether the Court could enquire into an error made by the Tribunal. The House of Lords said it could. The importance of *Anisminic* is because of Lord Reid's observations as to the question of jurisdiction. The relevant passage at 1969.2 AC is at page 171 below the letter B.
27. Where a Tribunal had jurisdiction to enter into an enquiry Lord Reid said that this was not the end of the matter because the Tribunal could do or fail to do something in the course of its enquiry that makes its decision a nullity. He then gave a list of such matters: The Tribunal may have given its

decision in bad faith; or have made a decision that it had no power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it; or it may have refused to take into account something which it was required to take into account; or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account; or there may have been a breach of natural justice. The court did not intend this list to be exhaustive. If the Tribunal decides the question within these parameters then the decision could not be challenged even if it was decided right or wrong.

28. Mr Uff says that the question of construction of section 109, the right to interim payments, is a question arising in relation to the construction of the Act, the established scheme and, indeed, confers powers on the Adjudicator to make the decision. He argues along Lord Reid's lines that where the body is established by statute and there has been a misconstruction of the statute, this invalidates the Adjudicator's decision. It is interesting to note one matter that Lord Reid refers to is natural justice. There have been a number of first instance decisions regarding the binding force of adjudication. One of these first instance decisions was Lord Dyson in Macob. In that case Dyson held that where there was an allegation of breach of natural justice the Award was still binding. The approach Dyson took appears clearly from two passages where he held that the Decision challenged is still within the scheme.
29. It is clear from the report of the Lord McFadyen decision that he had a difficulty in accepting Dyson's conclusions that although it was possible to challenge the validity of the decision the decision was still binding. Lord MacFadyen, having considered Anisminic, concluded merely that the decision given does not make it binding. The facts there were different. His Honour Judge Bowsher QC referred to jurisdiction in Northern Developments, a Judgment given on 24th January 2000. An application for payment had been made and Notice had been given. The Adjudicator was presented with damages for repudiation but this was not referred to in the Notice. The contractor submitted to the Adjudicator that this was not a claim under the contract and this was accepted by the Adjudicator. His Honour Judge Bowsher QC held that this was unsound. The claim for repudiation did arise under the contract, however, he upheld the Adjudicator's decision on the basis that no notice regarding the repudiation had been given. The facts were different from the present case. It is of some assistance because His Honour Judge Bowsher QC dealt with the Court's decision regarding Adjudications at page 9 of the report:
- (i) *Decisions challenged on their facts remain enforceable.*
 - (ii) *An erroneous decision would be enforced.*
 - (iii) *The Decision can be challenged if the Adjudicator had no power to decide the point.*
 - (iv) *Mistakes will inevitably incur and the Court should guard against characterising mistakes as going to jurisdiction.*
30. The question as to whether a construction contract came into existence must be decided by the Court. In the present case the question is whether the Claimant's entitlement to staged payments goes to the issue of jurisdiction. If it is then the issue can be challenged. If the Adjudicator was right in his conclusion then the question does not arise.
31. In my judgment the question as to whether a construction contract came into existence which entitled the Claimant to staged payments is a dispute as to the terms of the contract and not a dispute which goes to the jurisdiction of the Adjudicator. The position is that the Adjudicator had to decide what were contractually agreed terms and in particular whether the programme was a term of the contract. The Adjudicator said it was not. The Adjudicator arrived at this conclusion having regard to the documents before him. He considered the correspondence and in particular the acceptance by the Defendant. It is clear that the programme was supplied but there is no express term referred to in the documents as to the period of the works. All that appears on the documents was that works were to commence on 27th July 1998. The Adjudicator took the view that the reference to the programme commencing on 27th July did not incorporate this document and accordingly the provisions of the scheme apply. The question of terms of the contract is different to the question of whether they were within the powers of the Adjudicator. This was a dispute where he was asked to decide what were the terms of the contract. He made a decision and that is the end of the matter. The Adjudicator may be

right, he may be wrong, but it is within his jurisdiction. In Anisminic Lord Reid said that the failure of the statute could give rise to an error in jurisdiction. This is not what we have under the 1996 Act. It makes provision for adjudication and construction contracts. It provides, in s109, terms of payment. Maybe the Adjudicator was in error but it seems this was an error not going to the limits of his power nor without a construction contract. The Adjudicator may have got it wrong but it is still within his power and it does not necessarily reach the conclusion that he acted outside of his jurisdiction.

32. It was squarely before the Adjudicator whether there were contract terms regarding payment and the effect of paragraph 9 of the terms and conditions. It seems to me that even if he were wrong in interpreting s110, he was entitled to reach the conclusion as to the existence of the provision for staged payments. Undoubtedly there was provision by paragraph 9 of the terms and conditions. Some of the provisions of part 2 of the scheme apply to a relevant construction contract and some to construction contracts generally. In particular paragraphs 6 and 7.
- "6. Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on*
- (a) the expiry of 30 days from the completion of the work or (b) the making of a claim by the payee whichever is the later.*
- 7. Any other payment under a construction contract shall become due*
- (a) on the expiry of 7 days from the completion of the work to which the payment relates or*
- (b) the making of a claim by the payee whichever is the later."*
33. Paragraph 7 is directed to the position where payment is sought in relation to a period to which the payment relates. This relates to staged payments. There is no answer by the Defendant to the contention that even if the Adjudicator was wrong and he had no jurisdiction that nevertheless the effect of paragraph 9 of the terms and conditions and paragraph 7 of the scheme is to make, where there is provision for staged payments, the money due within 7 days of completion of the work.
34. If the Defendant had not served a Notice then it is not open to him to refuse payment. Just as in the decision in Northern Developments, the Defendant cannot raise the matters it seeks to raise. The decision of the Adjudicator is right even if he erred on jurisdiction.
35. I take the view that a decision as to what contract terms are is within the Adjudicator's jurisdiction. Whether there is a right to interim payments must arise under the contract. Accordingly, the Claimant is entitled to the relief which it seeks. I have not formed a view whether the Adjudicator was correct or not in his interpretation of the contract.
36. I accept the first and third submissions of the Claimant and reject Mr Uff's submission.

Simon Vaughan instructed by Pannone & Partners for the Claimant.

David Uff instructed by Bannister Bates & Son for the Defendant