

JUDGMENT : HIS HONOUR JUDGE BOWSHER Q.C : TCC : 9th August 2000

1. **Introduction** This is an application under CPR Part 24 for summary judgment against the defendants to enforce an award made by an Adjudicator pursuant to the HGCRA 1996. The claim is for £95,383.50 plus interest.
2. The Claim was issued on 1 June, 2000. This application was issued on 30 June, 2000.
3. **History** The Claimants are plastering sub-contractors. They were engaged by the defendants in connection with the construction of the Kingsway Hall Hotel, Kingsway, London WC2.
4. The Claimants were engaged on a contract incorporating the terms of the standard form of contract for sub-contractors DOM/1. Article 3 and Clause 38 of those terms provide for disputes or differences between the parties to be referred to Adjudication.
5. During the works, there arose a dispute with which I am not concerned which was submitted to Adjudication in September, 1999. The Adjudicator appointed by the President of the RICS under the terms of the contract was Mr. J.D.Murphy FRICS, FCI Arb, of the well known firm of Quantity Surveyors, Davis Langdon & Everest. On 23 November, 1999, the Adjudicator gave a decision that the defendants should pay to the claimants £101,524.39 plus VAT which has been paid.
6. By letter dated 13 January 2000, the claimants gave notice to the defendants of their intention to refer a further dispute to Adjudication. The effect of that notice is disputed.
7. Mr. Murphy was again appointed for that Adjudication and the JCT Adjudication Agreement was executed on 16 February, 2000.
8. The Adjudication proceeded in front of Mr. Murphy, and on 25 April, 2000 he gave his decision. He gave reasons for that decision in considerable detail. He ordered that the defendants should pay to the claimants the sum of £81,177.45 plus VAT totalling £95,383.50. The defendants have made no payment in response to that decision and this action is brought to enforce that decision.
9. **Issues** The defendant objects that the Adjudicator acted in excess of jurisdiction and for that reason his order should not be enforced. Suggestions that there were breaches of procedure in the Adjudication were made in correspondence but not pressed before me.
10. Counsel for the defendants submitted that:
 - a. the Adjudicator's jurisdiction is limited to considering the disputes indicated by the Notice of Adjudication;
 - b. the Referral Submission made by the claimants after the Notice of Adjudication referred to disputes not indicated by the Notice of Adjudication and the Adjudicator acted in excess of jurisdiction in dealing with those additional disputes;
 - c. the defendants are entitled to rely on matters of abatement (though not set-off) in reduction of the amount ordered to be paid.
 - d. Counsel for the claimants disputed all of the above submissions and also submitted that the defendants had waived the points taken on jurisdiction by agreeing that the Adjudicator should have jurisdiction to decide his own jurisdiction.
11. **Jurisdiction** By letter dated 13 January, 2000, the claimants referred to outstanding payments on Valuations 22 and 23 and their Final Account, including prolongation costs, interest and financing charges, and retention release referred to in the Final Account. The letter concluded,
"In pursuit of the above, and under clause 38A of the Domestic Sub-Contract DOM/1 we hereby give you formal notice of our intention to refer the dispute to adjudication as set out below.
 1. *Failure to make payment against our Final Account dated 25 October 1999.*
 2. *Failure to make payment against our interim applications nos. 22 and 23."*
12. As required by clause 38A.4.1 of DOM/1, the claimants served a Referral document on 25 February, 2000. That document is equivalent to Points of Claim in a civil action. Attached to that Referral document, and to be read as part of it, was an Amended Application by the claimants for an extension of time. That Amended Application was dated February 2000, that is after the date of the Notice of Adjudication.

13. The defendants disputed the Adjudicator's jurisdiction to deal with some, but not all, of the matters referred to in the Referral document. The disputed heads of claim were claims for:
 - a. Extension of time;
 - b. Contractual interest;
 - c. Prolongation costs;
 - d. Financing charges.
14. The solicitors for the defendants made their objection by letter to the Adjudicator dated 3 March, 2000. With that letter they enclosed a formally drafted "Submission by Impresa Castelli Construction UK Limited on the matter of Jurisdiction". The last paragraph of that letter read:

"We invite you to decide on this issue as a matter of urgency as our response to Whiteways Notice of Referral will depend on your decision. Our client does not wish to incur costs on matters which, in our view, fall outside the jurisdiction of the Adjudication."
15. The Adjudicator replied to the solicitors for both parties by letter dated 3 March, 2000. He wrote, *"I consider that there does appear to be an issue here which is better determined at the outset."* The Adjudicator directed that the claimant should respond to the defendants' submissions in writing, which they did.
16. On 7 March, 2000, the Adjudicator wrote to the parties:

"Further to the submissions received from the parties I now attach my determination on the matter of my jurisdiction in this adjudication."

With that letter, the Adjudicator sent a detailed reasoned decision. In respect of each of the disputed items he decided, "I do have jurisdiction to consider this matter".
17. In giving his reasons on jurisdiction, the Adjudicator began by referring to clause 38A.4.1 of DOM/1 1980 (reprinted 1998):

"When pursuant to Article 3 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. Within 7 days from the date of such notice or the execution of the JCT Adjudication Agreement by the Adjudicator if later the Party giving the notice of intention shall refer the dispute or difference to the Adjudicator for his decision ('the referral'); and shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party."
18. The Adjudicator then went on to say:

"I find that Clause 38A.4.1 requires that the notice of intention to refer contains a brief description of the dispute or difference to be referred sufficient to facilitate unambiguous identification of the same by the non-referring party and, if subsequently applicable, by the nominated Adjudicator. Such description would I suggest typically comprise the nature of each separate claim and the relief sought. I find that in the absence of any ad hoc agreement between the parties to subsequently extend the same, the adjudicator's jurisdiction is limited to the dispute or difference described in the notice of intention to refer. The inclusion of the words "the dispute or difference" in the second sentence of Clause 38A.4.1 in connection with the Referral is in my view clearly intended to mean the same dispute or difference referred to in the first sentence of that clause in connection with the notice of intention to refer. Accordingly, if it is Whiteways' contention that the Referral may include matters not briefly described in some sufficient manner in the notice of intention to refer, then I reject that contention. I find that Whiteways' notice of intention to refer dated 13 January 2000 includes the matters set out in paragraph 8 hereof. However, I find that such notice also contains reference to other matters."
19. Miss Dumaresq on behalf of the defendants was constrained to accept that the Adjudicator correctly construed the effect of clause 38A, but she submitted that he applied it wrongly. As was submitted by Miss Dumaresq, the jurisdiction of the Adjudicator extends only to disputes notified in the notice of intention to refer. The Adjudicator also was of the same view. Miss Dumaresq submits that the Adjudicator was wrong in the manner in which he applied that view of the law in this case.
20. On 16 March, 2000, the solicitors to the defendants served their Response to the claimants Referral document. In that response, the defendants repeated their objections to the jurisdiction and stated that

the response was made without prejudice to that objection and reserved "the right to raise the matter of jurisdiction in any future proceedings concerning this Adjudication".

21. In his final decision given on 26 April, 2000, the Adjudicator again referred to the matter of jurisdiction. He wrote:

"19. Although I consider that an adjudicator has no power under Clause 38A of DOM/1 to determine his or her jurisdiction I conclude from the parties' submissions, both from leading firms of Solicitors, that the parties had extended my jurisdiction to determine the matter.

20. I gave my determination on jurisdiction to the parties on 7 March 2000. A copy of that determination is attached to this Decision at Annexure A.

I found that I did have jurisdiction to consider the matters included in Whiteways' Referral. I found that all such matters were included in Whiteways' notice of intention to refer with the sole exception of Whiteways' application for the extension of the Subcontract period in which it was to carry out and complete the Subcontract Works which was not expressly included. Notwithstanding that the notice of intention to refer restricted matters to disputes as to payments I nevertheless concluded that if I was to decide on the merits of Whiteways' claims for payment, which included loss and expense arising from prolongation of the Subcontract period, and also Castelli's claims for loss and expense arising in part from Whiteways' failure to complete the Subcontract Works by the due date, some consideration was necessary of Whiteways' entitlement to the extension of its Subcontract Period vis-a-vis the period actually taken to complete its work."

22. Miss Franklin, counsel for the claimants, submits that the letter from the defendants' solicitors dated 3 March, 2000 was not an invitation to the Adjudicator to enquire into his jurisdiction but was an invitation to decide it. She adds that after the decision on jurisdiction had been made against the defendants, it was too late to protest that the Adjudicator had no jurisdiction to decide his jurisdiction.

23. Miss Dumaresq accepted that the parties had the power to give the Adjudicator power to decide his own jurisdiction. Miss Dumaresq however submitted that the letter of 3 March 2000 from her clients' solicitors to which I have referred was not an invitation to the Adjudicator to determine his own jurisdiction, it was only an invitation to decide whether he should proceed. I cannot accept Miss Dumaresq's reading of that letter.

24. I agree with the view of the Adjudicator expressed in paragraphs 19 and 20 of his final decision. The letter of 3 March 2000 and the formal written submissions made by solicitors on behalf of both parties were the clearest request to the Adjudicator to decide the issue of jurisdiction.

25. In **Fastrack Contractors v. Morrison** [2000] BLR 168 at 178, His Honour Judge Thornton Q.C. said:

"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 a 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."

In the present case, the parties adopted the first of the courses mentioned by Judge Thornton.

26. Like the remainder of the Adjudicator's decision, his decision on jurisdiction is, by virtue of clause 38A.7.1 of the agreement "binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given".

27. I see no reason to differ from the finding of the Adjudicator on jurisdiction, but in any event, this Court is not a court of appeal from the Adjudicator and I shall not rehearse his reasons for making his decision on jurisdiction.
28. **Abatement** By their second letter of 12 May, 2000, after the Adjudicator had given his decision, the defendants' solicitors averred that the claimants had been overpaid on previous applications for payment before the applications considered by the Adjudicator. The complaints related to (a) an allegation that the claimants had not supplied or installed some bathroom bulkheads for which payment was applied and paid; and (b) an allegation that the mark up for overheads and profit was excessive on earlier applications.
29. Lest it be thought that I have failed to do justice to the submissions of Miss Dumaresq with regard to abatement, I quote verbatim from her written argument:
*"The Respondent's contentions on abatement are as follows:
s 109 and s 111 (of the HGCRA) - deal respectively with "due date" and "withholding".
s110(2)(a) and (b) - give the widest possible description of cross-claims.
One reading of s110 and s111 together is that s111 may not deal with anything not already covered in a s110 notice.
The matters raised in s110(2)(a) are concerned with set-offs for failure to perform - and not sums not being 'due' (work not done/abatement etc).
Under the law concerning abatement the sums never became due and therefore do not fall within the section.
s110(2)(b) could mean all claims arising out of different contracts can be set-off irrespective of non-conformity - although there is a reference to abatement it is rarely if ever that abatement can be applied from one contract against another.
Because s110 has the power to extend the payor's rights in this way it must be complied with and if the payor intends to rely on such extended rights in s111 notice, then he must raise them in s110 notice. s110(2)(a) could mean that all cross claims can be set off irrespective of the existing test as to close/inseparable connection with the claim (as long as it is a matter arising out of some failure to perform)."*
30. Sections 110 and 111 of HGCRA include the following provisions:
"110. Dates for payment
(1) 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.
(2) 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 other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.
(3) If or to the extent that a contract does not contain such a provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.
111. Notice of intention to withhold payment
(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.
The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.
(2) To be effective such a notice must specify -
a. the amount proposed to be withheld and the ground for withholding payment, or
b. if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.
31. There may be some difficulty about the concept of an abatement claimed to be due under other contracts under section 110(2)(b), but we are not concerned here with other contracts. Section 110 requires the giving of a notice stating the amount of any payment proposed to be made, and that notice is to be given within 5 days after the date when payment would have been due if the party had

performed its contract, i.e. inter alia if there had been no ground for abatement. Section 111 provides for notice of intention to withhold payment.

32. It is common for a party to a building contract to make deductions from sums claimed on the Final Account (or on earlier interim applications) on account of overpayments on previous applications and it makes no difference whether those deductions are by way of set-off or abatement. The scheme of the HGCRA is to provide that, for the temporary purposes of the Act, notice of such deductions is to be made in manner complying with the requirements of the Act. In making that requirement, the Act makes no distinction between set-offs and abatements. I see no reason why it should have done so, and I am not tempted to try to strain the language of the Act to find some fine distinction between its applicability to abatements as opposed to set-offs. Of course, in considering a dispute, an Adjudicator will make his own valuation of the claim before him and in doing so, he may abate the claim in respects not mentioned in the notice of intention to withhold payment. But he ought not to look into abatements outside the four corners of the claim unless they have been mentioned in a notice of intention to withhold payment. So, to take a hypothetical example, if there is a dispute about Valuation 10, the Adjudicator may make his own valuation of the matters referred to in Valuation 10 whether or not they are referred to specifically in a notice of intention to withhold payment. But it would be wrong for him to enquire into an alleged over valuation on Valuation 6, whether the paying party alleges abatement or set-off, unless the notice of intention to withhold payment identified that as a matter of dispute.
33. I reject the submissions made on behalf of the defendants in relation to abatement.
34. **Conclusion** I see no reason why the decision of the Adjudicator should not be enforced and I therefore give judgment for the sum claimed, namely £95,383.50 inclusive of VAT together with an amount for interest agreed in the sum of £2,215.40 totalling £97,598.90.
35. The claimants' costs of the action assessed at £5,600 exclusive of VAT plus £738 for taking the judgment totalling £5,504.00 are to be paid by the defendants.
36. The above sums are to be paid by 4 p.m. on 23 August, 2000.

Kim Franklin for the claimants (Solicitors: Bond Pearce)

Delia Dumaresq for the defendant (Solicitors Bevan Ashford)