

JUDGMENT : His Honour Judge Richard Havery Q.C. TCC. 25th June 2004

1. This is a claim made under part 8 of the Civil Procedure Rules for declarations concerning an adjudication under the (housing Grants, Construction and Regeneration Act 1996 ("the Act"). The declarations sought are:
 - (1) that there is no agreement between the claimant and the defendant as alleged in the defendant's notice of adjudication dated 24th February 2004 whose terms, or whose material terms, are recorded in writing as required by section 107 of the Act; and/or
 - (2) that the defendant no longer has any statutory- right to adjudication under section 108 of the Act; and/or
 - (3) that the defendant's said notice of adjudication is an abuse of process.
2. Counsel have prepared an agreed list of issues. The issues are these:
 - (1) Has there been an agreement to which the claimant and the defendant have been parties and which is an agreement "in writing" within the meaning of s.107 of the Act?
 - (2) If the answer to question (1) is yes, did the defendant still have the right to refer a dispute to adjudication under s.108 of the Act on 24th February 2004 if the agreement has previously been discharged by the acceptance of the claimant's repudiation?
 - (3) If the answer to question (1) is yes, did the defendant still have the right to refer a dispute to adjudication under s.108 of the Act notwithstanding the letter of agreement dated 1st February 2002?
 - (4) If the answers to questions (1), (2) and (3) are all yes,
 - a. Is the defendant's notice of adjudication dated 24th February 2004 an abuse of process?
 - b. If so, what is the consequence?
3. The underlying facts are these. The defendants ("MJ") are building contractors experienced in installing closed circuit television ("CCTV") systems. In 2000, the claimant, Connex South Eastern Limited ("SE"), held a franchise for the operation of train services on railways in Kent. A company in the same group, Connex South Central Limited ("SC"), held a similar franchise in relation to railways in Sussex. Both companies were subsidiaries of Connex Transport UK Limited. The boundaries between the franchise areas were not everywhere the county boundaries, but what I have said is sufficiently accurate for present purposes. The same management team ran both those companies, which have been referred to generically as Connex. Connex were engaged in a project ("the project") to instal CCTV at their stations. The proposed adjudication is based on what is claimed to be a contract between Connex and MJ for the installation of CCTV at 50 stations within the two franchise areas. That part of the project was identified as phase 9. SE have denied the existence of a contract, but Mr. Ashton has, for the purposes of his present arguments, assumed the existence of a contractual relationship between Connex and MJ.
4. There is a question whether the phase 9 work was the subject of a single contract between the two Connex companies and MJ, or two contracts, one between SE and MJ for the stations (20 in number) situated within the SE franchise area, and the other between SC and MJ for the stations (30 in number) situated within the SC franchise area. Mr Speaight submitted that there was a single contract. Mr. Ashton preferred the view that there were two contracts, but was content to make his submissions on the basis that there was a single contract. In my judgment, having regard to the narrative of facts given below, there was a single contract.
5. A firm known as Condes (formerly known as Concept and Design) provided architectural and project management services to Connex. In February 2000, Condes, acting on behalf of SE and SC, issued a document entitled "Master specification for the design and installation of security CCTV systems to stations and car parks for Connex South (Central/Eastern) Ltd." That document included the specification for the works and conditions of contract. It identified the employer as Connex South (Central/Eastern) Limited. No company of that name existed. It listed the tender documents, which included the document itself (52 pages). It stated that the contract documents would be the same as the tender documents. It included a draft form of agreement which again identified the employer as Connex South (Central/Eastern) Ltd.

6. An invitation to tender was sent by Condes to NY by letter of 6th June 2000. So far as material, that letter read as follows:

You are invited to tender for the Phase 9 installation works consisting of 50... stations across the Connex South Eastern and South Central Networks.. ...Due to the nature of the works and short programme involved, it is our client's intention to let all 50... stations to a single contractor..... A formal written order from our client will be placed with the successful tenderer.....All works to be carried out in accordance with the master Specification for the installation of CCTV.

MJ responded by submitting their tender proposal on 31st July 2000. They described it as their tender proposal for the Phase 9 CCTV installation programme of works to be carried out by [sic] Connex South Eastern/South Central. It consisted of 50 pages, one in respect of each station, there being set out on each page a list of equipment, and in the case of each item a quantity, rate and price. On 11th August Condes invited MJ to attend a post tender meeting. The letter stated "The purpose of the meeting is to discuss the tender in detail if successful you will be required to start on site immediately". The meeting was held on 24th August 2000 attended by representatives of Condes and of MJ. The minutes of the meeting stated that the purpose of the meeting was to review the scope of the Phase 9 contract which comprised a total of 50 Connex stations throughout the South East and South Central regions. At the meeting it was stated that due to the geographical spread the contract had been broken down into eight separate phases 9.1A to C and 9.2A to E. A representative of MJ enquired when a decision was to be made for the award of the phase 9 contract, and a representative of Condes stated that he had had confirmation from Connex that a decision would be made very quickly.

At some time in August 2000 MJ produced a rolling programme of the works divided into the eight separate phases. That document shows the stations included within each of the eight phases. Four of the phases contained stations from both the SE and the SC franchise areas. On 15th September a further meeting was held described as "General Kick off". It was again attended by representatives of Condes and of MJ. The minutes stated that the purpose of the meeting was to provide a general overview of the project to take it forward post haste. They also stated that Connex had given Condes a verbal instruction that the project was to be carried out immediately. A representative of MJ stated that NY were still awaiting an official order from the client. In his witness statement Mr. Pashouros, the senior partner and proprietor of Condes, said that at the meeting he, on behalf of Connex, told Mr. Coster, representing MJ, that MJ were to commence work immediately. None of the evidence before me was controversial, and counsel invited me to treat it as agreed. The minutes go on to record that a representative of Condes stated that due to the splitting up of the contract to S/C and S/E the phases would be reallocated and that a revised schedule of stations would be issued without delay. It was simply a case of altering and possibly adding phase numbers.

9. No written order was issued by Connex, and no contract between Connex and MJ was signed.
10. On 20th September 2000 Condes wrote to MJ stating that by a direct instruction from Connex, all CCTV works were suspended until further notice. On 23rd September MJ replied stating that they had already committed considerable resources to the project and extensive delays would result in loss of allocated labour, disruption to programme and additional contract cost for non-productive time. The letter stated "In accordance with the terms of the contract and for the reasons pointed out above, we are now officially requesting an extension of time to complete our works. In the event that these works are not proceeded with in their entirety we reserve the right to make a claim for all losses incurred".
11. After further correspondence, Condes wrote to MJ on 18th October 2000 stating "You may proceed with the works post haste but on the condition that no claims will be made against Connex for an extension of time. If this is an acceptable condition, please contact my office at your earliest convenience to discuss a revised programme of works". MJ replied on 20th October confirming that subject to agreeing an ongoing programme of works MJ were prepared to set aside their grounds for compensation in that regard.

12. At a meeting held on 20th November 2000 attended by representatives of Connex, Condes and MJ, Condes confirmed that following the suspension of works and the rescheduling of S/E and S/C stations into separate phases, Connex had given approval for the project to proceed as quickly as possible. MJ tabled a new programme, which counsel believed was one in the court bundle showing a programme for the work on all the SC stations to be completed by the end of October 2001, and all the work on the SE stations to be done between the beginning of October 2001 and the end of March 2002. On behalf of Connex, Mr. Pashouros instructed MJ to proceed with phase 9.

13. In August 2001 Govia Limited acquired the entire share capital of Connex South Central Limited, which changed its name to South Central Limited. I use the abbreviation SC to refer to that company both before and after its change of name. SC retained its franchise.

The existence of the project had not been disclosed to Govia Limited before its acquisition of SC. After reviewing the situation, SC decided that it did not wish to proceed with the project in its original form. At about the same time, Condes ceased to act for SE, though they continued to act for SC.

14. On 4th December 2001, SE notified MJ that no further installations under phase 9 were to be commenced until further notice. Installations at four named stations were to be completed and commissioned. On 6th December MJ replied that the work on the four stations in question, plus two others, was now complete. The relevant final account was enclosed for certification and payment. All those six stations were in the SE franchise area.

15. On 14th December 2001 a meeting was held between representatives of Condes and of MJ on the subject of SE CCTV installations phase 9. At that meeting, MJ stated that the works on all six stations had been started, and work on the last two mentioned would be completed according to programme. The difference between that information and the information contained in the letter of 6th December is of no significance for present purposes. Condes advised MJ that the client opinion was that there was no contract in place. Condes also stated that it would not action certification for two reasons: the works were not complete, and Condes did not have an order to manage the works. It had at the time no instructions to project manage the project, and that all queries should be addressed to Elyes Frikha, Connex project manager.

16. Correspondence ensued between MJ and Mr. Frickha in which MJ claimed the sum of £199,326.28 from Connex South Eastern Limited for materials procured for the phase 9 CCTV rolling programme installation works. The correspondence culminated in a letter from MJ dated 29th November 2002 to Connex South Eastern, for the attention of their legal adviser, stating that Connex South Eastern had repudiated the contract and that MJ had accepted that repudiation.

17. In the meantime, meetings were held between Mr. Michael Blaquiére, facilities project manager for SC, and Mr. Maurice McAnallen, managing director of MJ. The object of those meetings was to re-structure the project. Agreement was reached between MJ and SC. On 11th February 2002 Connex wrote to Mr. McAnallen a letter in the following terms:

The phase 9 CCTV contract

Since Govia's takeover of South Central, the Client has worked with you to restructure the scope of works to reach a mutually acceptable solution.

The final shape of the contract is now clear. We list below the works instructed to date and the budgeted works awaiting instruction.

We would now like to formalise your mutual agreement with the Client that the works below now represent the full extent of the "Phase 9" contract. The forecast value of Works that have been instructed or will be instructed totals £937,847.

Please note that we do expect to be able to instruct some additional works on the Epsom Downs line, which might have a value of around £60,000 but for budgetary reasons this is not certain and you should regard this as a bonus.

We would be grateful if you would please sign the bottom of this letter and return to me in order to confirm your agreement.

The letter was marked as being copied to Mr. Blaquiere - South Central Facilities. Mr. McAnallen signed the letter at the bottom, as requested.

18. The works said to have been listed below were actually listed on a separate piece of paper. The list of stations shows that of the original 30 stations in the SC franchise area, 24 had been omitted. 13 stations were added. The net effect was to reduce the total from 30 to 19. But a different kind of equipment was required. The total price of the works was shown as 937,847. But the figures were broken down in a peculiar way. They make no mention of any works omitted. They show the price of total instructed works to date as £911,847. They show the value of works to be instructed as £26,000. There is then a total of £937,847 described as "Total fixed works to be instructed". Mr. Blaquiere's evidence was that it was his understanding that the agreement superseded any prior agreement to which SC might have been a party with MJ in connection with the project works. MJ carried out all of the revised works and were paid in full by SC.
19. Mr. Blaquiere's evidence was that when Govia Limited had completed its review, MJ had completed work on only five out of the 50 stations in the original list, all of them being in the SC franchise area. He did not identify them. It does not appear whether those five stations, or any of them, were included in the six which were not deleted from the list. Mr. Blaquiere stated that the value of the works to be instructed (£937,847) was largely the same as the value of works omitted from the original project scope (£911,847). That reflected, he said, the agreement reached between MJ and SC that the contract value would remain largely the same but that the nature and extent of the works would alter.
20. Mr. McAnallen's evidence on this point is scanty. He makes no mention of the change in the scope or nature of the works for the SC franchise area. The totality of his evidence on the point appears in paragraph 20 of his witness statement as follows:
Towards the end of 2001 and beginning of 2002 I did however continue to deal with Eric Smith of Condes in relation to the South Central element of Phase 9. By February 2002 we had completed work on all the stations in the South Central franchise to their satisfaction, and South Central had agreed our account. In order to record this, I signed Condes' letter of 11 February 2002. This countersigned letter refers only to stations in the South Central area.
21. Mr. Pashouros said in his witness statement that he was (sc., after 14th December 2001) eventually instructed to arrange a settlement with NY on behalf of SC, though whether he played any part in arranging the meetings between Mr. Blaquiere and Mr. McAnallen does not appear. He said:
Negotiations continued throughout early 2002 with [MJ] as to what was to happen with the remainder of Phase 9. Some time during 2002 [MJ] completed to the satisfaction of South Central Limited all the works which they were being required to carry out within the [SC] franchise area and the account of MJ had been agreed. Therefore, on 1 February 2002 Eric Smith wrote to [NJ] in order to confirm these matters.
22. On 24th February 2004 MJ served a notice of adjudication as follows:
The dispute referred to is [MJ]'s claim for payment from [SC] and/or [SE] of damages....in respect of the contract for the execution of installation works at 50 stations in the Connex South Eastern and Connex South Central franchise areas, known as the "Phase 9 Works". The dispute arose following the refusal/failure by [SE] and [SC] to make payment [of the sum of £362,914.12 plus interest] on request by [MJ] and as recorded in correspondence from Fenwick Elliott to [SE] and [SC].
23. An adjudicator was appointed who stayed the adjudication by consent pending the outcome of this hearing. There were two part 8 claims seeking similar relief against MJ, one made by SE and one by SC. I directed that they be heard together. But the latter has been settled. The terms of the settlement do not appear, and I have heard no argument on the relevance, if any, of the settlement to the issues I have to decide.
24. I am satisfied that the original contract was a single contract involving SE, SC and MJ. The first question I must consider is whether it was in writing, so as to fall within section 107 of the Act. Otherwise, the adjudicator would have no jurisdiction. Mr. Ashton drew my attention to the case of RTJ Consulting Engineers o. DM Engineering (Northern Ireland) Limited [2002] 1 WLR 2344, CA.. He submitted that the complete agreement (per Ward and Robert Walker L JJ. at paragraphs 19 and 20

respectively of the judgments), alternatively at least all the material terms (per Auld L.J. at paragraph 24) must be in writing in order to fulfil the requirements of section 107. Mr. Speaight submitted, and Mr. Ashton agreed, that whichever approach is adopted, it was manifestly not the intention of Parliament to exclude from the jurisdiction of an adjudicator an agreement solely because it contains implied terms. I accept that very reasonable proposition. Mr. Ashton has not identified any express terms of the agreement that are not in writing. His point is that there was no written acceptance of MJ's tender. In my judgment, that is irrelevant. It is not suggested that there was an oral acceptance containing terms. But in any case, there is a brief reference in the minutes of the meeting held on 15th September 2000 to the effect that Connex had given an instruction that the project was to be carried out immediately. In the context, the conclusion is irresistible that that instruction constituted an acceptance of MJ's tender. Since the minutes were written with the authority of the parties, they constitute evidence, falling within section 107(4) of the Act, of the acceptance. I conclude that the contract was in writing, within the meaning of section 107 of the Act.

25. The next question is whether acceptance of repudiation of in agreement brings to an end a provision as to adjudication. It is well established that an arbitration clause survives the discharge of a contract by acceptance of a repudiation: *Heyman t. Darwins Limited* [1942] AC 356. The reasoning in that case in my judgment is equally applicable to an adjudication provision. Mr Ashton submitted that there was an important difference between arbitration and adjudication. Adjudication was intended to provide a quick enforceable interim decision under the rubric of "pay now, argue later". He referred me to remarks of Ward, Robert Walker and Auld LJJ. to that effect in *RJT Consulting Engineers Ltd r. DM Engineering Ltd* [2002] 1 WLR 2344 at 2346, 2353, 2354. He submitted that adjudication was intended to relieve cash flow problems arising during the course of a contract. That situation did not apply in the instant case or in the case of other contracts where a repudiation had been accepted. I reject Mr. Ashton's submission. It is well established that adjudication can take place after the works under a contract have been completed. I consider these points further in the context of abuse of process.
26. I turn now to consider the effect of the letter of agreement of 1 ph February 2002, Mr. Ashton's argument, on the basis that the original contractual relationship was made by a single agreement between SE, SC and MJ, was that SF: and SC were joint contractors. By the agreement of 1 ph February, an accord had been reached between SC and MJ in that the original performance was being superseded by a completely different performance. The new performance promised by MJ constituted satisfaction. MJ thereby released SC from its original obligations. Since SE and SC were joint contractors, that release was effective to release SE also from its obligations.
27. The first question here is whether under the original contract SE and SC were joint contractors. As stated in *Chitty on Contracts*, 29th edition, paragraph 17-005, the presumption is that a promise made by two or more persons is joint so that express words are necessary to make it joint and several. Mr. Speaight submitted that in a course of previous conduct in relation to phases before phase 9, where the material terms of the relevant documents were the same, each certificate for payment named only the franchisee whose station was the subject of the relevant work. Moreover, the implied obligations of SE and SC to give MJ access to the sites and permit MJ to carry out works there could be performed in the case of each station only by the franchisee in whose area that station was situated. That argument, if correct, does not preclude the possibility of joint liability. Rather, it points to the proposition that each of SE and SC contracted only in relation to the stations in its own franchise area. That would, of course, imply several liability.
28. There are no express words making the liability of SE and SC joint and several, let alone several. There was only one form of draft agreement (albeit not signed) in the contractual documents. The employer was named as a single company, Connex South (Central/Eastern) Limited, albeit by a misnomer. SE and SC shared the management of their relevant business (or businesses). Both companies were at the time in the same ownership. There is nothing in the agreement to suggest that each company contracted only in relation to the stations in its own franchise area. in my judgment, SE and SC contracted jointly.

29. It was common ground that the original contract could not be varied except by agreement of all parties. Only SC and MJ were party to the agreement of 11th February 2002.
30. According to Chitty on Contracts, *ib.*, paragraph 17-017, the discharge of one joint debtor by accord and satisfaction discharges all, in accordance with the general principle that joint liability creates only one obligation; and the same is true, illogical though it may seem, if one joint and several debtor is so discharged. Mr. Ashton fairly described that situation as a trap for the unwary. Chitty goes on to say that a covenant not to sue one joint or joint and several debtor does not discharge the others. The courts generally construe a release as a covenant not to sue if it contains an indication of intention that the other debtors are not to be discharged. If the agreement appears from its words to be a release and there are no words reserving rights against the other debtors, nor anything to the circumstances to rebut the *prima facie* meaning of words used, the agreement will release all the debtors; but it would seem that the courts lean in favour of other debtors not being discharged by construing the agreement as a covenant not to sue or as a release but subject to an implied reservation of rights against other debtors. That is what Chitty says. In my judgment, it is clear that in this context the word "debtor" includes one liable in damages.
31. It is clear that the agreement of 11th February 2002 was intended to release SC from its obligations in relation to the 24 stations removed from the earlier agreement. In view of the words "the works below will now represent the full extent of the phase 9 contract", it is clear that the agreement was also intended to release SC from its liability, if any, in relation to the stations in the franchise area of SE. There is nothing in the agreement to suggest that SE should not be discharged. "There is nothing in the circumstances to rebut the *prima facie* meaning of the words used.
32. I conclude that SE are released jointly with SC from the obligations from which SC was released by the agreement of 11th February. I must consider the extent of those obligations. The negotiations between MJ and SC leading to that agreement appear to have been settlement negotiations (see paragraph 21 above). Settlement of what, does not appear. In particular, there is no evidence whether there was an existing claim or potential claim on the part of MJ against SC for expenditure wasted on work done or supply of materials to stations which were subsequently withdrawn from the list, or for the price of works done on such stations. The agreement makes no mention of any such claim. I conclude on the evidence, which is not satisfactory on this point, that neither SC nor SE was released by the agreement of 11th February from any such claim. But SC and SE were released from their obligations to afford access to MJ in the future to the stations withdrawn from the list of stations in the SC franchise area and from all stations in the SE franchise area. Thus a claim for loss of profits expected to be earned in relation to those stations has been released.
33. Mr. Ashton submitted that it was abuse of process for MJ to start adjudication proceedings so long after MJ purported on 29th November 2002 to accept repudiation of the contract on the part of SE. He accepted that under section 108(2)(x) of the Act a party is entitled to give notice of his intention to refer a dispute to adjudication "at any time". He submitted that the right arises only during the currency of the contract and the words "at any time" have to be construed accordingly. I He submitted further that the phrase must be subject to a limitation defence. Moreover, it was plain that Parliament did not mean that a notice could be given a hundred years after a dispute had arisen: that would be *reductio ad absurdum*. He relied on the speech of Lord Browne-Wilkinson in **Pepper v. Hart** [1993] AC 593, 634 where Lord Browne-Wilkinson said that reference to Parliamentary material should be permitted as an aid to the construction of legislation the literal meaning of which is obscure or leads to an absurdity and where such material clearly discloses the mischief aimed at or the legislative intention lying behind the words. He could not foresee that any statement other than the statement of the Minister or other promoter of the Bill was likely to meet those criteria.
34. In my judgment, the words "*at any time*" do not fall within Lord Browne-Wilkinson's statement. Whilst no limitation period is laid down for instituting an adjudication, a limitation defence must be taken into account by the adjudicator. If he fails to do so, then any payment made pursuant to his award would give rise to a claim for restitution. It is true that Earl Ferrers, the relevant minister at the material time, stated in the House of Lords that the Housing Grants, Construction and Regeneration

Bill had two purposes. The first was to speed up the flow of payments and information about payments on construction contracts. The second was to provide a reliable means of resolving disputes quickly (Hansard, 20th February 1996, 978 col. 2). Earl Ferrers also said: *"Put simply, in arbitration one waits until the end of the contract. One has a full-blown argument about it, perhaps in the courts with barristers and heaven knows what. It may take a year or two years to get to the end of it. Adjudication is an attempt to resolve the matter forthwith"* (ib., 1st April 1996, cols. 16 and 17). An amendment was proposed to add after the words *"at any time"* the words *"within the period prescribed in the contract"*. That amendment was rejected. Lord Lucas, then acting for the Minister, said *"As long as there is a possibility of a dispute arising under a contract, the right to seek adjudication will remain"* (ib., 23rd July 1996, col. 1344). *"Thus, in my judgment, the references to Hansard, even if admissible, do not help Mr. Ashton.*

35. Mr. Ashton submitted that it could be an abuse of process to make the same claim in two separate proceedings. But Dyson J. in *Herschel Engineering Ltd, u Breen Property Limited* [2000] BLR 272, 276, 277 saw no reason not to give the words *"at any time"* their plain and natural meaning, so as to allow court and adjudication proceedings to run concurrently. I respectfully agree.

36. My answers to the questions listed are as follows:

(1) Has there been an agreement to which the claimant and the defendant have been parties and which is an agreement *"in writing"* within the meaning of s.107 of the Act?

Answer: Yes.

(2) If the answer to question (1) is yes, did the defendant still have the right to refer a dispute to adjudication under s.108 of the Act on 24th February 2004 if the agreement has previously been discharged by the acceptance of the claimant's repudiation?

Answer: Yes.

(3) If the answer to question (1) is yes, did the defendant still have the right to refer a dispute to adjudication under s.108 of the Act notwithstanding the letter of agreement dated 11th February 2002?

Answer: Yes, but only to the extent indicated in paragraph 32 above.

(4) If the answers to questions (1), (2) and (3) are all yes,

a. Is the defendant's notice of adjudication dated 24th February 2004 an abuse of process?

Answer: No.

b. If so, what is the consequence?

Answer: Not applicable.

37. I therefore decline to make the declarations sought.

Mr. David Ashton (instructed by Courts & Co.) for the Claimant

Mr. Anthony Speaight Q.C. (instructed by Fenwick Elliott) for the Defendant