JUDGMENT : HIS HONOUR JUDGE GILLILAND QC : Salford District Registry. TCC. 15th October 2004.

1 This is an application by the Claimant ("Hortimax") to enforce by way of summary judgment 6 decision made in August 2004 by Mr. K.L.Scott as adjudicator in relation to disputes under 6 contracts entered into in 2003 between Hortimax and the Defendant ("Hedon") and whereunder Hortimax carried out work at Hedon's greenhouses at Burstick. Hedon is a commercial grower of cucumbers and other vegetables in its greenhouses. Hedon decided to extend its production of cucumbers. For this purpose it was necessary to install artificial lighting and screens in the greenhouses and to improve the watering system used to water and feed the plants. The provision of the lights would extend the growing season for cucumbers and enable them to be grown during the winter months when natural light was deficient. No doubt the lights could also be used at other seasons of the year when natural light might be insufficient for optimal growth. Hortimax was engaged to carry out this work. Disputes arose between the parties in relation to the work carried out by Hortimax and on 15 June 2004 Hortimax served on Hedon 6 notices to refer disputes under the 6 contracts to adjudication. The Notices were given on the basis that the 6 contracts were construction contracts within Part II of the Housing Grants Construction and Regeneration Act 1996 ("the Act") and that as the contracts did not provide for adjudication in accordance with s.108(5) of the Act, the Scheme for Construction Contracts (England and Wales) Regulations 1998 S1 1998 No649 (the Scheme) applied to the adjudications. It is not in dispute that if the contracts were construction contracts within the Act, the Scheme applied to the adjudications. The decisions of the adjudicator were that Hedon was liable to pay to Hortimax under the 6 contracts sums totalling (inclusive of VAT and interest up to the 10 August 2004) £455,423.44 together with further interest thereafter until judgment or payment.

2 Hedon resists the application to enforce the 6 awards on the grounds that Mr.Scott had no jurisdiction to deal with the disputes under the contracts because the work carried out by Hortimax was excluded by s.105(2) of the Act from the definition of construction operations within the meaning of Part II of the Act and that the contracts thus were not construction contracts with the consequence that s108 of the Act did not apply to confer any right of adjudication on either party. Hedon rely upon subsection (c) of s.105(2) of the Act which provides as follows :

"(2) The following operations are not construction operations within the meaning of this Part - ….

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is-

(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink".

3 Hedon's case is that the work carried out by Hortimax constituted the assembly or installation of plant and that the primary activity at Hedon's premises was the production of food. Hortimax disputes that the work amounted to the assembly or installation of plant or machinery or that the primary activity was the production of food within the meaning of the subsection. Miss Dumaresq on behalf of Hortimax has submitted that the subsection should be read as referring to the processing and industrial production of food and drink and that the commercial growing of cucumbers within a greenhouse, large or small, is not within the class of activities identified in the subsection. Even if the work did fall within the subsection, nevertheless Miss Dumaresq has also submitted that Hedon had conferred jurisdiction on Mr. Scott to decide the disputes. Reliance is placed by Miss Dumaresq in particular on the letter dated 1 July 2004 written by Hedon's solicitors to the adjudicator in which it stated :

"As regards your consideration of Hedon's jurisdictional objections, we are instructed that Hedon is prepared to vest in you the power to decide upon your own jurisdiction".

Hedon however denies that it did agree to submit to the jurisdiction of the adjudicator. I shall consider first whether the contracts are construction contracts within the Act.

Are the works carried out by Hortimax construction operations?

4 It has not been suggested by Mr.Burr who appeared for Hedon that the work carried out by Hortimax did not fall within the definition of "*construction operations*" within s.105(1) of the Act. It is only because the works are said to fall within the exclusionary provisions of s.105(2)(c)(ii) that Hedon submits that they are not construction operations within the Act. The works consisted of the installation of lighting and associated blackout screens (required to prevent or limit light pollution of the surrounding environment)

and the provision of irrigation feed units in Hedon's greenhouses as well as construction work on 2 reservoirs and a water collection system for watering and feeding the cucumbers being grown in the green houses. The works in my view fall squarely within s105(1)(c) and in the case of the reservoir s.105(1)(b) of the Act.

Were the contracts contracts for the installation of "plant"?

5 This depends on the meaning of "plant" in s.105(2)(c) of the Act. The Act does not contain any definition of the word "plant" or of the phrase "plant or machinery". That phrase has however a long history of use in tax statutes in relation to entitlement to capital allowances and there have been numerous decisions by the courts on what is or is not plant for the purposes of the relevant taxing statute. Mr Burr has submitted that it is clear from the authorities that "plant" has been used in its ordinary meaning in the taxing statutes and that it has not been given a special meaning for tax purposes. Accordingly in the absence of any definition in the Act parliament should be taken to have intended that the term should be understood as bearing its ordinary meaning in s.10(2) of the Act. Miss Dumaresq has pointed out that it is clear from the reported decisions in the tax cases that "plant" has been given a wide meaning and that it has been held to include such things as knives and lasts used in manufacturing shoes. See **Hinton (Inspector of Taxes) v Maden and Ireland Ltd.** [1959] 1 WLR 875, a decision of the House of Lords. Miss Dumaresq has submitted that such items could hot have been intended to be included within s.105(2) of the Act and that accordingly a narrow meaning should be given to "plant" in the Act. Effectively she submitted that "plant" should be construed as referring to process plant.

6 Mr. Burr is in my judgement correct in submitting that "plant" is used in its ordinary sense in the taxing statutes. In **Hinton (Inspector of Taxes) v Maden and Ireland** Lord Reid said [1959] 1 WLR 875, 889, 890:
"it is not dispute that plant is also used in the Act as an ordinary English word. It is not altogether an easy word to construe: it may have a more or a less extensive meaning according to its context. As a general statement of its meaning I would adopt the words of Lindley LJ in ***Yarmouth v France****:* ***"in its ordinary sense it includes whatever apparatus is used by a business man for carrying on his business – not his stock in trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live and dead, which he keeps for permanent employment in his business."*** *I would also refer to the judgment of Uthwatt J. in* ***J.Lyons & Co. Ltd. v Attorney General*** *[1944] Ch. 281, 286* ***"I do not think that the use throughout section 214 of the Act {Rating and Valuation Act, 1925] of the word "plant" as part of the phrases "plant and machinery" and "machinery and plant" has the effect of confining the meaning of the word to such plant as is used for mechanical operations or processes."*** *Next I find it unnecessary for the purposes of this decision to enter on the question whether any particular limitation should be placed on the general sense borne by the word "plant" by reason that the Act in which it appears is a rating Act. I propose to assume no such limitation should be placed. …. Confining my attention to trade plant includes whatever apparatus or instruments are used by a business man in carrying on his business. The term does not include stock in trade nor does it include the place where the business in carried on. Whether any particular article more properly falls within "plant" as understood, or in some other category, depends on all the circumstance of the case."*

Lord Reid then went on to say that knives and lasts were plant in the ordinary sense of the word. The case of Yarmouth v France was not itself a tax case but a case under the early legislation imposing liability on employers in respect of among other matters defects in "machinery or plant". It was held that a vicious horse which injured the claimant was plant within the statute.

7 It is in my judgment clear that some limitation must be placed on the wide ambit of "*plant*" in its ordinary sense when considering what meaning is to be given to the term in s.105(2) of the Act. Miss Dumareq is correct when she submits that such things as knives or lasts or for that matter the horse in **Yarmouth v France** itself cannot have been intended to be within s.105(2). However the limitation on the breadth of the term is to be found in my judgment in the fact that the definition of construction operations in s.105(1) of the Act is concerned not with free standing or loose chattels but either with works which involve the actual construction of buildings or structures or the installation of plant in or of fittings which form part of the land or certain clearing or decorative and other works. The exclusion of "*plant*" in s.105(2) must it seems to me be read in the light of the fact that s.105(2) is intended to exclude certain operations which would otherwise have been within the definition of construction operations in s.105(10. It is only such plant as

would fall within s.105(1) which is excuded and then only if it is at one of the specified sites. That "*plant*" may in its ordinary meaning include structures is clear from such cases as Commissioners of **Inland Revenue v Barclay Curle and Company** 1969 S.C.30 where it was held in the House of Lords that a dry dock at a ship repair yard was plant as distinct from merely being the place or setting in which the ship repairing business was carried on. The dock itself, it was held, played an essential part in the operations which took place in getting a ship into the dock, holding it securely, and then returning it to the river. The definition of plant in **Yarmouth v France** with the modification placed upon it by Uthwatt J (who excluded from the definition the place where the business was carried on) was held to be applicable.

8 In my judgment "*plant*" in s.105(2)(c) of the Act is to be understood as meaning apparatus which is used for carrying on the business. Plant however is to be distinguished from the place or setting in which the business is carried on and in the context of s.105(1) of the Act.

9 The definition of plant in Yarmouth v France as apparatus used for carrying on the business has, it seems to me, been applied in at least 2 reported cases unser s.105 of the Act. In **Homer Burgess Ltd v Chirex** [2000] BLR 124 it was held by Lord Macfadyen that the adjudicator in that case had been in error in concluding that pipework installed at a bulk storage and processing plant for pharmaceuticals was not plant within s.105(2) of the Act. The pipework in fact formed links between various pieces of equipment by which the chemicals and pharmaceuticals in process of manufacture were conveyed from one stage of the manufacturing process to another. Accordingly applying what Lord Reid had said in **Hinton (Inspector of Taxes) v Maden and Ireland** [1959] 1 WLR 875, 889, 890 Lord Macfadyen concluded that the pipework was "plant". *"I am of the opinion that the pipework was clearly part of the plant being assembled on the defender's site. Without such pipework, the individual pieces of machinery or equipment would be unable to operate. The pipework is in a real sense part of the apparatus which once it was installed the defenders were going to use in order to carry on their business of manufacturing pharmaceutical".* S105(2)(c)(ii) thus applied and the adjudicator did not have jurisdiction.

10 The second decision is that of Her Honour Judge Kirkham in **Comsite Projects Ltd v Andritz AG** (2004) 20 Const. LJ 24. In that case it was held that a contract for the installation of lighting, emergency lighting, small power distribution, power to roller doors, containment, fire and gas alarms and heating and ventilation and building management systems (the building services) in a building which housed a sludge dryer plant was not excluded from the definition of construction operations by s.105(2)(c)(i) as "*plant*" at a site where the primary activity was water or effluent treatment. After referring to the passage which I have quoted from the judgment of Lord Macfadyen in **Homer Burgess v Chirex**, Judge Kirkham said:

> *"Here, while the primary activity within the building is water treatment, the plant (to which the section applies) is a distinct element within the building. The fact that water treatment is the primary activity within the building does not have the consequence that all work within or related to the building housing the plant falls within the definition of plant. The building services are not necessary for the full and proper assembly of the dryer. The dryer was capable of fulfilling the purpose for which it was intended without the building services ….. In this case none of the services supplied under the building services [contract] was connected to the plant or used to enable the plant to be physically operated. Their purpose and function were simply related to the building, which housed not only the plant but also other areas of activity, including the workshop, compressor room, store room, control room, bagging and polymer rooms."*

In that case it had been argued that because it was not legally possible for the sludge plant to be operated without adequate lighting and fire and alarm systems, the works were to be regarded as being integral to the sludge plant. Judge Kirkham rejected that contention because a distinction was to be drawn between the building which housed the plant and the plant itself. The works carried out had not on the evidence been integrated into the plant *"and so do not fall within the definition of plant by virtue of such integration. It cannot be said that in any "real sense" the building services were part of the plant. The fact that Southern Water may not operate without some of the services does not im my judgement have the consequence that the building services are integral to the plant so as to fall within the definition of plant in s.105."* The decision in **Comsite** is an application of the distinction between the place or setting in which the business is carried on and the plant which is used to carry on the business.

11 Applying the ordinary meaning of plant as explained by Lindley LJ in Yarmouth v France, it seems to me that there can be no doubt but that the lighting system installed in Hedon's greenhouses was plant. It was part of the apparatus used or to be used by Hedon for carrying on its business of growing cucumbers. It was not a system for illuminating the premises in which the cucumbers were to be grown in order that people could work there during the hours of darkness. It was an integral part of the system used to enable the cucumbers to be grown at all seasons of the year. Plants require light to grow and the system which was installed was intended to increase the amount of light available to optimise production. Likewise the system installed for the irrigation and feeding of the cucumbers was an essential part of the apparatus used by Hedon to carry on its business of growing cucumbers in its greenhouses.

12 In addition to the actual provision of the lighting system the contract evidenced by the order dated 19 May 2003 also provided for the provision of overhead blackout screens to prevent the light escaping from the greenhouses and causing what is sometimes referred to as light pollution of the surrounding neighbourhood. There was a separate order dated 8 July 2003 for the installation of side screens. These also appear to have been in the nature of blackout screens although not of the same material as the overhead screens. (See File 2/4/B2p.123 under the description of cloth). The screens appear from the photographs in the bundle 2 to be of silvery colour on the inside and to be black on their external surface. Both the overhead and side screens were operated by electrical motors with wires and pulleys in the case of the overhead screens and aluminium rolling tubes in the case of the side screens. Miss Dumaresq has submitted that the screens are distinguishable from the lighting system itself and that just as the sludge drying plant in Comsite could have been operated without the building services in the building housing the plant, so here the lighting system could be operated and the cucumbers grown without needing to use the screens. The provision of screens was also a requirement of the planning permission for the installation of the lights. It would thus have been unlawful for Hedon to install the lights without also providing screens and Miss Dumaresq submitted that the potition was analogous also in this respect to the position of Comsite.

13 While it may be correct that the lights could physically be operated without the use of the screens and the screens had to be provided as a condition of the planning permission, nevertheless it was not, it seems to me, ever the intention that the lights should be used without the screens. The screens in the present case are intimately associated with the lighting system. Their function is to keep the light within the greenhouses and to prevent it from escaping. It has not been suggested that the screens have any independent function distinct from the lighting system. In my judgement the screens are to be regarded as part and parcel of the lighting system and are not an independent system in their own right. What was installed was a lighting system with screens. In the case of the overhead screens for blocks A to E they were comprised in the same contract and their electrics are linked into the same set of control panels as the lighting system. The side screens in blocks A to E were added later under a separate contract but their function is no different in principle from that of the overhead screens. The lights and screens in block K were the subject of a further contract dated 10 September which provided for both lighting and the installation of screens. Again the screens in block K are it seems to me part and parcel of the lighting system. I hold that the screens are plant within s.105(2)(c).

14 I have already stated that the watering and feeding system for the cucumbers is to be regarded as plant. The remaining contract is that dated 29 September 2003. It was a contract for the provision of a reservoir and water collection system. The work involved the cleaning out, reshaping and relining of the existing reservoir at Hedon's premises and the provision of pumps and pipework to carry and filter water from the reservoir to the storage tanks used for supplying watering system for the cucumbers. There was also provision for the supply and installation of a small reservoir and water collection system for block K. This involved cleaning out the existing reservoir and connecting pipework from the existing rainwater downpipes into the reservoir together with a pumping system taking water from the reservoir for use in the greenhouse. There was also provision for enlarging existing lagoons on site.

15 The cleaning out and enlargement of the reservoirs and the provision of pipework and other equipment to carry water to or from the reservoirs for use in watering the cucumbers is all part of the provision or improvement of a system essential to the carrying on of Hedon's business of growing cucumbers in its greenhouses. The pipe work storage tanks and pumping and filtering equipment is clearly plant as it is

apparatus used by Hedon in carrying on its business. The reservoirs are places where water is collected and stored in order that it may subsequently be used in Hedon's business and as such it is part and parcel of the water supply system for the cucumbers being grown in the greenhouses. The reservoirs cannot fairly it seems to me be described as places or settings in which Hedon's business is being carried on. They are in truth part of the means by which the business is carried on and they can in my judgement properly be regarded as part of the apparatus by which Hedon actually carried on its business of growing cucumbers. In my judgement they are "*plant*" just as much as the pipework which takes water to or from them for use in watering the plants in the greenhouses.

16 All 6 contracts in my judgment provided for the installation of plant within s.105(2)(c) of the Act.

Are Hedon's premises a site where the primary activity is … (ii) the production .. of … food and drink?

17 There can be no doubt that growing cucumbers is the primary activity which is carried out at Hedon's premises at Burstwick. Cucumbers undoubtedly fall within the term food as generally understood and Hedon produce cucumbers in their greenhouses. It would appear to follow that all 6 contracts are thus excluded under s.105(2)(c). Mr.Burr has submitted that the language of the subsection is clear and unambiguous and that this is indeed the only proper conclusion to be drawn from the undisputed facts. Against this Miss Dumaresq has made two submissions. The first is that the sub-section refers to both food and drink, not to food alone nor to drink alone and that as it has not been suggested that Hedon also produce drink at their premises, the sub-section has no application. Her second submission is that the production of food is different from the growing of food and that production of food is not the primary activity at Hedon's premises.

18 It is correct that the word *"or"* does not appear between food and drink and that the conjunctive "*and*" is used. The difficulty with Miss Dumaresq's submission however is that it is not easy to think of sites at which the primary activity is the production of both food and drink. It may be that a creamery at which both skimmed milk and butter or cheese are produced is an example of a site which produces both food and drink but this would seem to be one of the few examples which readily come to mind. A more serious difficulty in confining the phrase to sites at which both food and drink are produced is the apparent lack of any rational ground for excluding sites at which food but not drink and sites at which drink but not food are produced or processed but including within the exception only sites at which both food and drink are produced or processed. "*Food and drink*" in s.105(2)(c) is in my judgment a generic term applicable to either food or to drink or to both. It is not unusual for instance to speak of the food and drink industry but that is normally understood as a reference to an industry which produces or processes either food or drink. A bakery for example can properly it seems to me to be described or said to be part of the food and drink industry as can a brewery or a creamery or a milk treatment plant. It is not so much that "and" in the phrase "food and drink" is to be read distributively but rather that the phrase itself is a reference to either or both of its constituent elements. I do not consider that Hedon's premises are excluded from the operation of the sub-section merely because drink is not also produced there.

19 S.105(2)(c)(ii) refers to 4 different types of activity which are excluded if they are the primary activity on a site. These are production, transmission, processing or bulk storage of the specified items. In so far as it has been submitted that the exclusion relates only to the process engineering industry, it seems to me that is not a permissible construction of the sub-section. First process engineering is not mentioned at all. Secondly what is excluded by the sub-section is not an industry or industries as such but rather sites at which particular activities are carried on as the primary activity. The activities referred to extend well beyond the processing of the specified materials. Processing is only 1 of the 4 activities mentioned. Bulk storage as well as production or transmission of any of the specified materials is excluded as well as the actual processing of the materials. If the intention had been to exclude only sites at which the specified materials are processed, there would have been no need to refer also to the other categories of activity.

20 Although the actual activity which is carried on at Hedon's premises is the growing of cucumbers and Hedon is not engaged in any manufacturing or treatment process, Hedon's activities can also as a matter of ordinary English properly be said to consist of the production of cucumbers. A market gardener is engaged in the production of horticultural produce just as a farmer is engaged in the production of agricultural produce or a steelmaker is engaged in the production of steel or an oil refinery in the production of

petroleum products and chemicals. There is nothing in the term production as normally understood which implies that any kind of manufacturing or processing activity is being applied to what is produced. Miss Dumaresq submitted that the language of the sub-section was sufficiently obscure or ambiguous as to permit the admission of extrinsic evidence from Hansard of what had been said in the debates in parliament on the subsection but it seems to me that Mr. Burr is correct when he says that the language is clear. The words used in the subsection to describe the four activities are ordinary English words and there is nothing obscure or ambiguous in them. It is thus not permissible to refer to Hansard as an aid to construction in accordance with **Pepper v Hart** [1993] AC 593. The issue is what is meant by "*production*" of food and drink and there can it seems to me be no reason as a matter of construction to limit production to the production of manufactured or processed food and drink or to restrict production to production by means of the use of process plant. Accordingly, I hold that on the true construction of s.105.(2)(c) the growing of cucumbers is within the exception and that the adjudicator did not have jurisdiction under the Act to deal with the disputes under the 6 contracts.

Did Hedon submit to the adjudicator's decision or waive its objection to his jurisdiction?

21 The answer to this question depends in my judgement on the construction and effect of a small number of documents passing between the parties and the adjudicator in June and at the beginning of July and what the adjudicator did. No issues of fact arise in relation to the meaning and effect of these documents. Before considering the documents however, I should mention what the adjudicator did in relation to Hedon's objection that the 6 contracts were outside the Act by virtue of s.105(2)(c)(ii). His decision is set out in his letter to the parties dated 6 July 2004. Effectively, as appears from page 9 of his letter, what he did was to say that he thought that there was "*some merit*" in Hortimax's submissions that he did have jurisdiction but that the matter was complex and involved "subtle interpretation" of the Act: that he was not convinced that if the matter were "*fully rehearsed*" in court Horimax would succeed; and that he considered it would be inappropriate for him to decide whether or not the challenge to his jurisdiction was either good or bad. He then observed that the parties could have the matter dealt with by the court or that alternatively they could accept that he did have jurisdiction and that he proceed to make his decision. He then said: *"if that is not to be, then I have to say that in my considered view the question of my jurisdiction is debateable. It is not conclusive one way or the other, and as I say, it involves a somewhat complex area of law".* He then said that having considered the interests of the parties and the fact that the majority of the work had already been done by the parties to have the dispute determined by adjudication he considered it would be appropriate for him *"to continue with this adjudication and I shall do so."* He then observed that Hedon might still consider that he should not continue and that they might challenge his decision in any enforcement proceedings, commenting: *"That is their right."* He said that if that were to occur and it was found that he did not have jurisdiction it would follow that he had never had any jurisdiction and that he would not be entitled to his fees and expenses. He said he did not think Hortimax would take that stance but he did ask for written confirmation from Hortimax that *"in the event that a challenge is mounted by Hedon"*, Hortimax would reimburse him his fees and expenses.

22 The course which the adjudicator took in dealing with Hedon's jurisdictional challenge, was, it seems to me, the course which was recommended in Guidance for Adjudicators published by the Construction Umbrella Bodies Adjudication Task Group in July 2002. There is a reference to what HH Judge Thornton QC had said in **Christiani & Neilson Ltd. v The Lowry Development Company** (unreported 29 June 2000) where it was said that it was "*clearly prudent, indeed desirable"* for an adjudicator faced with a challenge to his jurisdiction which was not a frivolous one to reach his own non binding decision on the matter. Reference was then made to the need to be impartial. The Guidance then continues (so far as is material):

"1. If you are faced with a jurisdictional challenge, you should investigate, seek the views of the parties and reach your own conclusion on the merits of the challenge. If you fail to do so, it may seem that you are not impartial.

2. If you conclude that you do have jurisdiction, you should tell the parties immediately and continue with the adjudication.

3. If you conclude that you do not have jurisdiction, you should tell the parties immediately and give notice in writing of your intention to resign (paragraph 9(1) of the Scheme) …..

4. If you are unsure whether you have jurisdiction, nevertheless make a judgment as to whether to proceed or resign. If you proceed, consider obtaining confirmation from the referring party that it wishes you to continue..."

In the present case the adjudicator, it seems to me, neither concluded that he had jurisdiction under the Act nor that he did have jurisdiction. He was unsure whether he had jurisdiction or not but he made a judgment to proceed with the adjudication for the reasons he gave on page 9 of the letter dated 6 July.

23 Following receipt of the adjudicator's decision on Hedon's jurisdictional objection, Hortimax's solicitors by a letter to the adjudicator dated 8 July (which was of course copied to Hedon's solicitors) gave the confirmation requested in relation to the fees and expenses. They also formally confirmed, although the adjudicator had not requested it that Hortimax submitted to his decision to continue with the adjudication. Hedon's solicitors also write to the adjudicator on 8 July stating that Hedon's options included waiting to raise the jurisdictional issues again in any enforcement proceedings and that further participation in any meeting was not to be regarded as a waiver of the jurisdictional objections. In a letter of the same date to Hortimax's solicitors Hedon's solicitors also made clear that Hedon reserved its position in relation to the jurisdiction of the adjudicator. It has not been suggested that If Hedon was still entitled to raise the jurisdictional point after receipt of the adjudicator's letter of 6 July that anything subsequently occurred which prevents Hedon from raising the point in the present enforcement proceedings.

24 The adjudication was commenced by 6 notices of adjudication each dated 15 June. Each contained the claim that the relevant contract was a construction contract within the Act and that the Scheme applied. The notices stated that application was being made that day for the appointment of an adjudicator. In a letter dated 17 June to Hortimax's solicitors, Hedon's solicitors wrote saying that they were instructed to accept the notices of adjudication but that this was without prejudice to all jurisdictional objections Hedon might raise in due course. The letter then continued: *"So that you are clear, Hedon Salads does not consider that your client is entitled to refer any of these matters to adjudication. Our client's objection are to be treated as being raised at all stages in each adjudication (including all further correspondence) whether expressly stated or not."* Although no grounds for objection to jurisdiction were then stated, it is clear that Hedon was not at this stage agreeing to submit to the jurisdiction of the adjudicator or to be bound by any decision he might make.

25 The adjudicator was appointed on 17 June. He notified the parties of his appointment on the same day stating that he looked forward to receiving the Referral Notices. He said that he would allow Hedon 7 days from service of the Referral Notices. He said that he would allow Hedon 7 days from service of the Referral Notices in which to respond and Hortimax a further 3 days thereafter for any reply. The referral Notices were served on 18 June. On 25 June Hedon served on Hortimax and on the adjudicator its response dated 25 June. This was a single response dealing with all 6 adjudications and it raised only objections to the jurisdiction of the adjudicator. It did not deal with the merits of the dispute. Although more than one ground of objection was raised, the only one which is of relevance to the present application to enforce the 6 decisions given in August is the objection based on s.105(2)(c)(ii) of the Act. Amongst other matters however in this response Hedon set out the terms of the Guidance of the Adjudication Task Group (to which I have already referred) to adjudicators when faced with an objection to their jurisdiction. On 24 June Hedon's solicitors had also written to the adjudicator objecting to his jurisdiction and raising a number of "concerns" and suggesting that an oral hearing was desirable in relation to matters of disputed evidence. By a letter dated 25 June Hortimax's solicitors raised a jurisdictional point but this related to possible cross claims which Hedon was seeking to raise.

26 By a letter dated 28 June the adjudicator acknowledged receipt of Hedon's jurisdictional response dated 25 June and sought clarification because he did not regard it as the response which he had directed should be served 7 days from service of the Referral Notices. On 28 June Hortimax served on Hedon and on the adjudicator its reply to Hedon's jurisdictional response. Hedon then served its substantive responses on Hortimax and on the adjudicator on 29 June. Neither Hedon's jurisdictional response nor its substantive response contained an express reservation of Hedon's rights to challenge the adjudicator's decision if it went against them.

27 By a letter from the adjudicator dated 29 June the adjudicator reiterated his view that Hedon's jurisdictional response was not the response he had directed and he extended Hedon's time for service of

their substantive response until close of business that day. In the event that was complied with as I have indicated. The adjudicator then referred to the fact that both parties had raised jurisdictional ponts and that both parties reserved their positions. He then continued :
"As both Parties' representatives will be aware, unless the Parties vest in me the power to decide upon my own jurisdiction, I am unable to do so. I do consider however that I may enquire into the jurisdictional questions raised by the Parties, and dependent upon the outcome of those enquiries either proceed with the adjudication or resign".

The adjudicator then went on to say that he thought a meeting would be desirable and asked for dates, *"notwithstanding that the jurisdictional questions have to be resolved, I therefore suggest that subject to what my deliberations are on the jurisdictional questions, a meeting should be arranged, albeit on a provisional basis."* That meeting was a meeting to consider the merits of the dispute. He also said in the last paragraph of this letter that he would like to visit the site on 5 July in relation to the jurisdictional issues and he asked Hedon's solicitors to make the necessary arrangements.

28 Hortimax's solicitors responded to the adjudicator's letter of 29 June on the same day requiring him to decide by close of business on 30 June the jurisdictional issue whether the contracts were within the Act or not and saying that they would serve Hortimax's reply to Hedon's substantive response by 5 July if he found that he had jurisdiction. Hortimax's solicitors also referred to the adjudicator's proposal that there should be a meeting on a provisional basis and indicated that it was disproportionate to ask all Hortimax's witnesses to attend and asked for his further comments. The solicitors also noted that the adjudicator would be attending on site on 5 July and suggested that Mr. Lambert should attend.

29 Hedon's solicitors replied to the adjudicator's letter of 29 June by letter dated 1 July. After referring to the fact that Hedon's jurisdictional response did not deal with the substantive claims and that Hedon would reply "*shortly*" to Hortimax's response to Hedon's jurisdictional objections, the letter then continued : *"As regards your consideration of Hedon's jurisdictional objections we are instructed that Hedon is prepared to vest in you the power to decide upon your own jurisdiction as mentioned in the ninth paragraph on the second page of your letter."*

The letter also referred to Hortimax's jurisdictional point that the adjudicator had no jurisdiction to consider Hedon's cross-claims. It was then stated that these issues had been dealt with at the end of Hedon's substantive responses and that they were raised as defences and not as counterclaims or cross-claims. The letter concluded by saying; *"We look forward to your decision on Hedon's jurisdictional objections and to receipt of your agenda for the meeting you have provisionally proposed."* The meeting referred to was the meeting to consider the substantive issues subject to his decision on the jurisdictional questions. There was no protest in that letter that Hedon would only participate further under protest or that it was reserving the right to challenge the adjudicator's decision on jurisdiction if it were unfavourable to Hedon.

30 Miss Dumaresq has submitted that the passage in the letter dated 1 July from Hedon's solicitors which I have quoted is a clear submission or agreement by Hedon that the adjudicator should have jurisdiction to decide the question whether he had jurisdiction to deal with the disputes under the 6 contracts which had been referred to him. Mr. Burr on the other hand has submitted that there was no concluded agreement to give the adjudicator jurisdiction. He submitted tat there was never any meeting of minds and that as the adjudicator said in his letter dated 6 July *"unless the Parties vest in me the power to decide upon my own jurisdiction, I am unable to do so".* The parties, Mr. Burr submitted had not agreed to confer jurisdiction on the adjudicator to decide his own jurisdiction because Hortimax also maintained a jurisdictional objection to any consideration of Hedon's cross claims. Mr. Burr also submitted that Hedon's letter dated 1 July could not be rgarded as an acceptance of an offer as no offer had been put forward by Hortimax that the adjudicator should decide his own jurisdiction. The letter dated 1 July was, he submitted inviting a further response from Hortimax which never came. Mr. Bur also submitted that the passage in the letter was only a reference to Hedon being content that the adjudicator should inquire into his own jurisdiction and that Hedon was not thereby agreeing to be bound by the adjudicator's decision.

31 In my judgment the letter dated 1 July from Hedon's solicitors to the adjudicator was a plain submission and agreement that the adjudicator should have power to determine the jurisdictional issues. The words "*Hedon is prepared to vest in you the power to decide upon your own jurisdiction as mentioned in the ninth paragraph on the second page of your letter"* are perfectly clear and explicitly consent to the adjudicator having

the power to decide upon his own jurisdiction. That this is the correct interpretation is confirmed when one looks at the ninth paragraph of the adjudicator's letter because it is there that the adjudicator expressly says that he has no power to decide upon his own jurisdiction unless the parties "*vest*" that power in him. Hedon in my judgment vested that power in him in clear terms. The adjudicator appears to have had some doubt as to what power Hedon was conferring on him and also to have thought that because Hortimax had not expressly vested the same power in him, he did not have the consent of both parties to decide his own jurisdiction. In taking that view he was in my judgment clearly in error. The letter is as I have stated clear and unambiguous. The suggestion that Hortimax had not conferred power on him to decide his own jurisdiction is also incorrect. Hortimax had referred the disputes to adjudication and had never suggested that they were only participating in the adjudication under protest. Hortimax's actions in initiating the adjudication and proceeding to deal with the jurisdictional objections raised by Hedon and in requiring him to decide the jurisdictional issue by 4pm on 30 June can only be regarded as a submission by Hortimax to his jurisdiction. The only matter on which Hortimax reserved their rights was in relation to any cross-claims or counterclaims which Hedon might raise. In the event Hedon in its substantive response had expressly disclaimed any intention to raise anycross-claims or counterclaims and it has not been suggested that it did so.

32 Mr. Burr submitted that the reference in the letter dated 1 July to Hedon being "*prepared*" to vest power in the adjudicator was not the same as actually vesting such power in him. That however is in my view an impossible construction of the letter. It has not been suggested that any further document was contemplated and the letter itself stated that Hedon looked forward to the adjudicator's decision. The submission that there was no consensus between the parties or meeting of minds that the adjudicator should have power to decide the jurisdictional issue is also in my judgment unfounded. The letter of 1 July was copied to Hortimax and no response was needed from them. It has not been suggested by Hedon that it did not think Hortimax had conferred the like power on the adjudicator. As I have already stated Hortimax had initiated the adjudication and was clearly asking the adjudicator to decide the jurisdictional point.

33 I am satisfied and hold that Hedon did by the letter dated 1 July expressly confer power on the adjudicator to decide upon his own jurisdiction. Any previous reservation of its right to challenge the power of the adjudicator to decide upon his jurisdiction was thereby waived.

34 The only matter which has caused me concern is the course which the adjudicator in fact took. It is perfectly clear in my judgment that the adjudicator did not in fact decide whether the contracts were within the Act or outside the Act under s.105(2)(c). He appears to have inclined to the view that the contracts were within the Act and that Hortimax's submissions were correct. One can well understand that he did not find the question an easy one to determine but when both parties have made detailed submissions to him on the matter, it is not in my view desirable that the adjudicator should not reach a conclusion on the jurisdictional question which has been put to him for decision. Mr. Burr in argument submitted and I agree that what the adjudicator has none in the present case is to follow the advice given in paragraphs 2-4 of the Guidance for Adjudicators published by the Construction Umbrella Bodies Adjudication Task Force. In particular he followed the advice in paragraph 4 that if he was unsure whether he had jurisdiction, he should nevertheless make a judgment as to whether to proceed or to resign. That advice had been quoted to him in Hedon's jurisdictional response. The question which arises is whether the adjudicator's decision to proceed with the adjudication although he was unsure whether he had jurisdiction is a decision which is binding upon Hedon by virtue of its submission to his jurisdiction to decide upon his own jurisdiction. The matter is complicated by the fact that the adjudicator seems to have thought that he had not been given jurisdiction by the parties to decide his own jurisdiction and that his decision nevertheless to proceed with the adjudication was something which could be challenged by either or the parties. He appears to have taken the view that his decision to proceed was what is sometimes referred to as a non binding decision and that it was open to Hedon to mount a challenge to it, It was for this reason that he asked Hortimax to confirm that they would be responsible for his fees and expenses in the event that a court should find that he did not have jurisdiction to decide the case.

35 The adjudicator did proceed with the adjudication having received confirmation from Hortimax that it would be responsible for his fees if a challenge was mounted by Hedon and it was held that he did not have jurisdiction to decide the case. Miss Dumaresq has submitted that what the adjudicator was being asked to do when determining whether he had jurisdiction or not was whether he should proceed with the adjudication and that the adjudicator did decide to proceed. Accordingly, she submitted the 6 decisions are binding on Hedon because it agreed that the adjudicator should have the power to decide whether he should proceed or not. The precise basis upon which the adjudicator reached his decision to proceed is irrelevant because if he has jurisdiction he is the master of both the law and the facts. Mr. Burr on the other hand identified the jurisdictional issue as the power to decide upon the questions which were put before him for decision and that he failed to do so. He submitted that the adjudicator only proceeded upon the twin bases that Hortimax wished him to continue and would accept responsibility for payment of his fees and expenses should Hedon mount a successful challenge.

36 Support for Miss Dumaresq's approach can be found in the ninth paragraph of page 2 of the adjudicator's letter dated 29 June in that he does say that he considered he could enquire into the jurisdictional questions and decide whether to proceed with the adjudication or resign. He then decided that it was appropriate for him to continue with the adjudication having considered the interests of both parties. Her approach also receives support from the fact that Hedon's own submissions drew the adjudicator's attention to what he should do if he were unsure whether he had jurisdiction or not, namely decide whether to proceed or not. On the other hand it is clear that the adjudicator did not consider that his decision to proceed was binding on Hedon in the sense that Hedon had submitted to his decision.

37 In my judgment where a party agrees to confer jurisdiction on an adjudicator to decide upon his own jurisdiction, prima facie what he is doing is agreeing to be bound by and to abide by his decision on the question whether he can proceed with the adjudication. If the adjudicator decides that he has jurisdiction, the adjudication will proceed and his decision on the substantive dispute will be binding. If he decides that he has no jurisdiction, that too will be binding and the adjudication will not proceed further. In the present case although the adjudicator failed to make any decision on the question whether s.105(2)(c)(ii) applied, he was nevertheless invited by Hedon in its submissions to make a judgment as to whether to proceed or to resign if he were unsure whether he had jurisdiction and this is what the adjudicator did. In these circumstances it seems to me that it is not open to Hedon to complain of lack of jurisdiction if the adjudicator being unsure what the legal position is accepts that invitation and decides to proceed with the adjudication. It is thus not open to Hedon having received that decision once again to seek to reserve its position on the issue of jurisdiction.

38 The result is that Hedon is bound by the subsequent decisions of the adjudicator on the merits of the 6 disputes. The present case is in my judgment a clear case. Hedon expressly agreed to submit the issue of the jurisdiction to the adjudicator and the adjudicator accepted Hedon's invitation if he were unsure on the point to proceed or withdraw from the adjudication as the adjudicator might decide. Hedon does not in my judgment have any realistic prospect of successfully defending the action to enforce the 6 decision and I make an order for summary judgment in respect of all 6 decisions with interest up to the date of judgment. Hortimax is also entitled to its costs to be assessed if not agreed. If the parties are not able to agree the amount of costs I will summarily assess them either when this judgment is formally handed down or on a date to be arranged with my clerk. I propose formally to hand down this judgment on Friday 15th October 2004 at 2pm.

(Handed down on 15 October 2004. I direct that no recording be made of this judgment and that this written judgment shall be the authentic record.)