

**JUDGMENT : HIS HONOUR JUDGE HAVERY Q.C** TCC : 16th January 2004.

1. This is an application on the part of the claimant to enforce the award of an adjudicator appointed under the provisions of the Housing Grants, Construction and Regeneration Act 1996. The application was made under part 8 of the Civil Procedure Rules on the basis that there was unlikely to be a dispute of fact. There is, indeed, no dispute of primary fact, though as will appear there is a dispute as to an inference. By the application, the claimant sought permission to enter judgment in respect of the award and permission to enforce the judgment. The application has proceeded on the basis that it is an application for summary judgment under part 24.
2. By his award dated 18<sup>th</sup> November 2003 the adjudicator, Mr. John Smalley, directed the defendant to pay to the claimant forthwith the sum of £120,147.69 plus interest in the sum of £9,357.66, together with further interest at the rate of £29.62 a day for each day that **IDE** (sic) failed to make payment in accordance with the decision. He also ordered the defendant to pay his fee of £7,668.15 within seven days of the date of the decision. VAT was to be added to all those sums as appropriate. The total amount claimed before me was £161,229.61, including VAT. There is no dispute as to the correctness of the calculation of that figure on the basis of the award.
3. The defence is that the adjudicator had no jurisdiction to make the award. By its written response, dated 15<sup>th</sup> October 2003, to the claimant's claim before the adjudicator, the defendant submitted on a number of grounds that the adjudicator had no jurisdiction to act in this matter. It stated in the first paragraph of its response that it specifically reserved its right to raise the issue of jurisdiction during both the adjudication and in any subsequent court or arbitral proceedings. It went on:  
*R G Cambridge Limited take part in this adjudication in response to this adjudication is expressly subject to this reservation (sic).*  
  
The adjudicator was asked to decide that he had no jurisdiction. He considered the points raised and decided that he did have jurisdiction. He gave his reasons in writing for that decision on 30<sup>th</sup> October. The following day, the defendant, having good reason to believe that Mr. Smalley had not been duly appointed, withdrew from the adjudication.
4. Mr. Dennys relied on two grounds in support of his contention that the adjudicator lacked jurisdiction to make his award. The first was that Mr. Smalley had not been duly appointed.
5. The contract between the parties provided for adjudication as follows:  
*Any dispute arising for the adjudication's shall be in accordance with the provision of section 108 of the housing grants, construction and regeneration act 1996 and the scheme for construction contracts made thereunder and shall be referred to the following named person:*  
*Stephen Pratt LLB (Hons) MSc FRICS FCIQB ACI Arb: Foundation Court 2 Victoria Square, Victoria Street, St Albans Hertfordshire AL1 3TS.*  
*In the event that they are unable/unwilling to act, the president or a vice president of the Royal Institute of chartered Arbitrators shall nominate an Adjudicator.*  
  
The syntactical and other infelicities are in the original.
6. The facts as they emerged before me are that Mr. Stephen Pratt was telephoned on 12<sup>th</sup> September 2003 by Christine Holland, who worked for the practice of Stuart C. Holland, Chartered Quantity Surveyor, acting for the claimant, to enquire as to his availability to act in an adjudication involving R G Carter Ltd. He replied that he would not be able to accept the appointment as he had work commitments that would take him overseas. In an e-mail dated 15<sup>th</sup> January 2004 to Sarah Elliott, a solicitor acting for the claimant, Mr. Pratt explained that he had had a full diary to the end of September 2003 and had planned business and holiday commitments that took him overseas in October 2003. He went on to state that he had been unable to take the appointment for those reasons. It appears from an e-mail dated 23<sup>rd</sup> October 2003 that Mr. Pratt would have been back at work on 2<sup>nd</sup> November and would have been able to act as adjudicator after that date.
7. The notice of adjudication was dated, and received by the defendant on, 29<sup>th</sup> September 2003. The accompanying letter from Stuart C. Holland stated "The Chartered Institute of Arbitrators will now be requested to nominate an adjudicator". It was common ground that that was the institute mentioned

in the adjudication clause of the contract, but there misnamed. It was only in the notice of adjudication, at paragraph 10, that it was stated that Mr. Stephen Pratt had declined to act as adjudicator. Mr. Jason Hinch, a senior quantity surveyor employed by the defendant, did not want an adjudicator selected at random, and wrote to Mr. Holland on 2<sup>nd</sup> October 2003 suggesting Mr. G. Brewer and Mr. C. Dancaster as adjudicators. He offered further discussion on the point. That offer was not taken up. On 3<sup>rd</sup> October Mr. Holland wrote back saying "As stated in our letter of 29<sup>th</sup> September, an application has already been made to the Chartered Institute of Arbitrators". On the same day the Chartered Institute of Arbitrators nominated Mr. Smalley. Mr. Smalley wrote to the parties on 6<sup>th</sup> October 2003 in confirmation of his appointment.

8. The statutory provisions as to the appointment of adjudicators are contained in the schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 (S.I.1998 No. 649). The relevant provisions are as follows:

*2(1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator –*

- (a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or*
- (b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator*

.....

*2(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.*

.....

*3. The request referred to in paragraphs 2, 5 and 6 shall be accompanied by a copy of the notice of adjudication.*

.....

*6(1) Where an adjudicator who is named in the contract indicates to the parties that he is unable or unwilling to act, or where he fails to respond in accordance with paragraph 2(2), the referring party may –*

.....

- (b) request the nominating body (if any) referred to in the contract to select a person to act as adjudicator.*

9. Mr. Lee submitted that those provisions had been complied with. Mr. Pratt indicated on 12<sup>th</sup> September that he was unwilling or unable to act. Thus the condition contained in paragraph 2(b) was fulfilled. On a literal reading of the provisions, that submission cannot be gainsaid. But it seems to me not to be in accordance with the general intendment of the provisions. What is intended, in my judgment, is that the notice of adjudication comes first. Then the referring party is to request the person specified in the contract to act as adjudicator, unless he has already indicated to the parties that he is unwilling or unable to act. The request must doubtless be in writing since it must be accompanied by a copy of the notice of adjudication. The person specified must indicate within two days whether or not he is willing to act. If he indicates that he is not, then provided that that indication is made to all parties the referring party may proceed under paragraph 6(1)(b) to request the nominating body to select a person to act as adjudicator. What happened here is that no request at all was made under paragraph 2(a). The procedure was bypassed. And it is in my judgment implicit in paragraph 2(b), as it is explicit in paragraph 6, that the unwillingness or inability of the specified person to act should be indicated to all parties.

10. If Mr. Lee's construction of the scheme were correct, it would be open to an intending claimant who did not want the specified person to act as the adjudicator to ascertain, without the knowledge of the other party, when the specified person would not be available, and to serve the notice of adjudication at that time. By the time the notice of adjudication was served, the adjudicator might have become free to act. Yet he would not be appointed. The other party would suffer prejudice in that he would be deprived of having the adjudication carried out by the person of his (and the other party's) first choice. The same could apply in the absence of any ulterior motive on the part of the claimant.

11. I conclude that the provisions of the scheme relating to the appointment of the adjudicator were not complied with. Mr. Denny submitted, and I accept, that non-compliance with those provisions

deprives the adjudicator of jurisdiction unless the defendant has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that it would be bound by that ruling (see the words of Simon Brown L.J., as he then was, in *Thomas-Fredric (Construction) Limited v. Keith Wilson* [2003] EWCA Civ 1494, 21<sup>st</sup> October 2003). However, Mr. Lee submitted that non-compliance with the provisions of the scheme did not affect the validity of the appointment because, on the evidence, Mr. Pratt would in any event have declined to act as adjudicator and a nomination through the Chartered Institute of Arbitrators would have been made. Thus the defendant had suffered no prejudice. I summarize below the further evidence relevant to the questions of submission to the jurisdiction of Mr. Smalley and of prejudice to the defendant.

12. On 7<sup>th</sup> October 2003 the defendant wrote to Mr. Smalley in response to his letter of 6<sup>th</sup> October mentioned in paragraph 7 above. The letter stated that the defendant had not seen details of the claimant's application to the Chartered Institute of Arbitrators or the basis under which the claimant claimed that Mr. Smalley should have jurisdiction. It stated that Mr. Holland's letter of 29<sup>th</sup> September came as a bolt out of the blue as they had no knowledge who he was or what authority he had. The last paragraph of the letter read as follows:

*Until such time as we receive the details which particularise IDE Contracting's position on the contract between us and your jurisdiction to deal with a purported dispute then you will appreciate that we reserve our position in respect of our participation in this adjudication. For the avoidance of doubt this communication is not to be taken that we accept or concur with your appointment.*

By a further letter on 15<sup>th</sup> October the defendant added the objection that it understood that Mr. Smalley had been employed by a sub-contractor which had been in dispute with the defendant. On the same day the defendant sent to the adjudicator its response to the claim. In its covering letter, the defendant stated that it reiterated its position regarding Mr. Smalley's jurisdiction in this matter and that the submission was issued expressly subject to that reservation. There was further correspondence on this point, but before me Mr. Dennys disclaimed any suggestion of real or apparent bias on the part of Mr. Smalley.

13. In paragraph 9 of its response, the defendant stated:

*The conditions require any dispute to be referred to Mr. S. Pratt, we have not received an application to Mr. Pratt nor any confirmation that Mr. Pratt has been contacted and that he was unable/unwilling to act, with this the referring party has not followed the procedures correctly and the adjudicator has not been properly nominated.....we reserve our position on this matter.*

*After further correspondence, Mr. Smalley wrote to the parties on 22<sup>nd</sup> October suggesting that the referring party produce evidence that Mr. Pratt had stated that he was unavailable. On the same day Mr. Holland sent an e-mail to Mr. Pratt which included the following:*

*On or around 26<sup>th</sup> September 2003 my secretary made contact with you as you are named as adjudicator in the sub contract between R G Carter and my client.*

*You were informed that we were about to give Notice of Adjudication and therefore needed to apply for the appointment of an Adjudicator.*

*At that time you declined the appointment as you were involved with (I think) an arbitration in Hong Kong.*

*I am now being put under extreme pressure by R G Carter to prove that you declined the appointment.*

*Could I please ask you to confirm to me, as a matter of urgency, that you were unavailable at that time.*

*Mr. Holland's secretary was Christine Holland. Mr. Pratt replied the following day by an e-mail which included the following:*

*I genuinely do not recall your secretary telephoning me on or about 26<sup>th</sup> September 2003. From my records I was in conferences with counsel ....in London on both Thursday 25<sup>th</sup> and Friday 26<sup>th</sup> September 2003 and those meetings lasted all day and extended into each evening.*

*However, if I had been contacted on or about that date I would have declined. At the end of September 2003 I was already booked on a number of overseas appointments in October 2003. Given those absences from the United Kingdom I could not have properly served the parties in any adjudication.*

*I am going on a family holiday to California in the morning (which has been booked for some time) and I shall not be back at work until 2<sup>nd</sup> November 2003.*

*For your information I would be available to act as adjudicator after 2<sup>nd</sup> November 2003 and my only subsisting commitment overseas in November 2003 at present is.....for a period of one week at dates that have yet to be fixed.*

14. On 30<sup>th</sup> October the defendant wrote to Mr. Smalley in the following terms:  
*We have had an opportunity to review the email from Mr. S Pratt presented to us at the end of our meeting on 28 October 2003.*  
*The contents are most disconcerting as Mr. Pratt does not recall being contacted and indeed appears not to have been able to be contacted to advise whether he would be or not be available to act as adjudicator.*  
*The Scheme for Construction Contracts Part 1 Adjudication requires the request to the person should be accompanied by a copy of the notice of adjudication, it is evident that in this case this has not been so.*  
*It is also our experience in such matters that the adjudicator would advise/confirm this by way of correspondence and ensure that both parties were informed.*  
*It is also noted that the application to the Chartered Institute of Arbitrators was dated 26 October 2003, the same date as the notice of adjudication, thus there is no intervening time as would be expected where a person is requested and has two days to respond.*  
*We can only conclude that you have not been correctly appointed and you must resign.*  
*The penultimate paragraph of that letter is wrong. The application to the Chartered Institute of Arbitrators was made between 29<sup>th</sup> September and 3<sup>rd</sup> October.*
15. Mr. Smalley wrote to the parties the same day with reference to the defendant's letter. With regard to the last paragraph of the letter, he said this:  
*Three issues arise under this paragraph. The first is that as matters presently stand, there is no clear evidence that Mr. Pratt was not approached. The second is Mr. Pratt's statement that he would in any event have been unable to accept the appointment. The third is the appropriateness of me resigning at a time when the adjudication is so far advanced. In the context of the letter, I make the point that R G Carter had it within its gift to have ascertained Mr. Pratt's position when it received the notice of adjudication.*  
*With due consideration to all the circumstances, I am of the opinion that I should continue with the adjudication. The persuasive factors are:*  
*(i) the lack of prejudice to the responding party by any failure to request Mr. Pratt to act (since he was not in any event able to do so); and*  
*(ii) the fact that my resignation would result in disproportionate loss to the referring party.*
16. The defendant replied on 31<sup>st</sup> October. The letter was expressed to be without prejudice to the defendant's view that Mr. Smalley had not been appointed and did not have jurisdiction. The letter contained the following passage:  
*IDE did not request the person specified in the contract (Mr. Stephen Pratt) to act as adjudicator and can produce no evidence to support their contention that they did. Mr. Pratt is quite clear in his "e" mail to Mr. Holland of 24 October that he had not been requested to act as adjudicator in this matter as on the day IDE suggests contact was made he was in conference in London.*  
*The letter concluded:*  
*We therefore do not propose to continue even on a without prejudice basis to our position.*  
*If IDE have a dispute under the contract that they require to be referred to adjudication then let them do so, as they should have in the first instance, in accordance with the agreement in place. Mr. Pratt is as we all know available from 2 November onwards.*
17. On the same date, 31<sup>st</sup> October, Mr. Holland wrote to Mr. Smalley a letter describing the efforts that his firm had made to find Mr. Pratt, since he was no longer at the address mentioned in the contract. The letter contained the following paragraph:  
*Moving on to Mr. Pratt's comment that he did not recall being contacted, my secretary has confirmed that when she did finally locate Mr. Pratt he said something to the effect of how lucky we were to catch him – he was in London in a series of meetings.*  
*In his written decision of 18<sup>th</sup> November, Mr. Smalley dealt with the points raised as to his jurisdiction. He dealt with the point that he had not been properly nominated as adjudicator by*

reference to the points in the first paragraph that I have quoted in paragraph 15 above from his letter of 30<sup>th</sup> October. He went on to say, in paragraph 26 of his decision:

By letter dated 31<sup>st</sup> October 2003, **IDE** submitted a comprehensive account of the efforts taken to contact Mr. Pratt, and the conversation that took place between Mr. Holland's secretary and Mr. Pratt. I found the account persuasive...

18. For the purpose of these proceedings, Christine Holland made a witness statement dated 16<sup>th</sup> December 2003 in which she erroneously said that it was "around the 26 September 2003" that she was asked to make contact with Mr. Pratt. It was not until 15<sup>th</sup> January 2004 that, following research into Stuart Holland's telephone records and confirmation from Mr. Pratt, it was realized that the telephone call to Mr. Pratt had taken place not on 26<sup>th</sup> September but on 12<sup>th</sup> September. Christine Holland made a second witness statement on 15<sup>th</sup> January correcting her former statement.
19. I accept Mr. Smalley's point that the defendant could itself have contacted Mr. Pratt after service of the notice of adjudication. Nevertheless, the foregoing account of misapprehension and confusion surely confirms the importance of complying with what I have held to be the correct procedure for the appointment of an adjudicator. The defendant's understandable belief that Mr. Pratt had not been approached led to its taking no further part in the proceedings after 31<sup>st</sup> October, when it might otherwise not have taken that course.
20. Mr. Dennys submitted that the defendant had suffered prejudice by the claimant's failure to comply with the procedure laid down by the scheme. He submitted that what Mr. Pratt would have done if properly approached is unclear, and might have depended on whether the parties would have been prepared to accommodate his commitments. The state of the evidence was not such as to show convincingly that he would have refused or been unable to act. I accept that notwithstanding what he said in his e-mails of 23<sup>rd</sup> October 2003 and 15<sup>th</sup> January 2004, it is possible that Mr. Pratt might have changed his mind and made himself available, but in my judgment it is unlikely.
21. Mr. Dennys submitted that the defendant had also suffered prejudice in having Mr. Smalley as adjudicator when the defendant thought he might be biased against it. In view of Mr. Dennys's disclaimer of any actual or apparent bias on the part of Mr. Smalley, I cannot accept that submission. Thus I am not satisfied that the defendant has suffered prejudice. But it is in my judgment clearly unnecessary for the defendant to show actual prejudice.
22. It is abundantly clear that the defendant did not submit to the jurisdiction of Mr. Smalley in the sense of agreeing to be bound by his ruling on the issue of his jurisdiction. I conclude that the adjudicator's award cannot stand.
23. The second ground upon which Mr. Dennys relied was that two disputes were put before the adjudicator, whereas the effect of paragraph 8(1) of the scheme was that an adjudicator might not, without the consent of all parties, adjudicate at the same time on more than one dispute. It is unnecessary for me to decide that point.
24. There being no reason why the case should be disposed of at a trial, I dismiss the claim.