**JUDGMENT : Mr Recorder Dermod O'Brien QC** Sitting as a Deputy Judge of the TCC 15th July 2004.

1. The Claimant in this case Rossco Civil Engineering Ltd. seeks an order for the payment of £381,217.00 plus VAT plus interest of £5,890.58 plus further interest at the rate of £125.33 per day from 25th March 2003 to the date of this judgment. The Claimant's cause of action is based on an alleged contract and arises, if at all, following an adjudication by virtue of paragraph 23(2) of The Scheme for Construction Contracts (England and Wales) Regulations 1998 (hereafter referred to as `the Scheme').

2. Welsh Water Limited is a company registered in Wales under its Welsh name Dwr Cymru Cyfyngedig. Although the names Welsh Water and Dwr Cymru Cyf were used interchangeably throughout trial, I shall refer to them as WW. It appears that in respect of the matters the subject of this action WW acted through two other organisations: Hyder Utilities and Chandler KBS. The exact scope of the authority of these two bodies was not examined at trial but it was clear that they provided contract, project management and cost control services for WW. In all respects relevant to this action they were WW's agents.

**History**

3. From sometime in the early 1990s Francis Oliver Butler and Peter James Wall had carried on business in partnership. The business consisted of two parts, a plant hire enterprise and a civil engineering contracting enterprise. The major part of the work of the contracting business was the laying of water pipes and water service apparatus at various sites around South Wales for WW.

4. The partnership was called Rossco Civil Engineering and, where necessary to distinguish it, I shall call it "the partnership".

5. Mr Butler was the partner principally concerned with the contracting business. He gave evidence. His proof of evidence was obviously prepared by reference to the documents most of which appear in the Trial Bundle but it was clear that his knowledge and recollection was wholly insufficient to support even the contents of his proof let alone to give useful evidence outside it. He spent his time supervising gangs of workmen on site and he did not go near his office if he could help it. He left almost all matters relevant to this action to his personal assistant Mrs Honeywell, to Mr Richard Park and to his account Mr Honeywell.

6. For the purpose of paying suppliers of goods and services WW maintained a Vendor Master Data Record and the partnership was recorded there as Rossco Civil Engineering with the payee details initially shown as Butler and Wall trading as Rossco.

7. In July 1998 the partnership applied to Chandler KBS to be included in WW's list of contractors for WW's mains refurbishment programme. These works came to be known as `AMP2'.

8. On 8th September 1998 the partnership was invited to tender and the invitation enclosed the proposed conditions of contract which were to be in the *"NEC Engineering and Construction Contract Option C"* form published by the ICE. This describes itself as *"A form of contract for a target contract with activity schedule"*. The precise details are not material to this action. One of the features of the contract was that it was referred to as a partnering agreement. While apparently it incorporated elements of risk sharing, the relationship under the contract was clearly that of employer and contractor not partner and partner.

9. On 10th November 1998 Hyder notified Mr Butler that, following evaluation of their submission, the partnership had been successful. In this letter Hyder said: *"... we confirm that the individual works orders shall themselves constitute the contracts to undertake the works described upon them. Works orders shall be issued on a scheme by scheme basis. Each works order shall be governed by the provisions of the tender documentation and the terms and conditions of the NEC Engineering and Construction Contract ... "*.

   This inspired me to suggest to counsel that the correct legal analysis might be that there was not one but a series of contracts thereafter. Both counsel rejected this analysis and it is fair to say that all parties (although now at issue over who was the contracting party) have proceeded on the basis that the relationship should not be broken down into a series of individual contracts.

10. In fact no formal contract was ever signed by the parties but it is common ground:
    (a) That the partnership started `AMP2' works in January 1999.
    (b) That those works were undertaken subject to the terms and conditions set out in the tender documents including the NEC Engineering and Construction Contract.

(c) That that contract was a construction contract.

(d) That that contract did not comply with section 108(2)-(4) of the Housing Grants Construction and Regeneration Act 1996 (`the HGCRA') and accordingly, by section 108(5), the Scheme applied.

(e) That the contract, although not signed, was an agreement in writing within section 107(2) of the HGCRA.

11. One of the features of this contract was that WW supplied all or a large proportion of the water pipes and fittings which Rossco laid in the ground. These were referred to as the `free issue materials'. At first these materials were drawn from WW's own stores but latterly they were drawn from the store of WW's materials suppliers. As I understand it, Rossco would draw the quantities of pipes and fittings estimated to be sufficient for the particular location in respect of which they had received a works order. After the job was done the materials left over had either to be returned to store or collected by the suppliers or redirected to another WW job. The actual quantity of pipes and fittings laid were measured and the difference between the quantities so laid and the quantities drawn and not otherwise accounted for (after an allowance for off cuts and wastage) were the subject of a debit against Rossco. Obviously the system was dependent on efficient operation and accurate record keeping of materials issued and materials returned.

12. At the end of 1998 or the beginning of 1999, probably at the suggestion of Mr Robert Davies of The Robert Davies Partnership, Mr Butler's solicitors, Mr Butler raised the question of incorporation of the business with his accountant Mr Peter Honeywell. For this purpose Messrs. Deloitte & Touche were brought in.

13. There was a meeting on 18th February 1999 attended by Mr Butler, Mr Foster Thomas of Deloitte & Touche, Mr Peter Honeywell and Mr Robert Davies at which it appears to have been decided to incorporate the contracting business but not the plant hire business.

14. There was a further meeting on 6th May 1999 at which the same persons were present. The manuscript note of the meeting includes:
*"7 New contract. No problems with incorporation by [but?] F[rank] Butler] will check it out. "*

The new contract referred to was the contract for the AMP 2 works.

15. The Claimant company Rossco Civil Engineering Ltd. (which, where necessary to distinguish it, I shall refer to as `the Limited Company') was incorporated on 20th May 1999.

16. The same day Chandler KBS on behalf of WW sent to Mr Park of Rossco two copies of the Form of Agreement, Contract Terms and Contract Documentation for signature and return.

17. There is some doubt as to what was actually enclosed with this letter. Two copies of the contract documentation survive. Both are photostats. Both have the parts left blank in the printed forms completed in manuscript in the same handwriting. It is admitted by WW that that handwriting is that of a Mr Ken Stacey who was a member of Chandler KBS procurement personnel and was clearly authorised to write what he did. Mr Clague accepted that Mr Stacey should have appreciated the difference between a partnership and a limited company.

18. The copy which was retained in Chandler KBS' file (Trial Bundle pp. 934 to 1002) records (at p.993) the contractor's name as Rossco Civil Engineering and its key people as Mr Butler and Mr Wall described as partners. However on the copy which emerged from Mr Robert Davies' files the same page (p.203) shows the contractor as Rossco Civil Engineering Limited although the key people are still described as partners. It appears from the copies that both had been altered at some earlier time by Mr Stacey to give Rossco's new address at Albury Road, Newport. Presumably when originally drawn up it had shown Mr Butler's address of Bartholley Lodge, Llantrissant, Wales which the partnership had earlier given as its place of business.

19. Neither Mr Stacey nor Mr Davies were called as witnesses so the circumstances in which Mr Stacey made these alterations, including the addition of the word "Limited", are not directly explained. There is no evidence of copies of the contract being sent for signature on any date other than 20th May 1999 and I find on balance of probabilities that the copy on Mr Davies' file was a copy of one of copies sent on that date.

The copy retained in Chandler KBS' file was therefore likely to be a copy of an earlier copy photostatted before Mr Stacey had added the word `Limited'.

20. I further infer that someone on behalf of Rossco must have told someone dealing with the contract for WW, probably a member of Chandler KBS, that Rossco were going to incorporate and that it was proposed that the Limited Company should be the contracting party. This would tally with the note of 16th May 1999. However the fact remains that as at 20th May 2999, the Limited Company had only just been incorporated, it had not yet taken over any work from the partnership or indeed started to trade at all and of course neither party ever signed any version of the contract. AMP2 works at that time were being carried out by the partnership and that continued to be the position at least for the next 7 weeks or so.

21. The originally proposed date at which the Limited Company would take over from the partnership was 1St June 1999 but a note dated 25th May 1999 of a telephone conversation between Mrs Honeywell and Mr Wooton of Deloitte & Touche refers to postponing the transfer *"presumably because [Rossco] will need to write to various people to advise them of the change from partnership to a limited company status"*. On 29th June 1999 Mr Wooton wrote to Robert Davies reporting on his dealings with Mr Honeywell with whom he appears to have been encountering difficulties. Mr Honeywell was apparently saying that *"due to `commercial complexities'* [which [Mr Wooton understood*] to revolve around the contracts] incorporation cannot take place until such time as all customers etc. have been notified"*. `Incorporation' in this context clearly meant `transfer'. I think that it was intended that Rossco's customers should be circulated with written notice that the Limited Company was taking over the contracting business but equally clearly this was not in fact done.

22. Mr Butler and Mr Park say that they believe they did tell WW in the persons of Mr Clague or Mr Hassan that the Limited Company was taking over the contract. Their evidence is extremely vague on this and is denied by Mr Clague. In this context Mr Butler and Mr Park appear to be putting these conversations in June or July 1999. I find that no such conversation took place and the only conversation was that which occurred in May 1999 and resulted in Mr Stacey putting `Limited' on the contract forms.

23. Mrs Honeywell, whose evidence I accept, said that the actual takeover of the business by the Limited Company took place on Monday 12th July 1999. All work done up to the previous weekend was invoiced by the partnership on Wednesday 14th July. The work done in the week commencing on 12th July was invoiced by the Limited Company on Wednesday 22nd July 1999 regardless of when the works order was received in respect of it. She said that any invoices raised by the partnership after the takeover date were in respect of works carried out before that date. The print out of her computerised records appears to support this.

24. Mrs Honeywell's evidence did not therefore really go to support Rossco's case which is that the Limited Company became entitled to payment in respect of work undertaken both before as well as after the takeover date. Nor would her evidence have been compatible with a series of contracts each originating from a separate works order.

25. What Mrs Honeywell did do however was to produce an entirely new form of invoice and in my judgment there should have been no doubt in the minds of WW and Chandler KBS, if they had looked at the invoices (as they would have done before passing them on to WW's payment staff), that the Limited Company was claiming to have carried out AMP2 works pursuant to the contract and were claiming that they were entitled to be paid for it.

26. Even the system described by Mrs Honeywell did not operate with its intended clarity because, as I understand it, WW's computerised payment system had a block preventing payment to anyone who had not produced a CIS Certificate (entitling payment to be made gross). Apparently this had to be provided by Mr Butler in person at WW's offices. Mr Butler did not, I gather, attend to this requirement, which no doubt he regarded as bureaucratic, as promptly as would have been desirable. Since this requirement appears to have been dealt with by personnel at a different level in the WW hierarchy from those who were or should have been concerned to take notice of contractors' identities, nothing turns on this point.

27. In my judgment the use of the name Rossco Civil Engineering after the formation of the Limited Company was neutral in the sense that it did not necessarily refer to the partnership because the Limited Company could and did trade under that name. If WW had had no notice of the Limited Company's existence and



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the fact that it was purporting to undertake AMP2 works, then the use of the name Rossco Civil Engineering might have been significant in the negative sense of suggesting that there had not been any change, but in my view that was not the position.

28. The formal Business Sale Agreement was not formally executed until 30th November 1999 but WW were not given any specific notice of this. By it, the contracting business, including the goodwill and right to use the name Rossco Civil Engineering, were transferred to the Limited Company purportedly with effect from 19th July 1999. So far as Mrs Honeywell and the practical operation of the business was concerned this date was wrong. The transfer had taken place a week earlier. The transfer agreement was apparently drawn up by Chris Jones of the Robert Davies Partnership and a manuscript note of the conversation between Mr Jones and Peter Honeywell of 29th October 1999 indicates that the incorrect date was supplied by the latter.

29. Apart from the invoices, a number of matters were dealt with at a higher level in the WW hierarchy, mostly by Chandler KBS.

30. On 22nd October 1999 Mr Park wrote to Mr Neil Taylor at Chandler KBS using the Limited Company's name and letterhead on the subject of Plant Rates applicable to AMP2. It was clear from this letter that AMP2 works were now being done by the Limited Company at least so far as Rossco were concerned.

31. On the 25th October 1999 Mr Honeywell wrote to Mr Roger Thomas, Capital Services Manager at WW/Hyder in response to an invitation issued on 13th October by Mr Thomas to Rossco to tender for AMP3 works. The invitation included a questionnaire which Rossco obviously passed to Mr Honeywell for completion. Mr Honeywell's letter states:
*"The above company [Rossco Civil Engineering Ltd.] was formed on 20th May 1999 and commenced trading on 12th July 1999. Prior to that date the business was carried on by a partnership known as Rossco Civil Engineering. "*

He went on to give details of the Limited Company's bankers, VAT registration number and CIS Certificate. Mr Roger Thomas was not called to give evidence but he was Capital Services Manager and according to Mr Clague, the Capital Manager, Mr Thomas provided services to his department among others. Mr Clague was concerned with the procurement for the contracts both in respect of AMP2 works and AMP3 works. I was not impressed by this attempt to distance himself from the information contained in the letter of 25th October 1999 nor the attempt to confine its significance to AMP3 works.

32. I am satisfied however that WW, including Mr Clague and Mr Neil Taylor, the partner concerned in Chandler KBS, never really applied their minds to the significance of the identity of the party contracting with WW. So far as the Vendor Master Data Record kept by WW was concerned, the partnership and the Limited Company were the same thing. This remained the case notwithstanding the fact that Mrs Honeywell on 11th January 2000 faxed amended banking details (using the Limited Company's letterhead) which showed the company to be banking under the name *`Rossco Civil Engineering'* instead of *`Butler & Wall t/a Rossco'.*

33. By letter of 31St January 2000 Mr Roger Thomas wrote to the Limited Company indicating that Rossco had not been successful in getting onto the shortlist for AMP3 works as a "strategic partner" (i.e. principal contractor). However his letter held out the possibility of further AMP3 works as a "local or specialist contractor" and, since Rossco would remain a "qualified contractor", they might get some work which for some reason might not be awarded to the strategic partners.

34. This failure by Rossco must have been a disappointment but of more immediate concern was WW's failure to allocate AMP2 work to them. On 19th May 2000 Mr Park wrote on the Limited Company letterhead to WW for the attention of Mr Clague seeking, in substance, to get more AMP2 or AMP3 work allocated to Rossco. It contains the passage: *"Given our long involvement and commitment in delivering Hyder's AMP] & 2 programme we remain committed to delivering Hyder's AMP3 programme through your strategic partner. "*

To this letter Mr Snook of WW replied on 2nd May 2000 by a letter in the drafting of which Mr Taylor and Mr Clague were concerned. It was addressed to Mr Park as operations manager of the Limited Company. Most of the letter concerned AMP2 works and quoted from the Contract Documents. The basic assertion was that WW was not obliged under the contract to allocate any works at all to Rossco but that Rossco

were obliged to do works allocated to them at agreed rates and were only entitled to payment for what they did do. However an objective observer should have said, in the circumstances, that WW were accepting that the other contracting party in respect of the AMP2 works was the Limited Company.

35. It is not entirely clear when the AMP2 works ended but it appears to have been towards the end of 2000. It may be that no new work was allocated after April 2000. After that there was a prolonged period during which Rossco ran off existing allocations of work and the Limited Company was chasing payment of various invoices. At no stage did WW contend that it was the partnership not the Limited Company which was entitled to issue the invoices and receive payment on them.

36. On 6th March 2002 Knowles Lawyers Ltd. wrote to WW on behalf of the Limited Company making essentially the same complaint as had been raised by Mr Park in his letter of 17th May 2000 and making a money claim on the basis of the allegedly wrongful failure to allocate work. This was firmly rejected by WW's solicitors Hugh James Ford Simey in a letter dated 18th March 2002 essentially on the same grounds as those in Mr Snook's letter of 24th May 2000. It was implicit in the letter that it was the Limited Company with whom WW was in contractual relations and in the last sentence the solicitors show that they have in mind that Rossco is indeed a limited company by the threat to seek security for costs.

37. By a letter from WW dated 20th May 2002 countersigned by Mr Butler as a director of the Limited Company, some of the issues on some of the outstanding invoices were compromised. It appears unlikely that these related to AMP2 works where, as I understand it, the final account was being negotiated by Chandler KBS, but the text also shows that Mr Ian Davies of WW was well aware that it was the Limited Company with which WW were contracting at least in respect of some of the works which Rossco was doing for WW.

38. In the later summer/autumn of 2002 the parties were still in dispute on the state of the final account in respect of the AMP2 works. The matter was being handled by Jeff Moore on behalf of Rossco and Mark Salt of Chandler KBS for WW. Rossco began to lose patience and consulted Robert Davies Partnership. They wrote a letter of claim on 27th November 2002 seeking payment of £384,473. There was then a further negotiation about which Mark Salt gave evidence.

39. Mark Salt had been assistant to Simon Lander the member of Chandler KBS's staff who had been project manager for the AMP2 programme. The negotiation related to a large number of individual schemes each of which was concerned with the laying or refurbishment of pipes and fittings at a different site. Initially Mr Salt told Mr Moore that he would not be able to reach agreement on any particular scheme unless all issues on that scheme were agreed. However as the negotiation proceeded they did agree to, and were able to, reach agreement on all issues on all schemes with the exception of the `free issue materials' issue. Mr Salt accepted that they, WW and Chandler KBS, initiated the Adjudication because everything else had been tied up and they wanted the `free issue materials' issue tied up.

40. It is in the nature of an Adjudication that it results in a temporary solution until the issues are ultimately resolved in arbitration or litigation. Whether Mr Salt's reservation about agreeing all issues on all schemes would enable him to raise issues other that the `free issue materials' issue in any subsequent arbitration or litigation is not a matter for decision in this case. He was certainly bound by his agreement on all these other issues for the purposes of the Adjudication.

41. On 17th January 2003 Mr Tonkin of Chandler KB S applied to the Chartered Institute of Arbitrators by means of a formal Application signed by Mr Taylor. The referring party was WW and the Application specified *"Other party to the contract: Rossco Civil Engineering Ltd. "*.

42. On 31st January 2003 Mr Stanley Francis Knill, the appointed adjudicator wrote a letter to Mr Taylor at Chandler KBS and to the Robert Davies Partnership which contained this paragraph

    *"I have also today received a faxed letter from the Robert Davies Partnership in which I am informed that they are representing the Responding Party, Rossco Civil Engineering Limited (`Rossco ), although I note from Appendix `F' in the Referral that as of 21" January 2003 they were not calling themselves `limited'. Perhaps this small matter could be clarified".*

    Mr Knill got no response from either party to this query and wrote again on 4th February

*"The reason why Rossco is referred to as a partnership in places and a limited company in others has not been explained. Unless either party wishes to make any particular point in this respect I shall assume henceforth without further query that both parties accept that Rossco is incorporated. "*

To this Chandler KBS made no response. Robert Davies Partnership however replied (with a copy to Chandler KBS)

*"We have not taken the trouble to find the references to Rossco as a Partnership, but confirm that it is incorporated as [a] limited liability company.*

Chandler KBS did not dissent from this and the Adjudication proceeded on the basis that the Limited Company was the correct responding party.

43. The dispute as presented to Mr Knill following the Salt/Moore negotiation can be simply stated as follow:

***WW's case***

| | |
|---|---|
| *Value of work done* | *£6,983,065.84* |
| *Less paid* | *£6,601,848.83* |
| *Balance* | *£381,217.01* |
| *Free issue materials disallowed* | *£506,726.65* |
| *Due to WW* | *£125,555.64* |

***Rossco's case***

| | |
|---|---|
| *Balance as above (adjusted down from Rossco's original claim of £384,277.98)* | *£381,217.00* |
| *Free issue materials* | *nil* |
| *Due to Rossco* | *£381,217.00* |

Mr Knill had therefore only to decide the `free issue materials' dispute and his scope for decision lay between zero and £506,726.65. If he concluded that the disallowance should be more than £381,217.00, WW would be entitled to an award of a sum of money, if less than that figure Rossco would be entitled to an award of a sum of money.

44. The Adjudication did not proceed smoothly. Rossco's solicitor took issue with Mr Knill's appointment on the grounds that he had some connection with Mr Taylor of Chandler KBS. The ferocity with which this issue was pursued by Mr Barnet of the Robert Davies Partnership is to be regretted. The Adjudication proceeded on the basis that Rossco's right to apply to set aside the adjudication (if it went against them) on grounds of natural justice was expressly reserved.

45. Mr Knill resisted all attempts to get him to disqualify himself and proceeded with the Adjudication.

46. In the event WW having initiated the Adjudication were, in Mr Mort's words, "spectacularly unsuccessful". Mr Knill rejected the claim that a disallowance of any sum at all for the value of free issue materials unaccounted for, should be made. He ordered WW to pay £318,217.00 together with interest of £5,890.58, plus VAT within 7 days with interest thereafter at £125.33 per day until payment. He also ordered WW to pay his fees and expenses of £6,596.60.

47. Following the adjudication WW instructed Lane & Partners, solicitors, and there was correspondence between solicitors. The only issue of substance raised was whether the Adjudicator had been entitled to order a payment to Rossco as opposed to a payment to WW. This correspondence got nowhere and the present proceedings were issued on 17th June 2003. It was only in the Defence dated 8th August 2003 that the argument emerged for the first time that the proper party was the partnership and that the Adjudicator therefore lacked jurisdiction.

48. Subsequently WW commenced arbitration proceedings against the partnership. No doubt it was felt that this course had to be adopted in order to show consistency with the pleaded case in this action. It does not assist me in relation to the findings which I make.

**My findings**

49. In the event no formal contract between the parties was ever executed. If it had been, and if it had been executed after 20th May 1999 as would inevitably have been the case, it would probably have been in the name of the Limited Company albeit with the key people designated as directors rather than as partners.

50. I do not accept that WW would have had any objection to this course. Mr Clague believed that, if the contract was properly carried through, Rossco would only be paid for the work they had done, free issue materials would be brought into account contemporaneously and the contract would not therefore involve credit risk to WW. Because of the reinstatement obligation I think he was wrong in this respect but I do not accept that, on this account, the Limited Company would have been unacceptable as a contractor in circumstances in which a partnership would have been acceptable as a contractor. Had this been the case WW could have taken issue with the introduction of the Limited Company at a much earlier stage. I do not accept that this point now being taken occurred to anyone at WW, Chandler KBS or the two firms of solicitors Hugh James Ford Simey and Lane & Partners, until Counsel settled the Defence in this action.

51. Had the contract been executed in the name of the Limited Company, the parties would have dealt with all the works, including those carried out prior to incorporation, as if the Limited Company had been the contractor all along. As it was, both sides proceeded on the basis that the contract terms applied even in the absence of execution of the documents.

52. I find that WW and its agents Chandler KBS knew that Rossco had become a Limited Company and they had ample notice that the Limited Company had taken over the business of the partnership. If the innocent bystander had asked them at any time in late 1999 or thereafter "To whom are you contracting this work, the Limited Company or the partnership?" they would have replied "The Limited Company". In fact they never did ask themselves that question nor did they ever consider the legal consequences in particular in respect of the work carried out pursuant to orders given before the Limited Company existed.

53. I do not accept that there is any common industry practice whereby contractors call themselves by names, with or without the addition of the word limited, which have no significance in relation to their contractual status. The name, with the word `Limited', may well be significant depending on the circumstances. Equally I do not accept that when the words `Rossco Civil Engineering' appeared without the word `Limited' that that conveyed to WW that it was the partnership which was being referred to. I do not believe that they thought about it at all. Mr Clague said that he thought that there only was one entity which he generally referred to as Rossco.

54. My conclusion is that by the time of the Salt/Moore negotiation, and indeed much earlier, there was a clear common understanding between the parties that the benefits and burdens of the contract, both in respect of the pre incorporation schemes and the post incorporation schemes, were the benefits and burdens of the Limited Company.

55. The fact that on occasion Mr Mannell designated the Limited Company as principal contractor under Regulation 6 of the Construction (Design and Management) Regulations 1994 - something technically he could not have done unless the Limited Company was a contractor in the first place - is not in my judgment very significant by itself. It is however symptomatic of the common understanding to which I refer.

56. I reject the contention that the Adjudication was in reality intended to be commenced against, or was in fact against, the partnership. It was obvious to all parties that the Responding party was intended to be, and was in fact, the Limited Company (see Pt. 1 para. 1(3)(d) of the Scheme).

**The arguments**

57. Mr Mort for Rossco argues for the following conclusions:
    (a) A novation by which the partnership rights and liabilities under the contract were transferred to the Limited Company.
    (b) An estoppel by convention preventing WW from resisting their claims under the contract based on the Adjudicator's determination in favour of the Limited Company.
    (c) An assignment by the Partnership to the Limited Company.
    (d) That the Limited Company was the agent of the partnership.
    (e) That if there was no agreement in writing within section 108 of the HGCRA, there was none the less an ad hoc adjudication because the parties had by separate agreement given the Adjudicator authority to decide the dispute.

    Mr Collings for WW attacks each of these submissions and says:

(a) The Adjudicator had no authority because the contracting party was the partnership not the Limited Company.

(b) The Adjudicator has no authority to rule on the Counterclaim.

My attention has been drawn to **Macob Civil Engineering Ltd. v. Morrow Construction Ltd**. [1999] BLR 93, **Bouygnes (UK) Ltd. v. Wahl Jensen (UK) Ltd**. [2002] BLR 522 and **C&B Scene Concept Design v. Isobars** [2002] BLR 93 on the proper approach to jurisdictional challenges.

58. In my judgment no novation agreement as such has been established. It would require that someone on behalf of the partnership and someone on behalf of the Limited Company (they could be the same person) should agree with someone on behalf of WW to extinguish the rights and liabilities of the partnership and create those rights in the Limited Company. While the Business Sale Agreement went part of the way, as between the partnership and the Limited Company, it did not transfer rights and liabilities in respect of pre 12th (or 19th) July 1999 works and anyway WW were not parties to it. In fact none of the three parties focussed attention on the possibility of such an agreement still less did they think of concluding one.

59. Whether novation comes back into the picture under estoppel I shall deal with hereafter.

60. It is not at all clear whether the Partnership's relations with WW would be assignable at all without the consent of WW. However if they were assignable, there would be no conceptual difficulty in the partnership assigning the whole of the contract rights and liabilities (if they remained a contracting party until the end of the AMP2 works) or so much of the rights and liabilities as were vested in the partnership (if it be held that at some stage during the currency of the AMP2 works the Limited Company had, with WW's consent express or implied, stepped into the shoes of the partnership).

61. Again the Business Sale Agreement would only go part of the way. Suffice it to say at this stage that there was no assignment in writing of the pre incorporation rights and liabilities and there was no notice in writing of the Business Sale Agreement to WW. In my view section 136 of the Law of Property Act 1925 was not complied with.

62. Again there is no conceptual difficulty in the Limited Company being the authorised agent of the partnership for the purpose of making or recovering any payment due from or to the partnership or for the purpose of doing any work which the partnership was contracted to do. This would probably be dependent on the agreement of WW express or implied, because WW was probably entitled to have the work done by a contractor of its choice and was certainly entitled to get a valid discharge for any payment it made. This agency could apply to the whole works or, if, with WW's consent, the Limited Company took over both the obligations and the rights part way through the AMP2 programme, in respect of the earlier part.

63. There is however no evidence that any of the parties thought about creating an agency nor do I believe that anyone thought that an agency had in fact been in existence until the issues in these proceedings provoked it as a possible analysis.

64. In my judgment this ought classically to be a case of estoppel by convention and probably also by representation of existing fact. It is not simply based on the common understanding of the parties which I have dealt with. WW commenced the adjudication with the assertion (or representation) that the Limited Company was the contracting party not only in respect of the later schemes but all the schemes covered by the contract.

65. When Mr Knill inquired as to the precise status of Rossco, WW through Chandler KBS chose not to reply. An estoppel cannot normally be based on silence unless there is, in all the circumstances a duty to speak up. In my judgment there was here a duty, if WW ever wished to contend that the true contracting party was the partnership, to speak up not only in the general context but so as to give efficacy to the initial words of Part 1 para. 13 and para. 15 of the Scheme.

66. It is in the nature of a common understanding of the parties such as applied in this case that the parties had not gone through the sophisticated process of ascribing a legal analysis to that understanding. It could have been based on a novation, it could have been based on an assignment, and it could have been based on an agency relationship. In the end the fact, which I find to be the subject of the common understanding

of the parties by the time of the adjudication at the latest, was that in relation to all the AMP2 schemes the contracting parties were WW and the Limited Company. That is the existing fact (although possibly a mixed matter of fact and law) which WW is by the convention itself, and by their own representation of it, estopped from denying.

67. For what it is worth, the estoppel was mutual. If the adjudication had gone the other way, the Limited Company would have been obliged to make any payment ordered and, as Mr Clague and Mr Taylor (less felicitously) accepted, in the end the Limited Company might have been put into liquidation. Both parties acted to their detriment on the basis of this common understanding; both incurred what must have been the considerable expenditure of dealing with the adjudication which, if WW are now right, was a complete waste of money.

68. Mr Collings for WW drew my attention to **Amalgamated Investment & Property v. Texas Commerce International Bank** [1982] QB 84 and to the commentary on that case in Chitty on Contracts para. 3-105. His contention was that, if the estoppel argument were to be allowed to succeed, it would be allowing the estoppel to be used as a sword rather than as a shield. He says that this approach rests only on the judgment of Lord Denning MR in Amalgamated Investment & Property which was not supported by the other members of the Court of Appeal.

69. In my judgment the availability of estoppel does not depend on who is claimant and who is defendant (see **Furness Whithy (Australia) Ltd. v. Metal Distributors (UK) Ltd**. [1990] 1 Lloyds Rep 238). As Chitty points out the facts giving rise to the cause of action should exists independently of the estoppel. Here they do as I have found in para. 66. Because estoppel works, amongst other things, as a rule of evidence, in my judgment it is not obligatory for Rossco to prove the legal route or analysis by which such matter of fact (or matter of mixed fact and law) is sustained provided of course that it is, or would be, sustainable by one such route or analysis.

70. Is the contract, which I have found WW are estopped from denying to be with the Limited Company, one within section 108 of the HGCRA? To be so it must be a construction contract (as defined by sections 104 and 105) in writing, as to which section 107 provides:

"(1) *The provisions of this Part apply only where the construction contract is in writing and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing ...*

(2) *There is an agreement in writing*

(a) *if the agreement is made in writing (whether or not it is signed by the parties)*

(c) *if the agreement is evidenced in writing.*

(3) *Where the parties agree otherwise than in writing by reference to terms which are in writing they make an agreement in writing.*

(S) *An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings on which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.* "

71. In my judgment the common understanding of the parties which I have to found to exist was something upon which "*the parties agree otherwise than in writing by reference to terms which are in writing*" for the purposes of subsection (3) of section 107 and are therefore deemed to make an agreement in writing.

72. Similarly there is plenty of evidence in writing of the agreement in accordance with the common understanding of the parties for the purposes of s. 107(2)(c). Mr Snooks' letter of 24th May 2000 and Hugh James Ford Simey's letter of 18th March 2002 (incorporating as they do by reference the full contractual terms) are but examples (see **Thomas-Fredric's Construction v. Wilson** [2004] BLR 23).

73. Section 107(5) is more problematical. His Honour Judge Bowsher QC in **Grovedeck Ltd. v. Capital Demolition Ltd.** [200] BLR 181 had resort to **Pepper v. Hart** [1993] AC 593 in interpreting this subsection. He concluded that it necessarily referred to adjudications and arbitral and legal proceedings preceding the appointment of the adjudicator (for otherwise he would lack authority at the time of his appointment) and that therefore the reference to `adjudication proceedings' necessarily meant other adjudication proceedings. As a matter of first impression I would not have been inclined to follow that experienced Judge. The

 

mischief, in respect of agreements other than in writing, which it is Parliament's intention to avoid, is that of adjudicators interpreting oral contracts. A contract other than in writing can only fall within an adjudicator's authority if all the material terms are agreed, not simply the existence of a contract in the first place (see **RJT Consulting Engineers Ltd. v. DM Engineering (NJ) Ltd**. [2002] 1 WLR 2344 and **Pegram Shopfitters Ltd. v. Tally Weil (UK) Ltd**. 2004 BLR 65). A challenge to the jurisdiction of an adjudicator will necessarily occur when, with or without earlier objection from one of the parties, he has entered on the adjudication and made an award to which one or other party objects. I see no particular problem in saying that, if in the unlikely event that all the material terms of an agreement (other than in writing) have been the subject of an exchange of submissions and not disputed in that very adjudication, the requirements of section 107(5) have been met. Equally in respect of a long drawn out contract there may be litigation or arbitration commenced and an adjudication later commenced in another matter. It might be pure coincidence whether the pleadings and skeleton arguments in the former were exchanged before or after the adjudicator was appointed in the latter. In view of my decisions on the other matters it is not necessary for me to base my judgment on this particular point.

74. In the circumstances I do not see that the issue of a possible ad hoc adjudication, that is to say one dependent not on the contractual effect of section 108 but upon an independent agreement of the parties, arises. If it did arise my findings would have been
    (a) The parties were in agreement that the parties to the contract and therefore the proper parties to an adjudication were WW and the Limited Company.
    (b) No issue therefore arose for the adjudicator to decide upon the proper parties. When he asked the relevant question, the reply received from Rossco's solicitors and the non-reply of Chandler KBS indicated agreement not dispute.
    (c) The parties were in agreement that there was a construction contract in writing within the meaning of the HGCRA and therefore there was a contract in respect of which a dispute was subject to adjudication.
    (d) Rossco, the Limited Company, did not agree to give Mr Knill any special additional authority to decide anything. If the decision was adverse to Rossco and if Mr Knill could be shown to have been biased, the adjudication would be voidable. It was not void and, leaving aside their objection, Rossco participated in it. This was what was described as the reasonable course by Judge Galliland QC in **Nordot Engineering Services v. Semens Plc** 14.4.2000 (unrep.) quoted with approval by Simon Browne LJ in **Thomas-Fredric's (Construction) Ltd**. (supra). If, as happened, the decision was in Rossco's favour, they had not lost the right to enforce it.

**The Counterclaim**

75. It is said by Mr Collings that the Adjudicator had no authority to make an order for payment of money to Rossco. This involves the proposition that the Adjudicator was entitled to deal with the dispute over the free issue materials only insofar as WW were entitled to a disallowance exceeding £381,217.00; yet the Adjudicator could never get to this position without deciding whether there were any, and if so how much, in the way of free issue materials for which a disallowance should be made.

76. In any event I would hold that what Mr Knill did was exactly what paragraphs 13 and 20 of the Scheme expect and authorise him to do. His authority to require *"any of the parties to the dispute to make a payment under the contract"* is specifically provided in para. 20(b).

77. This approach seems to me to tally with that set out in the judgment of HH Judge Thornton QC in **Fasttrack Contractors Ltd. v. Morrison Construction** [2000] BLR 168.

**Conclusion**

78. I therefore hold that the Claimant is entitled to the sums ordered by the Adjudicator. The parties having considered my judgment may make submissions to me as to the form of order, interest to date and in the future, Value Added Tax, costs and whether there should be a stay of execution.