

(Name of judge not available) : TCC : Salford District Registry : 6<sup>th</sup> April 2004.

The claimant contracted to extend and convert a building under IFC – 98 Standard Form terms. A Mr Myers was appointed as Contract Administrator who issued a certificate of practical completion on the 20<sup>th</sup> September 2002. The claimant served a final account on the defendant employer on the 27<sup>th</sup> March, adjusting the price and claiming £85,000 net outstanding. Myers certified the contract sum at a little under £400K, in consequence of which, according to the defendant there had been a £7,000 overpayment. According to the claimant, under Clause 4.6.1. of the contract, a final certificate should have been issued by the end of July, but none was issued. The claimant served notice of adjudication on the 11<sup>th</sup> December with a response due on the 30<sup>th</sup> December.

In due course, the adjudicator gave notice of a meeting, scheduled for the 27<sup>th</sup> January to deal with contract law issues arising out of the absence of a final certificate and in relation to quantum. Myers, on behalf of the defendant agreed a postponement of the meeting to the 12<sup>th</sup> February and the claimant extended time for the decision to the 20<sup>th</sup> February. A fortnight later the adjudicator was informed that Mr Myers would not be available until the 23<sup>rd</sup> February and the defendant's solicitor would not be available till the 16<sup>th</sup> February. The claimant refused to grant a further extension of time and the adjudicator ruled that the meeting should go ahead on the 12<sup>th</sup> since he would not otherwise have sufficient time to produce the decision. The adjudicator agreed to receive written legal submissions from the defendant, since the solicitor would not be present. Myers represented the defendant at the hearing, submitting additional witness statements and engaging in argument. A non-practicing barrister represented the claimant.

The adjudicator found for the claimant. The defendant did not pay. The claimant commenced this enforcement action. The defendant resisted on two grounds, namely :

- 1) Breach of Rules of Natural Justice and
- 2) Jurisdiction to open up and revise certificates.

**Natural Justice :**

The defendant asserted that he was under a severe disadvantage, without legal representation, to meet the arguments of the barrister. Whilst in order to resist enforcement a defendant is required to demonstrate "*a real prospect of successfully defending the claim*" where a breach of natural justice is concerned he only had to show that "*there was a real, not fanciful, prospect of success.*"

The court noted that there had been no objections in respect of procedural unfairness during the hearing. The matter was only raised after the decision had been issued (*Note : in similar circumstances, under the Arbitration Act 1996, a party who fails to object to procedures during the course of an arbitral hearing will be deemed to have waived any breach and will thus lose the right to subsequently raise the issue* ).

Regulation 16 of the Scheme for Construction Contracts provides that a party can choose to be represented by anyone he wants. The defendant, without explanation, took two weeks to indicate that the 27<sup>th</sup> January was not a suitable date. He was represented by Mr Myers and had plenty of opportunity to arrange alternative counsel. The adjudicator had a statutory deadline to comply with and his decision to go ahead was reasonable as was his acceptance of written submissions.

**Jurisdiction :**

The defendant asserted

- IFC 98 cl.4.6.1 makes the contract: of practical completion a condition precedent to the liability to pay. The power to open up and revise certificates was reserved to the contract administrator or to an arbitrator under the IFC 98.
- Regulation 20 of the Statutory Scheme gives the adjudicator the power to "*open up, revise and review any decision taken, or any certificate given, unless the contract states that the decision or certificate is final and conclusive.*" Thus, it only applies where a final or conclusive certificate is issued. In the absence of a certificate the adjudicator does not have jurisdiction.
- Regulation 20 does not empower an adjudicator to issue a certificate.

The court held that an adjudicator can consider whether or not a certificate should have been issued and if a missing certificate was due he could determine the sum. The adjudicator had found that a final certificate should have been issued on or before the 30<sup>th</sup> July. He went on to determine the amount and held that that sum was due. There was no reason why a dispute in those terms, viz whether or not a certificate should be issued and if so what it should contain, should not be referred to adjudication.

The judge held at para 12 that *"... There seems to me no good reason why the adjudicator should not make an adjudication on those issues which would be binding only until there had been an arbitration under clause 9(b) of the contract conditions [IFC 98]. It is said that under clause 9(A), the settlement of dispute adjudication provisions of this contract, there is no power given to the adjudicator to make measurements or to award any sum which ought to have been included in a certificate; whereas that power is contained in 9(b)(2). It seems to me that it is not a decisive argument given, as I say, that the statute allows any dispute under a contract to be adjudicated on. This was, in my judgement, a perfectly valid dispute fit for adjudication. Therefore, I reject the defendant's contention."*