

JUDGMENT : HIS HONOUR JUDGE RICHARD HAVERY Q.C. TCC. 25 July 2005

1. This claim is brought under part 8 of the Civil Procedure Rules. It arises out of adjudication proceedings that were abandoned. The defendant instituted adjudication proceedings against the claimant and, after the parties had incurred substantial costs, abandoned its claim. The adjudicator subsequently directed that the defendant should pay the claimant's costs of the adjudication and his own fees and disbursements. He assessed the claimant's costs at £87,131.04 plus any VAT payable, and directed the defendant to pay him £14,643.44 including VAT (in addition to what he had already been paid, as explained below) as his costs and disbursements. By this claim, the claimant claims the sum of £87,131.04 which the adjudicator directed the defendant to pay to the claimant, or the same sum, or a sum at large, as damages for breach of contract. The defendant contends that the adjudicator had no jurisdiction to make the direction that he did, and denies any liability to the claimant.
2. The relevant facts are these. On or about 7th October 2002 the claimant was engaged by the defendant to provide certain architectural services in connection with building works to be carried out at premises at Charles House, Salford. The contract between the parties incorporated the RIBA Conditions of Engagement for the Appointment of an Architect (CE/99), which provided for adjudication.
3. On 11th May 2004 the defendant's parent company, evidently on behalf of the defendant, sent a letter to the claimant claiming the sum of £1,363,834 said to represent loss suffered by the defendant consequent upon failings in the standard of service provided by the claimant pursuant to the contract mentioned above. The letter required a response within seven days failing which, or failing an acceptable offer of settlement, the sender would conclude that a dispute existed between the parties and the matter would be referred to adjudication. On 21st May 2004, in the absence of a response to that letter, the defendant served on the claimant a notice of adjudication. On 2nd June 2004, Mr. Colin Moore was appointed to act as adjudicator. The claimant agreed to participate in the adjudication without prejudice to a contention on its part that the adjudicator lacked jurisdiction. Four grounds were given for that contention, in particular the ground that having regard to the limited time given for the claimant's response to the claim, there was no dispute prior to the appointment of the adjudicator. On 9th June 2004, following discussions between the parties, both parties invited Mr. Moore to resign as adjudicator, which he did.
4. On 10th June 2004, the defendant served a further notice of adjudication in the same terms as the earlier notice. Mr. Paul Greenwood was appointed adjudicator by agreement between the parties. The claimant undertook with the defendant not to take any points as to jurisdiction. On 6th July the claimant served its response. In that response, it did take the points as to jurisdiction, as a result of some failure of communication. On 7th July, the defendant's solicitors wrote to the adjudicator and to the claimant's solicitors stating that the defendant accepted the point that the adjudicator did not have jurisdiction on the ground that a relevant dispute between the parties had not arisen prior to the issue of the notice to refer to adjudication, and that it was therefore inappropriate that any further steps should be taken in the adjudication. The adjudicator responded on the same day asking for confirmation, for the avoidance of any doubt, that the adjudication was discontinued and that he should accordingly submit his account to Parkcare (the defendant before me) for time expended on the matter. On 8th July the claimant's solicitors wrote to the adjudicator and to the defendant's solicitors noting that the referring party had discontinued the adjudication, and reserving the claimant's position in relation to the costs of the adjudication. On 9th July the defendant's solicitors wrote to the adjudicator (sending a copy to the claimant's solicitors) confirming that the adjudication was discontinued and that the adjudicator should submit his account accordingly. He did so, and the defendant paid the account.
5. The claimant asked the adjudicator for an award of costs in its favour. The defendant actively opposed that application, without prejudice to a contention on its part that the adjudicator had no jurisdiction to make such an award. The claimant subsequently asked the adjudicator also for a formal order that the claim be dismissed. The adjudicator, having taken counsel's opinion for the purpose, decided that he had jurisdiction to make an award of costs, but did not have jurisdiction to order that the claim be

dismissed. He imparted his decision to the parties on 12th November. The sum of £14,643.44 mentioned above constituted the additional fees of the adjudicator incurred after the discontinuance of the substantive adjudication.

6. The contract between the parties provided, by clause 9.2 of CE/99, that the adjudication procedures and the Agreement for the Appointment of an Adjudicator should be as set out in the '*Model Adjudication Procedures*' [MAP] published by the Construction Industry Council current at the date of the reference, save that clause 28 should be deleted and replaced as follows:

"The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another as part of his decision. The Adjudicator may determine the amount of costs to be paid or may delegate the task to an independent costs draftsman".

It is common ground that the reference to clause 28 of the MAP should be a reference to clause 29. The other relevant provisions of the MAP are these:

1. *The object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the Contract and this procedure shall be interpreted accordingly.*
 8. *Either Party may give notice at any time of its intention to refer a dispute arising under the Contract to adjudication by giving a written Notice to the other Party. The Notice shall include a brief statement of the issue or issues which it is desired to refer and the redress sought. The referring Party shall send a copy of the Notice to any adjudicator named in the Contract.*
 20. *The Adjudicator shall decide the matters set out in the Notice, together with any other matters which the Parties and the Adjudicator agree shall be within the scope of the adjudication.*
 30. *The Parties shall be jointly and severally liable for the Adjudicator's fees and expenses.....but the Adjudicator may direct a Party to pay all or part of the fees and expenses. If he makes no such direction, the Parties shall pay them in equal shares. The Party requesting the adjudication shall be liable for the Adjudicator's fees and expenses if the adjudication does not proceed.*
7. The notice of adjudication sought damages and the defendant's costs of the adjudication pursuant to clause 9.2 of CE/99 plus a decision of the amount of those costs.
8. I consider first the effect of the MAP agreement. The question turns on the words "*as part of his decision*" in clause 29 as amended. Mr. Francis Tregear Q.C. submitted that once the adjudication was discontinued, the adjudicator ceased to have any jurisdiction in relation to the dispute. In particular, he had no jurisdiction under clause 29 to direct payment of legal costs. That could be done only as part of his decision. The word "*decision*" referred to the decision of the matters set out in the notice. An award of costs could not be a decision on its own.
9. Mr. Ronald Walker Q.C. submitted that the words "*as part of his decision*", or at any rate the words "*part of*" were otiose. Given that the agreement empowered the adjudicator to award costs, the parties to the agreement could not be taken to have intended, he submitted, that the referring party could discontinue an adjudication, perhaps just before the giving of a decision which the party believed would be against him, thereby leaving the other party without any remedy for the recovery of its costs. In litigation, discontinuance was subject to rules which enabled the other party to recover its costs if appropriate. Mr. Walker accepted that there was nothing to stop a referring party to an adjudication from abandoning it. In my judgment, nothing turns on the use of the word discontinuance. A referring party can discontinue an adjudication. The question is what are the consequences. Mr. Walker submitted that the abandonment of a claim did not remove the jurisdiction of the adjudicator to decide the dispute (though he did not need to decide it) or to make an award of costs. The adjudicator evidently reached the conclusion (in my judgment rightly) that he had no jurisdiction to decide the dispute, since he expressly concluded that he did not have jurisdiction to order that the claim be dismissed.
10. Mr. Walker relied on the speech of Lord Hoffman, with the reasoning of whom Lord Hope of Craighead and Lord Clyde agreed, in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 913, where he said
- "The meaning which a document..... would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what*

the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. "

Mr. Walker submitted that a conclusion that the parties had agreed that a referring party could cause the opposing party to incur heavy costs and then prevent that party, by the expedient of discontinuing the adjudication, from having an opportunity of recovering those costs was a startling conclusion. The agreement should be construed in such a way as to avoid it. What Lord Hoffman said in the passage quoted above made it possible so to construe the agreement.

11. In my judgment, part of the relevant background is this. The model terms relating to adjudication contained in S.I. 1998 No. 649 operate as implied terms of any construction contract which does not contain express terms providing for adjudication. The model terms do not provide for the recovery of the costs incurred by either party in prosecuting or defending a claim made in an adjudication. Thus Parliament has not thought it essential for any adjudication agreement to provide for the recovery of costs. I do not consider it a startling conclusion that an adjudication agreement should contain a provision which operates to enable a party to recover its costs in limited circumstances, such as where the matter goes to a decision of the adjudicator on the dispute referred to him. In my judgment, the parties using the words of clause 29 against the relevant background would reasonably have been understood to mean the meaning of the words. That is, the parties meant what the words mean, to adopt the distinction made by Lord Hoffman. Or, as I would prefer to put it, the meaning of the document appears, in this case, from the plain meaning of the words in their context.
12. In my judgment, the meaning of clause 29 of the document is clear. The decision of the adjudicator is his decision of the matters set out in clause 20. It is only as part of that decision that he can direct the payment of legal costs. In reaching that conclusion, I have not so far considered clause 1. That clause provides that the procedure is to be interpreted on the basis that the object of adjudication is to reach an inexpensive decision. Thus in my judgment the words in clause 29 must be interpreted on the basis that the costs in question are likely to be inexpensive (a false basis in this case, but the meaning cannot depend on the particular case). That only strengthens the conclusion I have reached.
13. The adjudicator did not make a decision on the matters set out in the notice. Thus the effect of clause 29 was that he had no jurisdiction to decide the question of liability for costs.
14. Mr. Walker submitted that the contract contained an implied term that the adjudicator should have power to make an order for the payment of costs by one party to the other notwithstanding that the referring party had purported to discontinue the reference. It was necessary to imply that term in order to give business efficacy to the contract. Alternatively, the term should be implied because it represented the obvious intention of the parties. If an adjudication is going well for the applicant, the respondent cannot stop the adjudication. Thus it would be unfair if the applicant could stop the adjudication if it were going badly for the applicant.
15. Whether the business efficacy criterion and the obviousness criterion are alternative or cumulative was the subject of submissions before me. *Chitty on Contracts* 29th ed., paragraph 13- 004, submits that they are alternative grounds. In the majority judgment of the Privy Council in *B.P. Refinery (Westernport) Pty. Ltd. v. President, Councillors and Ratepayers of Shire of Hastings* [1978] 52 A.L.J.R. 20, 26 they are treated as cumulative, though possibly overlapping. It is unnecessary for me to decide the point. Mr. Tregear referred me to *Philips Electronic Grand Public SA v. British Sky Broadcasting Limited* [1995] EMLR 472. That was a decision of the Court of Appeal: Sir Thomas Bingham M.R., Stuart-Smith and Leggatt L.JJ. The headnote asserts a holding of the Court of Appeal to the same effect as the remarks of the majority of the Privy Council in the *B.P. Refinery* case in support of the proposition that the criteria are cumulative. But that proposition, in so far as it relates to the implication of terms into commercial contracts, was not in issue (see p. 480). The passage in the judgment of the Court of Appeal upon which Mr. Tregear relied was this:
The question whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of

hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.

16. A term will not be implied in order to give business efficacy to a contract unless it is necessary to prevent such failure of consideration as cannot have been within the contemplation of either side (per Bowen L.J. in *The Moorcock* (1889) 14 P.D. 64, 68). In my judgment, the implied term proposed by Mr. Walker clearly falls short of that strict requirement. A term will not be implied on the ground of obviousness unless the need for implication of the term is so obvious that it goes without saying. It is not sufficient that the term proposed should express an obvious duty of a party or represent obvious good practice. It must be obviously implicit in the contract. Again, in my judgment the proposed term falls short of that requirement.
17. Mr. Walker submitted that the defendant was estopped from asserting that the adjudicator lacked jurisdiction. He said that having (a) initiated an adjudication under the contract, (b) concurred in the appointment of an adjudicator, and (c) prosecuted the adjudication thereafter, and thereby caused the claimant to incur costs in the defence of the referred claim, the defendant was estopped or otherwise precluded from asserting that the adjudicator lacked jurisdiction. Mr. Walker relied on a decision of Judge Humphrey Lloyd Q.C. in *Griffin v. Midas Homes Ltd.* (2000) 78 Con. L.R. 152, 159. In that case an adjudicator was held to have had authority to decide some of the questions put before him, but not others. Only the party that sought adjudication was liable for the adjudicator's fees, expenses and costs in so far as they related to the matters which were outside the adjudicator's jurisdiction.
18. In my judgment, *Griffin's* case is not in point. It is not a case of estoppel or preclusion. It was not the party that sought adjudication that asserted lack of jurisdiction. Here, the defendant's case is that the adjudicator lacked jurisdiction after the claim was discontinued. The defendant has paid the adjudicator's costs in respect of the period before that event. The defendant's former assertion, or acceptance, that the adjudicator lacked jurisdiction before the discontinuance is irrelevant.
19. In further support of his submission Mr. Walker relied on the judgment of Robert Walker L.J. in *Oliver Ashworth (Holdings) Ltd. v. Ballard (Kent) Ltd.* [1999] 2 All E.R. 791, 802 where he said obiter "*The principle that a party to litigation cannot 'approve and reprobate' (or 'blow hot and cold') does sometimes curtail that party's theoretical freedom to plead wholly inconsistent cases as alternatives....It seems to me at least arguable that by demanding and suing for rent the landlord was unequivocally treating the tenant as not being a trespasser, and that the subsequent amendment of the statement of claim to plead an alternative and inconsistent case should not be allowed to operate retrospectively so as to make the tenant's occupation unlawful....I would regard it as an unfair result if in the circumstances of this case the tenant were liable to pay double rent under the 1737 Act as a trespasser in respect of a period when the landlord was, in correspondence and in pleadings, vigorously contending that the tenant was not a trespasser.*"

I was referred to *The Modern Law of Estoppel* by Elizabeth Cooke, p.67, footnote 68, which refers to *H.B.Property Developments Ltd. v. Secretary of State for the Environment* (1998) 78 P. & C.R. 108, CA per Aldous L.J. at p.117:

The doctrine of election is one where a party is held to an informed decision. It is not to be confused with estoppel or acquiescence where the court looks at the actions of both parties and ascertains whether it would be unconscionable for one party to take an action....It is a practical doctrine which requires a person who takes a course of action with full knowledge of his right to stand by his decision. He cannot blow hot and cold.

The basis of this part of Mr. Walker's argument must be that by doing the things identified by the letters (a), (b) and (c) in paragraph 17 above, the defendant elected to treat the adjudicator as having jurisdiction, and cannot now go back on that election. In my judgment, the defendant did no more than elect to treat the adjudicator as having jurisdiction in accordance with the contract. The defendant was not thereby electing or promising not to exercise any power it might have to discontinue its prosecution of the adjudication. Thus if I am right in concluding that the contract, in the events which happened, conferred no jurisdiction on the adjudicator to decide the question whether the defendant was liable for the claimant's costs, this part of Mr. Walker's argument does not avail the claimant.

20. Mr. Walker cited section 23 of the Arbitration Act 1996, which provides that in the absence of a contrary agreement, one party to an arbitration cannot unilaterally revoke the authority of the arbitrator. But no such provision governs adjudication.
21. Finally, Mr. Walker submitted that it was a term of the contract that a party would not invoke the adjudication procedure save where there was a dispute or difference properly referable to adjudication and justiciable pursuant to its notice. Clause 9.2 of CE/99 provided that any dispute or difference arising out of the contract might be referred to adjudication. Thus the contract entitled a party to invoke the adjudication procedure only where there was a dispute or difference arising out of the contract. It followed that to purport to do so where there was no existing dispute or difference was an action that that party was not entitled to take under the contract. That is where the argument begins to go wrong, in my judgment. The statement is strictly accurate; but “*not entitled*” is to be distinguished from “*disentitled*” or “*forbidden*”. Sure enough, the argument goes on to assert that the action was therefore a breach of contract. That is a non sequitur.
22. Mr. Walker further submitted that the term mentioned in paragraph 21 above was an implied term of the contract. He again relied on the business efficacy and obviousness criteria. As to business efficacy, he submitted that without such a term a party could cause the other party to participate in an adjudication and incur the costs of so doing where the adjudicator had no jurisdiction to award costs because there was no dispute. I accept that that would be an undesirable state of affairs and is not authorized by the contract. But the same might be said of many things, relevant or irrelevant to the subject-matter of the contract, not all of which could arguably be said to be contraventions of implied terms. This proposed term in my judgment fails to satisfy the criterion of business efficacy. As to obviousness, it is of course obvious that a person should not invoke adjudication when he knows that there is no dispute. It is by no means obvious that he should not invoke adjudication when he believes, wrongly as it turns out, that there is a dispute. But obvious or not, it is by no means obvious that a prohibition of such activity should be a term of the contract. It thus fails to satisfy the obviousness criterion.
23. Finally in support of the implication of the term in question, Mr. Walker relied on *Griffin v. Midas Homes Ltd.* (2000) 78 Con. L.R. 152, 159, 160, which I have mentioned above. In respect of part of their claim in an adjudication, the claimants failed to comply with the requirements of paragraph 1(3) of the statutory scheme for construction contracts which formed an implied term of the contract between the parties. That failure consisted of a lack of clarity in the notice of adjudication. In relation to that part, Judge Humphrey LLoyd Q.C. held that there was no dispute referable to adjudication. He said at p.160 that the claimants were in breach of contract by their partial failure to comply with paragraph 1(3) of the scheme. None of the relief granted depended on that passing comment. In my judgment, the case is not authority for the proposition that there is an implied term of the contract not to invoke adjudication when there is no dispute.
24. Mr. Walker did not invite me to decide whether there was in fact a dispute or difference between the parties. He submitted that it made no difference whether there was a dispute or difference, perhaps because of the defendant’s acceptance of the point made by the claimant that there was no dispute when the notice was served. There was a suggestion made in passing by Mr. Walker that the defendant’s claim mentioned in paragraph 3 above might have been triggered by a claim on the part of the claimant for its fees, and by implication was not a serious claim. It is thus apparent that the claimant would not have contemplated paying the amount of the claim. There is no suggestion of bad faith on the part of the defendant in making the claim, though it seems that the defendant had little confidence in it. In my judgment, there clearly was a dispute, at any rate when the second notice of referral was given on 10th June 2004.
25. The claim is dismissed.

Mr. Ronald Walker Q.C. (instructed by Squire & Co) for the Claimant

Mr. Francis Tregear Q.C. (instructed by Fladgate Fielder) for the Defendant