**JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM :** TCC : 17th March 2005

1. The claimant applies for summary judgment to enforce the decision of an adjudicator dated 16 January 2005. That decision concerned application for payment number 20. The defendant resists enforcement on the following grounds:
   a. There was no dispute at the time of the reference to adjudication and as such the adjudicator had no jurisdiction to make a valid decision.
   b. The contractual provisions relating to the appointment of the adjudicator were not followed, and this deprives the adjudicator of jurisdiction.
   c. The adjudicator departed from an agreed position between the parties and/or failed to afford the parties the opportunity to comment upon this departure. This was a breach of the rules of natural justice.

**Background**

2. The parties contracted on the JCT Standard Form of Building Contract With Contractor's Design, 1998 edition. That contract incorporated, at clause *39A*, a provision whereby a dispute could be referred to adjudication. It is common ground that the contract is a construction contract within the meaning of HGCRA 1996 and complied with the Act. Nicol Thomas Ltd were the Employer's Agent, engaged by the defendant.

3. The contract provided for the claimant to carry out building work at property owned by the defendant. Work began in about October 2003. During the course of the work, the claimant made various applications for payment and the defendant made various payments. On 28 October 2004 the claimant issued, by email, to Nicol Thomas their application for payment number 20, for work carried out up to and including 28 October 2004, in the gross sum of £748,447.64. Nicol Thomas received that application by e mail. The defendant did not issue any payment or withholding notice and made no payment to the claimant in respect of that application. The defendant notified the claimant that it did not intend to take any payment. The claimant contends that a dispute thereby arose.

4. By notice dated 2 December 2004 the claimant notified the defendant of its intention to refer that dispute to adjudication. The notice of adjudication was posted to the defendant by special delivery to the defendant's usual place of business. Following an application to the RICS, Mr Eric Mouzer was nominated as adjudicator. By letter dated 8 December 2004, Mr Mouzer confirmed his acceptance of the appointment. The notice of referral was served.

5. By letter dated 13 December 2004 Gateley Wareing (solicitors for the defendant GW) denied that the adjudicator had jurisdiction on the ground that the defendant had not previously received the notice of adjudication. Enquires were made and it was learnt that the notice of adjudication had not reached the defendant. On 15 December 2004 Mr Mouzer stated that he did not consider his appointment to be valid, due to non service of the notice of adjudication, and declined to proceed with the adjudication.

6. The claimant prepared a second notice of adjudication, dated 15 December. The claimant's case is that that notice was delivered to the defendant's usual place of business at approximately 13:00 hours on 15 December. The defendant's case is that the notice was not discovered until the following morning, 16 December 2004.

7. At 13:59 hours on 15 December 2004 the claimant sent by facsimile to the RICS a second request for nomination of an adjudicator. The notice of adjudication was faxed to Nicol Thomas and to GW during the early afternoon of 15 December 2004. By letter dated 17 December 2004, the *RICS* re-nominated Mr Mouzer. By letter of that date Mr Mouzer confirmed his acceptance of the appointment. By letter dated 17 December 2004 the claimant re-served its referral notice on the defendant. It is common ground that Mr Mouzer was appointed after the notice of adjudication had been served on the defendant.

8. The defendant challenged the adjudicator's jurisdiction. Mr Mouzer formed the view that he did have jurisdiction and proceeded with the adjudication. By his decision dated 16 January 2005, he decided that the defendant should pay the claimant £169,912.85 plus VAT and that the defendant should pay the adjudicator's fees. The defendant has refused to make that payment.

9. I am referred to the decision of the Court of Appeal in **Thomas-Fredric's (Construction) Ltd v Keith Wilson** [2004] BLR 23, [2003] EWCA Civ 1494. In his judgment, Simon Brown LJ said:
*"The position can I think be summarised in the following 2 propositions. (I) If a defendant to a Part 24 (2) application 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 he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue. (2) Even if the defendant has not submitted to the adjudicator's jurisdiction in that sense, then he is still liable to a Part 24 (2) summary judgment upon the award if the adjudicator's ruling on the jurisdictional issue was plainly right."*

10. It is common ground that the defendant did not submit to the jurisdiction of the adjudicator but, instead, disputed jurisdiction and reserved its position. The defendant's case is that the adjudicator's ruling on the jurisdiction questions was not plainly right.

**Ground 1: There was no dispute at the time of the reference to adjudication and as such the adjudicator had no jurisdiction to make a valid decision.**

11. The subject matter of the adjudication was application for payment number 20. The defendant's primary position is that service by email to Nicol Thomas on 28 October 2004 was not in accordance with the contract, and the application was therefore not validly served in accordance with the contract; until the application had been validly served, there could be no dispute as to that application. Alternatively, if the contract did permit the application to be made by email, the parties expressly agreed at a meeting on 3 September 2004 that the only effective means of communication between the parties would be by fax and letter. Service of application for payment number 20 by email was not in accordance with what the parties had agreed.

12. In a letter dated 23 December from Pyments (a firm of quantity surveyors and dispute resolution consultants acting for the claimant) to Mr Mouzer Pyments state "We concur with GW that no manner or service of documents or notices was specifically stated in the contract and it therefore follows that any such notice or other document shall be given or served by any effective means. We further concur with GW when no address for service is agreed, as is the case here, in accordance with clause 1.5 the only manner of effectively serving the notice or document is hand delivery or service by post to the registered office or principal office." The defendant relies on that paragraph in support of its contention that the claimant accepts that service by email of application number 20 is invalid. I accept the claimant's case, namely that that passage refers only to service of the notice to adjudicate and not to service of other documents.

13. I accept Mr Kennedy's submission that this is not a matter concerning the adjudicator's jurisdiction. The notice of adjudication referred to application number 20 and the clauses which provided for payment to the contractor, then stated as follows: "As a consequence of the foregoing a dispute now exists between the parties on account of the failure of the [defendant] to pay [the claimant] in accordance with the payment provisions of the contract ... A dispute has arisen on the following matters: 1. failure to issue a notice of interim payment; 2. failure to issue a withholding notice; 3 failure to make an interim payment".

14. Accordingly, the adjudicator was asked to decide a dispute regarding the claimant's application number 20 and the amount, if any, of any payment due against that application. In order to decide that dispute, the adjudicator had to decide whether or not the application had been validly made under and pursuant to the contract. The adjudicator expressly stated in this decision that he had decided that the application had been validly made. In my judgment, in doing so he was answering a question which was within his jurisdiction. It is not open to the court to go behind the adjudicator's decision and enquire whether the adjudicator had answered the question correctly. The adjudicator had answered the correct question and his decision was within his jurisdiction.

15. It is therefore not necessary to consider whether application for payment number 20 had been validly served. However, if it had been, I should have concluded as follows.

16. Clause 1.5 of the contract provides:
*"Where the Contract does not specifically state the manner of giving or service of any notice or other document required or authorised in pursuance of this Contract such notice or other document shall be given by any effective means to any agreed address. If no address has been agreed then if given or served by being addressed to, pre-paid and delivered by post to the addressee's last known principal business address or, where the addressee is a body corporate, to the body's registered or principal office, it shall be treated as having been effectively given or served."*

Although the contract includes an annex containing Supplementary Provisions for electronic data exchange, the parties had not incorporated those provisions into their contract.

17. In my judgment, the first sentence of clause 1.5 permits the parties to communicate by any effective means to an agreed address. The second sentence of clause 1.5 provides a deeming provision with respect to service, ie if service is not effected to an agreed address then, by complying with the provisions of the second sentence of clause 1.5, a party is able to prove service.

18. Minutes of a pre-contract meeting held on 4 June 2003 record the sort of matters one would expect to see discussed at such a meeting. Appended to the minutes of that meeting is a schedule of contact details for the claimant and Nicol Thomas, including email addresses. This indicates that there was an expectation that the parties communicate by e mail. It appears that in fact there was regular e mail communication between the claimant and Nicol Thomas. In my judgment, in those circumstances, the sending of application number 20 by email was communication by an "effective means" to an agreed address ie to the email address which had been identified in the schedule to the minutes of the pre-contract meeting. It is not disputed that Nicol Thomas in fact received the application. Subject to the question of matters discussed at the meeting on 3 September 2004 in my judgment service of application number 20 by email was effective.

19. It appears that the meeting on 3 September 2004 was attended by Mr Lander and Mr Ireland of Nicol Thomas, Mr Redpath of the defendant and Mr Sandels, Mr Slater and Mr Semke (or Smeke) for the claimant. I have seen statements from Mr Lander, Mr Ireland, Mr Redpath and Mr Sandels. It is common ground that methods of communication were discussed. Mr Sandels' evidence is that the meeting was held on a without prejudice basis, no minutes were taken and all discussions were said to be "off the record". I have seen no notes of that meeting. There is a difference between the witnesses as to the scope of the discussion and what was agreed. Mr Sandels states that that he was concerned that documentation sent between parties by email might not be read, and this might create difficulties. The defendant was dealing directly with the claimant rather than through Nicol Thomas. His evidence is that he requested that all instructions be issued by either fax or post by Nicol Thomas. Mr Sandels said that he had not intended to infer that communication by email would not be used. He denies that there was express or implied agreement to that effect. Indeed, he states that Nicol Thomas continued to use email as a means of communication. The statements of Messrs Lander, Ireland and Redpath are in precisely the same wording -indicating that the statements are not in the witnesses' own words. That is a matter of some concern. Their evidence is that they agreed that there would be no communication by email.

20. For the purposes of an application under Part 24, it would not be right for me to attempt to choose between the evidence of Mr Sandels and that of Messrs Lander, Ireland and Redpath. Notwithstanding the concerns as to the similarity of the defendant's witnesses' statements, it cannot be said that there is no credible evidence from the defendant's witnesses that agreement was reached at that meeting as to service of all documents, and not only as to instructions to the claimant. It cannot be said that the defendant has no real prospect of persuading a court of those matters.

21. Accordingly, had I not concluded that the question whether application number 20 had been validly served was a matter for the adjudicator, I should have concluded that the defendant had a real prospect of successfully defending the claim on the ground that no dispute had arisen because the adjudicator did not have jurisdiction on the basis that application for payment number 20 had not been validly served because it had been served in a manner contrary to agreement reached at the meeting as to service of documents.

**Ground 2: The contractual provisions relating to the appointment of the adjudicator were not followed, and this deprives the adjudicator of jurisdiction.**

22. The defendant's case is that the claimant did not comply with the adjudication procedure set out in the contract. The contract required notice of adjudication to be given to the defendant before the claimant applied to the RICS for nomination of an adjudicator.

23. The claimant's primary case is that notice of adjudication was served before the claimant applied to the RICS. In any event, the contract does not preclude an application being made in advance of the notice of adjudication being served. Further, any defect in the procedure was de minimis, was not material to the process, caused no prejudice to either party and does not affect the validity and enforceability of the decision.

24. The relevant term in the contract is clause 39A. Clause 39A.2 provides:

*"The Adjudicator to decide the dispute or difference shall be either an individual agreed by the parties or, on the application of either party, an individual to be nominated as the Adjudicator by the person named in Appendix 1 ("the nominator"). Provided that:*

*39A 2.1. .*

*39A 2.2 where either Party has given notice of his intention to refer a dispute or difference to adjudication, then ... any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer ... "*

25. Miss Morris, a secretary at Pyments, explains, in a witness statement, that on the morning of 15 December 2004 she was asked to hand deliver a notice of adjudication to the defendant. She had been involved in dealing with the initial notice of adjudication, dated 2 December 2004. She re-dated the original notice and then went to the defendant's offices on foot arriving at about 13:00 hours. She put the notice through the letterbox to the front door of 2 Wheelwright Court, the defendant's place of business. She returned to Pyments office. immediately after lunch she began to process the application for nomination to the *RICS.* The facsimile record shows that that application to the RICS was timed at 13:58 hours. She then faxed copies of the adjudication notice to Nicol Thomas (timed at 14:14 hours) and GW (timed at 14:38 hours). In her statement in these proceedings, Miss Briggs, director of the defendant, states that she attended at 2 Wheelwright Court on 15 December 2004, arriving late morning. She left the office at lunch time then returned for the afternoon, leaving at some time between 17:30 and 17:45 hours. Her evidence is that no notice had been delivered to 2 Wheelwright Court by the time she left. Her evidence is that the notice was discovered in the hallway on the following day, 16 December 2004 (though she does not say how or by whom the notice was found).

26. Comparison of the original notice of adjudication (dated 2 December 2004) and the later notice, dated 15 December 2004, shows that Miss Morris did more than simply change the date. The original notice is described in the heading as "notice of adjudication sent by registered post". The later notice is described in the heading as "notice of adjudication sent by facsimile and post".

27. There is credible evidence from Miss Briggs that the notice of adjudication was not found until the morning of 16 December 2004. The witnesses' evidence has not been tested in cross examination. For the purposes of an application under CPR Part 24. *l* am unable to prefer the evidence of Ms Morris to that of Miss Briggs. It cannot be said that the defendant has no real prospect of persuading a court that they did not receive the notice until 16 December 2004.

28. The claimant accepts that notice of adjudication is required before appointment of an adjudicator. Jurisdiction springs from the notice, so appointment must be after the notice. The claimant's case is that the nomination procedure may begin before the notice of adjudication is served. There is nothing in the contract or HGCRA 1996 which prevents nomination before notice of adjudication.

29. The defendant relies on **IDE Contracting Ltd v R G Carter Cambridge Ltd** [2004] BLR 172, [2004] EWHC 36 (TCC). In that case, the question was whether or not the appointment of the adjudicator had been validly made. The parties there were subject to the Scheme, which expressly provides that *following* the giving of notice of adjudication, the referring party shall request the named person to act as adjudicator, or if none is named, then to approach the nominating body. IDE, however, contacted

the nominating body before serving the notice of adjudication. His Honour Judge Havery QC decided that non-compliance with the Scheme had deprived the adjudicator of authority, even though the responding parry had suffered no prejudice. In this case, the contract provides for a different procedure from that required by the Scheme. As the basis for the decision in IDE was construction of the provisions of the Scheme, it is of little assistance to me in this case.

30. In my judgment, clause 39A.2.2 does not stipulate that an application for nomination of an adjudicator must be made after notice of adjudication has been given. The word "then" in clause 39A.2.2 is used as a stylistic device to link clauses. The word is used in that way elsewhere in the contract. It is not, in my judgment, used in clause 39A.2.2 in a chronological sense, that is, it does not mean that a party must first serve a notice then apply to the nominator. I accept Mr Kennedy's submission that the purpose of that clause is to set out a procedure for appointment of an adjudicator. It does not stipulate that any application for nomination must be made after the notice of adjudication has been served.

31. I derive support for that view from the wording of section 108 (2) of HGCRA 1996. which provides:
*"(2) The contract shall:*
*(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication*
*(b) provide a timetable with the object of securing the appointment of the Adjudicator and referral of the dispute to him within 7 days of such notice."*

32. Section 108 is not prescriptive as to the timing of any nomination. The requirement is for the contract to aim to secure appointment within 7 days of the notice of adjudication. The application to the nominator simply leads to the nomination of an individual as adjudicator. The nominated person then indicates whether or not she or he is willing to accept appointment. The referring party confirms the appointment by sending the notice of referral to the person so nominated.

33. The defendant refers to the (regrettable) tendency for adjudication by ambush. Mr Evans submits that, to accept the claimant's case would make it even easier for referring party to ambush a responding party by effectively reducing the period of time during which a responding party must respond. Section 108 of the Act requires only a timetable which has the object of securing the appointment within 7 days of the notice of adjudication. Implicit within that is that an appointment may be made at any time within the 7-day period. To find for the claimant in this case would not in my judgment have the effect of giving more ammunition to those who indulge in ambush adjudication. In any event, in this case, the defendant knew, from the previous failed attempt at adjudication (as part of which the defendant had received the notice of referral) that the claimant intended to adjudicate and the nature of the claim against them. Accordingly, the question of ambush would appear not to arise here.

34. In my judgment, the claimant did not go outside the procedure envisaged by the contract. No prejudice has been suffered by the defendant. The appointment of Mr Mouzer as adjudicator was validly made.

*35.* If it were necessary, the claimant relied on Clause 39A 5.6*: "Any failure by either Party to .comply with ... any provision in or requirement under clause 39A shall not invalidate the decision of the Adjudicator."*

36. I accept Mr Evans' submission that the effect of that clause is not such as to validate the appointment of an adjudicator invalidly appointed: its scope is limited to procedural steps within a validly constituted adjudication. That clause would not assist the claimant.

**Ground 3: The adjudicator departed from an agreed position between the parties and/or failed to afford the parties the opportunity to comment upon this departure. This was a breach of the rules of natural justice.**

37. Mr Mouzer requested information before he made his decision. By letter dated 14 January 2005, addressed to both parties, he referred to article 3 in the contract, and quoted part of the text of that article. He asked the claimant to provide evidence as to which applications for interim payment had been made to Nicol Thomas, how they had been made and the individual to whom they had been made. By their reply dated 14 January 2005, Pyments explained that all applications (numbered 1 to 20 inclusive) had been made to Nicol Thomas, that a total of 14 applications had been made by facsimile and that the application numbered 20 had been made by email. The remaining 5 applications, it was

said, had been delivered either by post, by facsimile, by email, by hand, or possibly a combination of these. All had been expressly addressed to Mr Chris Lander of Nicol Thomas. GW replied, also by letter dated 14 January, stating that applications numbered I to 19 had been received by fax only and that no application for payment, prior to that numbered 20 had been received by emaiL

38. In his decision, Mr Mouzer dealt with the question of service of application for payment number 20. He referred to the defendant's arguments and stated that the defendant's contention "ignores the position under article 3. My interpretation of the contract in regard to notices or applications given to [Nicol Thomas] is that they are still to be given in accordance with clause 1.5 but given that all applications for payment prior to the application the subject of this reference had been made to Mr Lander of Nicol Thomas ... it would seem to me that it was first part of clause 1.5 which applies thereto ... in this instance by conduct (if by no other means) it was effectively agreed that all applications would be submitted to [Nicol Thomas] ... the requirement is then that the application is served by any effective means. Effective service would in my view include any method which leads to the intended recipient being in receipt of the application; that would potentially include the use of email." He went on to explain that he accepted that the claimant's email of 28 October was an effective method of service of such application upon Nicol Thomas and was therefore effectively served.

39. I reject the defendant's submission that Pyments had agreed the procedure for service of all documents or that this was common ground between the parties. The passage in Pyments' letter of 23 December 2004, which I have quoted, refers only to service of the notice of adjudication and appears, as the claimant submits, to be a comment in response to the adjudicator's conclusion as to service of that notice. In any event, Pyments' view of the true construction of the contract is irrelevant. It is not suggested that the defendant has altered its position to its detriment as a consequence of the statement in that letter. The defendant's submissions based on what they describe as an agreed position or as common ground as to the method of service therefore lack force. The adjudicator therefore did not, as the defendant submits, ignore the "agreed position" with respect to service of application for payment number 20.

40. The circumstances here are very different from those in **Balfour Beatty v London Borough of Lambeth** [2002] BLR 288, [2002] EWHC 597 (TCC), to which my attention has been drawn. Here, unlike in that case, the adjudicator did not construct one party's case. He did not, for example, obtain information from other sources and fail to notify the parties that he had done so. It is the case that Mr Mauzer did not mention in advance that he was considering the question whether there had been agreement by conduct as to service of applications for payment. However, that, in my judgment, did not amount to a breach of the rules of natural justice in the context of this adjudication. in the correspondence to which I have referred, the adjudicator made reference to Article 3. He invited comment from the claimant. In fact, as can be seen, the defendant commented also. Both parties knew that the adjudicator had Article 3 in mind and had had the opportunity to comment before he made his decision. The adjudicator invited submissions. He incorporated no new material. He made no investigation of his own. By clause 39A.5.5 of the contract, the adjudicator is permitted at his absolute discretion to take the initiative in ascertaining the facts and the law. That is what Mr Mouzer did, and he did so on the basis of submissions made and information given by the parties. He was entitled to do so. In my judgment, there was not a breach of the rules of natural justice here.

41. Mr Evans made passing reference to another adjudication in relation to this contract. I have no details and have received no submissions as to the effect of any other adjudication.

**Conclusion**

42. For the reasons I have given the defendant has no real prospect of successfully defending the claim. The claimant is entitled to summary judgment to enforce the adjudicator's decision.

Mr Stuart Kennedy of Counsel (instructed by Shoosmiths) for the Claimant

Mr Robert Evans of Counsel (instructed by Gateley Wareing) for the Defendant