CA an appeal from TCC, HHJ Richard Havery QC, before The Rt Hon Lord Justice May, The Rt Hon Lord Justice Keen and The Rt Hon Lord Justice Scott Baker, 9th February 2006.

JUDGMENT : LORD JUSTICE MAY:

Introduction

1. This is an appeal from a judgment and order of HH Judge Richard Havery QC, sitting in the Technology and Construction Court, of 25th July 2005. The judge gave permission to appeal on two of four proposed grounds of appeal. Chadwick LJ gave permission on the other grounds.

2. The issue before the judge was whether a contract for adjudication of disputes between the claimants, John Roberts Architects Limited, and their developer clients, Parkcare Homes (No. 2) Limited, empowered the adjudicator to direct the payment by Parkcare to Roberts of legal costs and expenses of the adjudication, when Parkcare had withdrawn the substantive claim which they had referred for adjudication before the adjudicator had decided it. The issue turned on the construction of the agreement for adjudication. The judge decided that the adjudicator was not empowered to award Roberts their costs. Roberts appeal against this decision.

Adjudication

3. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 gives a party to a written construction contract the right to refer a dispute arising under the contract for adjudication under a procedure complying with the section. Subsections (1) to (4) stipulate requirements for compliance. If the contract does not so comply, the adjudication provisions of the Scheme for Construction Contracts apply. This is a statutory scheme made by regulations under section 114(1) of the 1996 Act. So a written construction contract has to provide for adjudication. In default of compliant contractual provisions, the statutory scheme applies.

4. The Parliamentary intention in making adjudication obligatory for construction contracts was described by Dyson J (as he then was) in ***Macob Civil Engineering Limited v Morrison Construction Limited*** (1999) BLR 93 at 97. It was to provide a speedy mechanism for settling disputes under construction contracts on a provisional interim basis. The statutory provisions have in general been salutary. But it is common experience that the policy of the statute is sometimes not achieved – as when a large dispute unrelated to immediate cash flow and not suitable for speedy resolution is oppressively squeezed into the short timetable required by the Act; or when what was intended to be an inexpensive procedure generates very large costs. It is not suggested that the first of these applies to Parkcare's reference to adjudication in the present case. But the reference certainly did generate very large costs.

The agreement for adjudication

5. The parties entered into a compliant contract. So we are concerned with the construction of their contract. The statute and the terms of the statutory scheme are relevant only as context. Insofar as the judge may have referred to the terms of the statutory scheme as a direct aid to construction of the contract, I do not think he was correct. But that is a small point.

6. The parties incorporated into their contract, with one crucial amendment, the standard printed terms of the Construction Industry Council's Model Adjudication Procedure, 3rd Edition. The incorporation and the crucial amendment derived from their entering into the RIBA Conditions of Engagement for the Appointment of an Architect (CE/99). This deleted what is agreed to be Clause 29 of the CIC's Model Adjudication Procedure and replaced it in terms which I shall shortly set out. Insofar as it matters, the parties adopted a printed compliant model procedure adapted for use in a contract for the appointment of architects.

7. Clause 1 of the Model Adjudication Procedure records that the object of adjudication is to reach a fair, rapid and inexpensive decision, and that the procedure should be interpreted accordingly. Clause 8 provides that either party may give written notice of its intention to refer a dispute to an adjudication. The notice should include "a brief statement of the issue[s] or issues which it is desired to refer and the redress sought." By clause 14, the subsequent statement of case is confined to the issues raised in the notice. Clause 20 provides that 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." Clause 27 empowered the adjudicator to direct the payment of interest.

8. Clause 29, in its standard unamended form, provided that the parties should bear their own costs and expenses incurred in the adjudication. Clause 9.2 of the RIBA Standard Conditions – the clause which incorporated the Model Adjudication Procedure – deleted this clause 29 and replaced it with: *"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."*

The construction of this clause is central to this appeal.

9. The Model Adjudication Procedure has some provisions which anticipate the possibility that an adjudication may come to an end before the adjudicator has decided the substantive dispute. These mainly relate to the adjudicator and his entitlement to fees and expenses. Clause 23 provides that the adjudicator may resign at any time on giving notice in writing to the parties. Clause 11 enables the parties to effect the nomination of a replacement adjudicator, if the adjudicator is unwilling to act or fails to reach his decision within the time required by the procedure. Clause 30 provides that the parties are to be jointly and severally liable for the adjudicator's fees and expenses, but that the adjudicator may direct a party to pay all or part of these. If he makes no direction, the parties are to pay them in equal shares. The party requesting the adjudication is liable for them, if the adjudication does not proceed.

Facts

10. On 11th May 2004, an associate company writing on behalf of Parkcare – I shall refer for convenience to this company also as Parkcare – wrote to Roberts saying that Parkcare had suffered a loss of £1,343,834 as shown on an attached schedule as a direct consequence of what was believed to have been Roberts' poor performance. They said that, in the absence of an acceptable offer of settlement, a dispute would exist and they would refer the matter to adjudication. We were told that there had been a previous reference to adjudication concerning Roberts' fees.

11. On 21st May 2004, Parkcare sent a formal Notice of Adjudication saying that they would seek the appointment of an adjudicator. The notice said that Parkcare claimed damages, the nature of which was briefly described. It also said that Parkcare claimed *"costs in the adjudication including costs incurred from [consultants] and the appointment fee."* The Notice also stated, or restated, that Parkcare "is entitled to recover from [Roberts] its legal costs of the adjudication pursuant to clause 9.2 of CE/99 plus a decision as to what those costs amount to."

12. An adjudicator, Mr Moore, was appointed; but he quickly resigned. Parkcare gave a second Notice of Adjudication in the same terms as the first, and Mr Greenwood was appointed adjudicator. Roberts resisted the claim made in the adjudication and spent a lot of money preparing and serving a voluminous response. In it, they said that all heads of claim were denied and should be dismissed, and they contended that all their costs should be paid by Parkcare. So each party was expressly claiming legal costs against the other under an agreement for adjudication which empowered the adjudicator to direct the payment of legal costs and expenses "as part of his decision". In the different circumstances of an adjudication under the statutory scheme, HH Judge Bowsher QC held in ***Northern Developments (Cumbria) Limited v Nichol*** **(**2000) BLR 158 that, when each party had claimed costs against the other, they had given the adjudicator jurisdiction to decide a claim for costs by implied agreement. Mr Ronald Walker QC, for Roberts, did not rely on an equivalent line of submission in this appeal. He was, in my view, correct to refrain from doing so. This appeal turns on the construction of the Model Adjudication Procedure, which contains, as the statutory scheme does not, a provision as to costs.

13. The adjudication in the present case did not proceed to a substantive decision. On 7th July 2004, Parkcare accepted that the adjudicator did not have jurisdiction and that it was inappropriate for any further steps to be taken in the adjudication. The substantive adjudication came to an end by what the parties each described at the time as discontinuance. Parkcare's reference to the adjudicator lacking

jurisdiction was a muddle and has become a red herring. Roberts had contended in their response that the adjudicator had no jurisdiction because there was no dispute. They had previously agreed, after Mr Moore resigned, not to take this point. There plainly was a dispute, as Judge Havery held. The parties do not contend otherwise. So up to the point when Parkcare withdraw, the adjudicator had such jurisdiction as the Model Adjudication Procedure as amended gave him.

14. Parkcare having discontinued or withdrawn their claim, they then paid the adjudicator's fees and expenses up to the time of their discontinuance, accepting that clause 30 of the Model Adjudication Procedure obliged them to do so. Not surprisingly, Roberts claimed their legal costs and asked the adjudicator to direct that Parkcare should pay them. Parkcare said that the adjudicator had no power to make such a direction, because the amended clause 29 did not, they said, empower the adjudicator to direct payment of legal costs other than "as part of his decision". "[H]is decision" meant his substantive decision, which he was not going to make because they had discontinued. The clause did not give power to make an order for costs alone, other than as part of a substantive decision.

15. The parties then spent a lot more money before the adjudicator arguing whether he had power to quantify and direct the payment of Roberts' legal costs. He decided, upon the written advice of Michael Black QC, that he did have power. He decided that Roberts were entitled to recover £87,131.04 plus any VAT. He also directed that Parkcare should be responsible for the payment of his fees (including counsel's fees) amounting to £14,643.44 including VAT. This amount was the adjudicator's fees and expenses resulting from the proceedings, and his decision, about costs. Parkcare had themselves already paid his fees and expenses up to the time of their discontinuance.

16. Mr Black had said in his detailed written opinion that it was a startling proposition that, in any dispute resolution procedure where the parties have contractually agreed that costs may follow the event, that agreement may be defeated by the simple expedient of withdrawing the claim. Mr Tregear QC, for Parkcare, submits that sentiments such as this, adopted by Mr Walker, have no place. You do not, says Mr Tregear, sit under a palm tree and construe agreements to produce a desired result, if the words of the agreement properly understood do not yield that result.

17. Parkcare did not pay the £87,131.04 which the adjudicator had directed that they should pay to Roberts. So Roberts brought these Part 8 proceedings to enforce the adjudicator's costs direction.

The judge's decision

18. The judge held that Parkcare's construction of the amended clause 29 was correct. The adjudicator did not have jurisdiction to direct payment of legal costs other than "as part of" a substantive decision, and there was no substantive decision for the costs direction to be part of. Mr Walker had accepted that a referring party could abandon the claim which had been referred. But he had submitted that the parties to the agreement could not be taken to have intended that the referring party could discontinue an adjudication, perhaps just before the giving of a decision which the party believed would be against him, leaving the other party without any remedy for the recovery of costs. In litigation, discontinuance is subject to rules which enable the other party to recover its costs, if this is appropriate. The same, incidentally, broadly applies to arbitrations by virtue of section 23 of the Arbitration Act 1996, unless the parties acting jointly agree to revoke the authority of the arbitrator.

19. The judge held that a referring party can discontinue an adjudication, but that nothing turned on the use of the word discontinuance. The question was what were the consequences. I agree. Mr Walker is, in my view, correct that, under this version of the Model Adjudication Procedure, Parkcare could abandon and withdraw the claim which they had referred so as to remove the need for the adjudicator to make a decision about it; but not so as to remove unilaterally any jurisdiction which the adjudicator had in such circumstances to direct the payment of costs. I do not understand the judge to have decided otherwise, nor does Mr Tregear so submit. The third ground of appeal to this court, that the judge was wrong to hold that Parkcare were entitled to discontinue the reference to adjudication, takes Roberts nowhere. But the question is whether the adjudicator had power to direct Parkcare to pay Roberts' legal costs, when Parkcare had withdrawn the claim which they had referred. The withdrawal did not diminish the adjudicator's jurisdiction in that respect. The question is what was

the adjudicator's power and jurisdiction in those circumstances. That is a question of construing the agreement.

20. Mr Walker had relied on the very well known passage in the opinion of Lord Hoffmann, with whose reasoning Lord Hope of Craighead and Lord Clyde agreed, in ***Investor's Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 WLR 896 at 913B, 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 grammar; 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: see* ***Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd*** *[1997] AC 749."*

The judge did not find 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. The parties using the words of clause 29 against the relevant background would reasonably have been understood to mean the meaning of the words. The parties meant what the words mean. Or, as the judge preferred, the meaning of the document appears from the plain meaning of the words in their context. There is, I think, an element of tautology here; but certainly the meaning of the document has to be determined in its context.

21. The judge considered the meaning of clause 29 to be clear. He said at paragraph 12 of his judgment: *"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.*

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."

22. The judge rejected a variety of other submissions, some of which Mr Walker renewed before this court, relying on one or more implied terms, estoppel or election. In the light of the view that I take on the construction issue, it is not necessary to consider Mr Walker's submissions in support of the fourth ground of appeal, to the effect that the judge should have held that there was an implied term of the agreement that the adjudicator should have power to direct the referring party to pay the other party's legal costs, if the referring party was entitled to discontinue at will.

Grounds of appeal and submissions

23. Part of the second ground of appeal is that, if clause 29 is to be construed as requiring a substantive decision to support a jurisdiction to direct the payment of legal costs, there was such a decision, that is, the decision that Parkcare were to be responsible for the adjudicator's fees and expenses. It is not, I think, necessary to decide this point. But I regard it as contrived and unattractive. If "as part of his decision" refers only to a substantive decision on the merits of the referred claim, the decision about the adjudicator's fees and expenses in this case was not such a decision. The submission may also be seen as self-suspending, since the decision about fees and expenses used to sustain the power to award the costs were fees and expenses of the adjudicator in deciding that he had power to award the costs.

24. Mr Tregear, in supporting the judge's decision on construction, accepted that it would work both ways. If a responding party to an adjudication under this version of the Model Adjudication Procedure paid a referred money claim in full including interest on the day before the adjudicator was to make his decision, the adjudicator would have no power to direct the responding party to pay the referring party's costs. Mr Tregear says that clause 29 is a complete code providing for the

circumstances in which the adjudicator has power to direct the payment of legal costs. The adjudication procedure is explicitly supposed to be rapid and inexpensive. The parties could have left out the words "as part of his decision", but did not do so. The "decision" is the adjudicator's substantive decision on the matter referred, as indicated by the use of the word in other clauses, especially clauses 20 and 24.

25. Mr Tregear submits that the court has to construe the meaning of the words used. He referred defensively to the well known passage in the opinion of Lord Diplock in ***Antaios Compania S.A. v Salen A.B.*** [1985] 1 AC 191 at 201D, where he said: *"While deprecating the extension of the use of the expression "**purposive construction**" from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flights business commonsense, it must be made to yield to business commonsense."*

Mr Tregear then referred to the commentary on this passage in the judgment of Hoffmann LJ (as he then was) in ***Co-operative Wholesale Society Ltd v National Westminster Bank plc*** [1995] 1 EGLR 97 at 99F as follows: *"This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business commonsense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."*

In the present case, says Mr Tregear, the language is not capable of more than one construction. All ***Antaios*** allows you to do is to choose between two viable meanings. Here there is only one. One of Mr Walker's submissions – that the words "***as part of his decision***" are unnecessary and can be notionally left out – is not a solution. That would be illegitimate rectification.

26. Mr Tregear referred us to a passage from the judgment of Chadwick LJ in ***Bromarin v IMD Investments*** (1999) STC 301 at 310. Chadwick LJ quoted the passage from ***Investor's Compensation Scheme*** to which I have referred and the first instance judge's interpretation of it. He then said: *"The difficulty with that approach is that it is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually exist at the time when the contract falls to be construed are not circumstances which the parties foresaw at the time when they made the agreement. If the parties have foreseen the circumstances which actually arise, they will normally, if properly advised, have included some provision which caters for them. What that provision may be will be a matter of negotiation in the light of an appreciation of the circumstances for which provision has to be made.*

It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'. The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them, and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee.

In the present case it seems to me that that question can be answered without the need to resort to any novel principle of interpretation. But, for my part, I am not persuaded that Lord Hoffmann intended, in the passage in the Investor's Compensation Scheme case (at 912-913) which is so often relied upon, to propound any novel principle. To my mind, he was doing no more than emphasising that words are to be construed in the context of the agreement which the parties are making, having regard to the other provisions in the agreement, and the commercial purpose for which the agreement is made. What is, of course, essential is that the court can be confident, from the other provisions of the agreement and an understanding of its commercial purpose, what meaning the parties did intend the words to bear. That may lead to the conclusion that the words used do not express the meaning which the parties intended, but that will be an exceptional case."

27. Chadwick LJ's discussion of the problem when a contract is construed as contemplating only one of two possible events could be relevant, if the amended clause 29 were to be construed to apply only in the event that the adjudicator made a substantive decision on the merits. But that begs the question – as did Mr Tregear's submission based on this passage – whether the clause is to be so construed. More generally, however, Chadwick LJ's commentary towards the end of the passage which I have quoted is apt. The court has to determine what objectively the parties intended the words in their context to mean.

Discussion and decision

28. I do not agree with the judge and Mr Tregear that the meaning of the amended clause 29 limits the adjudicator's power to direct the payment of legal costs to circumstances in which he makes a substantive contested decision on the dispute referred to him. A statutorily compliant private agreement in a construction contract for adjudication could sensibly provide that each party should bear their own legal costs and expenses. The unamended version of the Model Adjudication Procedure did so. It is, however, commonplace that some construction contract adjudications are fiercely adversarial and expensive. It is commercially unsurprising, if some parties, by adopting a standard form amendment to a standard form, give the adjudicator a jurisdiction to direct the payment of legal costs. It is equally unsurprising if parties, so providing, do not amend the aspirational terms of clause 1 of the Model Adjudication Procedure. The parties no doubt both truly agreed at the outset that one object of adjudication is to try to reach an inexpensive decision. But that does not, I think, have more than very general bearing on the construction of a costs provision which, notwithstanding clause 1, they have in fact agreed. The parties themselves clearly agreed that it would be "fair" – another object of clause 1 – that the adjudicator should have a power to direct the payment of legal costs.

29. To turn to the meaning of clause 29, it would seem to me to be very odd indeed if the parties by their agreement gave the adjudicator power to direct the payment of legal costs, which could be substantial, only if he were to make a substantive contested decision. Other terms of the agreement contemplate that he may not do this. The oddity arises because I can see no reason – nor could Mr Tregear suggest one – why parties, who had agreed that they should be at risk as to the other party's costs, should draw a line where the construction of the agreement contended for draws it. It would mean that either party, having generated legal costs by referring an unmeritorious claim to adjudication, or by responding to a claim with an unmeritorious defence, could throw their hand in at the 11th hour without being at risk of paying the legal costs which their conduct had generated. Why should parties want to agree to draw this particular line? I can see no objectively sensible answer.

30. I do not consider that the words of clause 29 mean this. The very odd meaning contended for and as found by the judge requires clause 29 to be read as if it said: *"The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another, but only as part of his substantive contested decision."*

In my judgment, the more natural meaning of the clause in its context, and certainly the commercially sensible meaning, is that the words ***"as part of his decision***" mean "***as part of what he may decide".*** This is, in my view, what the words against the relevant background would reasonably be understood to mean. A linguistic purist might say that this duplicates a meaning that can be extracted from the antecedent word "***may***". But I do not think that the court is required in this instance to attribute an *additional* meaning to the last five words of the sentence, when to do so produces a very odd and uncommercial result – a result which the parties, by not including the words "***but only***" and "***substantive contested***", have not clearly expressed.

31. In my judgment, therefore, the judge was persuaded to adopt the wrong construction of clause 29, and I would allow this appeal.

32. It is therefore not necessary to examine a further possibility, not argued before the judge, nor advanced initially by Mr Walker. The argument would be as follows. Clause 20 provides that the adjudicator shall decide the matters set out in the notice. Parkcare's notice made a claim for legal costs. So the decision which clause 20 required the adjudicator to make included a decision as to legal costs.

This carried through to the amended clause 29 so that "decision" in clause 29 included a decision as to legal costs, which did not need to depend on the adjudicator making a substantive contested decision on Parkcare's damages claim. Mr Tregear's response to this was to point out that Parkcare had claimed, in one of the two places where they did so, legal costs "***pursuant to clause 9.2 of CE/99***". So they were limiting their claim to costs which clause 29 would entitle them to. The argument may be seen as circular. If it had been necessary to do so, I should have been strongly inclined (a) to read "***decision***" in amended clause 29 as having the content to be derived from clause 20; and (b) to read Parkcare's notice as embracing an orthodox general claim for legal costs, not limited only to circumstances in which the adjudicator gave a substantive contested decision on their damages claim.

Lord Justice Keene: I agree.

Lord Justice Scott Baker: I also agree.

Ronald Walker QC (instructed by Messrs Squire & Co) for the Appellant
Francis Tregear QC (instructed by Messrs Fladgate Fielder) for the Respondent