# ADJUDICATION CASE SUMMARIES A

**LAST UPDATED 11th DECEMBER 2008**

**A De Gruchy Holdings Ltd v House of Fraser (Stores) Ltd [2001] TCC. HT 00 -186 : Lawtel AC 0101484**

The claimant provided construction management services to HoF pursuant to letters of intent. A dispute arose as to remuneration and here the claimant sought to recover on a quantum meruit evaluation of the management services provided. HoF asserted amongst other things that there was no evidence to substantiate the claims. The court held that information available at a prior adjudication provided substantiated evidence which was available to both parties and to the court. The adjudication only covered a short period of time and here the claimant sought to recover outstanding sums in relation to the remainder of the project. As to the jurisdiction of the court to determine income, ***Beaufort Development (NI) Limited v Gilbert-Ash NI Ltd*** [1999] AC 266 applied, in as much as there was an arbitration clause in normal form enabling the court to open up and reexamine certificates etc.

His Honour Judge David Wilcox. TCC. 22nd May 2001.

**A v. B [2002] ScotCS 325**

This concerned an action for the enforcement of an adjudicator's decision. A term of the contract (Construction Sub-contract based on the SBCC Scottish Building Contract with Contractor's Design September 1995 Revision as amended by a standard form of sub-contract produced by the defender) precluded court action until the end of the project. Lord Drummond Young held that contract terms cannot exclude HGCRA adjudication or enforcement of the decision. However, enforcement actions apart (which presumably includes any challenge to enforcement on the basis of judicial review) subsequent de nouvo retrial by court or arbitration could be contractually deferred to the end of project.

**Regarding summary decree**, cases referred to included ***C.C.G. v Highland Council,*** *2002 :* ***Mackays Stores v City Wall (Holdings)*** *1989 SLT 835.*

**Regarding retentions**, cases referred to included ***President of India v Lips Maritime Corp*** *[1988] AC 395.* ***Turnbull v McLean & Co****, 1874 1 R 730.* ***Johnston v Robertson****, 1861, 23 D 646.* ***Heyman v Darwins****, [1942] AC 356.* ***Bank of East Asia v Scottish Enterprise****, 1997 SLT 1213.* ***Macbride v Hamilton*** *1875, 2 R 775.* ***Redpath Dorman Long v Cummins Engine Co*** *1981 SC 370.*

Lord Drummond Young. Outer House, Court of Session. 17th December 2002.

**Comment :** The effect of such a clause would enable an arbitrator to reconsider ALL matters in a dispute in respect of a final account. The benefit is that it provides interim certainty but the drawback is that the scope of any final arbitration is likely to be extensive, expensive and time consuming. Contrast provisions that seek to achieve the exact opposite, such as those that state that any objection to an adjudication decision must be filed within for example 14 days, otherwise the decision becomes final (see for instance FIDIC 1999 suite).

**A&D Maintenance v Pagehurst [1999] 64 Con LR**

A&D were the sub-contractors responsible for boiler works to a school. A&D submitted and were paid for initial interim payment. Payment 3 was not honoured. Work was running behind schedule. The main-contractor and employer for the purposes of this action gave notice that work was due for completion in October and later notified A&D that if work was not completed by 9th November then they would give notice of determination. A&D gave notice of completion on the 13th November and applied for final payment on the 14th. On the 19th the main contract was determined on the grounds of defective boilerwork and Pagehurst issued a notice of determination against A&D stating that all payments would be suspended pending making good. On the 27th a Schedule of Outstanding works was issued but the following day a fire damaged the school. Insurers assert that the cause of the fire was the defective boiler. On the 8th February, with the final application outstanding A&D commenced and prevailed in adjudication for payment of applications 3 & 4, followed in default by an action for enforcement of the decision. Pagehurst in the meantime commenced an action against A&D for breach of contract.

Pagehurst resisted enforcement on a number of grounds including (a) no written contract (b) the implied right to adjudication dies with the termination of the contract (c) the adjudicator did not examine the applications for payment in respect of due time for payment under the Scheme , so the court should reopen and examine his decision and (d) enforcement should be stayed pending outcome of the trial.

His Honour Judge David Wilcox dismissed each of these in turn. There was a written sub-contract order and further during the adjudication in the present action both parties referred to that order providing additional written proof of a contract (*This application of the Adjudication Act 1996 to adjudication has not subsequently been adhered to*). The Adjudicator's jurisdiction survives the termination of contract under s108 HGCRA (***Hem. D (****1942) AC Page 356*. applied by analogy with arbitration). There is no scope for the reviewing/enforcing court to open up the decision – this is for a subsequent arbitration or litigation – ***Outwing v Randall*** *15th March 1999* applied. There were no special circumstances that would justify the court not enforcing the decision. His Honour Judge David Wilcox. TCC. 23rd June 1999.

**A&S Enterprises v Kema [2004] QBD HT 04 199**

This concerned an action for the enforcement of an adjudicator's decision ordering payment of the 6th interim certificate which would have taken payments above the initial contract price. The nub of the case turned on whether under a JCT contract payments became due on certification by the architect (there was an underlying assertion that the architect was serving the contractor's rather than the developer's interests) or whether payment depended upon applications to the developer. The adjudicator decided that the latter both applied and took place, rendering payment due.

Payment was resisted on the basis that the adjudicator demonstrated bias. The adjudicator set up a hearing between the parties. The defendant's requested a change of date because of problems attending on the selected dates. Ultimately the meeting went ahead, with arrangements being made for some of the defendant's team to engage via tele-conference facilities, but one of the team failed to take part. The adjudicator made it clear in his judgement that he drew an adverse inference from this failure to participate particularly because he deemed that this person's participate was key to the proceedings. The defendants claimed that it had not been made clear that that individual's non-participation would play a critical part in the outcome.

His Honour Judge Seymour concluded that the adjudicator took a dim view of the defendant's submissions because of the non-attendance of someone whom it was not initially made clear was crucial to the meeting which was to explore the submissions of the architect. Accordingly the decision was not enforceable.

**Regarding bias,** cases referred to : ***Amec Capital Projects v Whitefriars City Estates*** *[2004] EWHC 393.* ***Woods Hardwick v Chiltern Air Conditioning*** *[2001] BLR 23.* ***Buxton Building v Governors of Durand Primary School*** *[2004] CILL 2117..* ***Dean & Dyball Construction v Kenneth Grubb Assoc.*** *[2003] CILL 2045.* ***In Re Medicaments & Related Classes of Goods No 2*** *[2001 ] 1 WLR 700.*

His Honour Judge Richard Seymour. TCC. 27th July 2004.

**COMMENT :** If the adjudicator had simply recorded that he had not heard any evidence from that individual and had gone on to reach his decision without reference to that non-attendance no doubt the decision would have been enforceable. A degree of unnecessary verbosity disclosed a bias which might not otherwise have been apparent. Whilst it is trite law that justice must be seen to be done, whether or not justice is actually done may be less easy to discern. In the circumstances Seymour J was able to do just that, though of course, not being a decision on the merits, it remains open for a subsequent adjudicator to reach the same decision again, which in the absence of breach of due process, would then be enforceable.

**ABB Power Construction Ltd v. Norwest Holst Engineering Ltd [2000] EWHC TCC 68**

A payment dispute arose in connection with a contract for the supply and installation of insulation and pipework at a Power. The dispute was referred to adjudication. The respondents applied for a declaration that the work was exempt from the HGCRA. His Honour Judge Humphrey Lloyd acceded, holding that the station fell within the exclusion under s105(2)(c)&(d) HGCRA, in that the works were in furtherance of power station operations. ***Palmer v ABB Power*** and ***Homer Burgess v Chirex*** applied.

An assertion that the exemption only applied to ongoing operations rather than future operations, thus removing new-build from the remit of the HGCRA was rejected. The court granted a declaration which effectively brought the adjudication to a halt. His Honour Judge Humphrey Lloyd. TCC. 1st August, 2000.

**COMMENT :** The more interesting question here is *"Whether or not it is prudent for an adjudicator to continue, in the light of a question mark over his jurisdiction, where one party applies to the court for a declaration?"* By continuing the adjudicator may run up costs. Might these be unnecessary? In the event that the court declares that he has no jurisdiction that might appear to be the case. The problem is that once commenced, the adjudicator has to work to a very tight time-frame – so, in the absence of consent by the parties to put the clock on hold – pending the outcome of the application for declaration, the adjudicator may have no real option, but to continue. Furthermore, it is not uncommon for a party to raise a spurious jurisdiction challenge to try and wear the other party down by attrition.

**ABB Zantingh Ltd v. Zedal Building Services Ltd [2000] EWHC TCC 40**

Scottish & Southern Energy (SSE) contracted with the Mirror Group (MCP) to install temporary (there was no planning permission for a permanent fixture) standby power generators at MCP's printing works in order to ensure electricity supply to the printing works, particularly over the millenium. On completion SSE were to lease the generators to MCP. The work was subcontracted to ABB to design, build and maintain the installations on MCP's land. ABB sub-sub contracted wiring and other works to Zedal. A dispute arose which was referred to adjudication. Following the precedent set in ***ABB Power v Norwest Holst*** *2000* the adjudicator stayed the action pending a judicial enquiry into jurisdiction and the applicability of the HGCRA to works which involved power generation.

His Honour Judge Bowsher found that the primary purpose of operations at MCP's works were printing not power generation. There was no arrangement or licences to supply power to the national grid and this was highly unlikely, given the temporary nature of the installations. The s105(2)(c)&(d) exemption for power generation did not apply. He refused to treat the secured generators as separate sites. In consequence the adjudicator had jurisdiction over the dispute.

***Palmers v ABB Power Construction*** *[1999] BLR 426.* ***Homer Burgess v Chirex*** *[2000] BLR 124* considered.

His Honour Judge Bowsher. TCC. 12th December 2000.

**Abbey Developments Ltd v PP Brickwork Ltd [2003] EWHC 1987**. TCC

Can a declaration on a point of law be sought after an adjudication has taken place, in lieu of arbitration or a trial in order to defeat an adjudication decision? It would appear that this is a valid course of action in appropriate circumstances, though in the current case the declaration was refused because the language used was not sufficiently clear. An adjudicator had previously decided that a sub-contractor was entitled to damages for wrongful termination of the contract by the employer. The tender invitation letter, which was incorporated into a labour only bricking contract attempted to introduce a "termination at will with right to re-tender without liability" provision into the contract for additional aspects of the work, which had not yet been commenced. The employer sought a declaration that this provision was enforceable, thereby justifying the termination and setting up grounds for resistance of the adjudicator's decision.

The legality of such termination at will clauses (common in the US and internationally) is examined. English law has consistently found against such clauses in traditional supply and fix contracts, particularly because they conflict with determination for cause provisions. The right to complete the works by contractors has been supported, though the courts have permitted provisions allowing the reduction in the scope of works at will clauses (though Hudson seems to support a justification requirement). Part of the rationale lies in the fact that once a party has committed himself to supplying resources, cancellation of stages would have financial repercussions. However, since in a labour only contract there is no such resource implication, the court was prepared to countenance such a provision.

***Carr v JA Berriman*** *(1953) 27 ALJ 273.* ***Simplex Floor v Duranceau*** *[1941], 4 DLR 260,* ***Amec v Cadmus Investments*** *(1996) 51 Con LR 105.* ***SA Maritime of Geneva v AngloIranian Oil*** *[1954] 1 WLR 492.* ***Beaufort Developments v Gilbert Ash*** *[1999] 1 AC 266.* referred to.

His Honour Judge Humphrey Lloyd. TCC. 4th July 2003.

**Absolute Rentals Ltd v Gencor Enterprises Ltd [2000] CILL 1637**

Absolute Rentals contracted with Gencor on JCT Minor Building Works [1980] standard form terms, which included an arbitration clause, for works to a company owned flat, to be occupied by the sole director of the company and his family. A payment dispute arose that was referred to adjudication. The adjudicator found for the contractor. Gencor then referred a larger all embracing claim to arbitration. Absolute Rentals sought enforcement of the adjudication decision whilst Gencor resisted on grounds of set-off against the arbitration and alleged financial insecurity of Absolute Rentals. An attempt to exclude the adjudicator's jurisdiction on the basis of the residential occupier was quickly dropped because a company cannot be an occupier within the HGCRA exception. His Honour Judge David Wilcox found that the HGCRA applied and over-rides the express arbitration clause and thus the application of s9 Arbitration Act 1996 & ***Halki Shipping***. Set off against a subsequent dispute is not permitted. There was insufficient evidence before the court to consider an application for a stay on the grounds of financial insecurity and hence the adjudication was enforced. ***Bouygues v Dahl-Jensen*** *1999* applied. His Honour Judge David Wilcox. TCC. 16th July.

**AC Plastic Industries Ltd v Active Fire Protection Ltd [2002] All ER (D) 61 (Aug) BLD 1908023115.**

This concerned an application for the enforcement of an adjudicator's decision. The defendant issued proceedings for final determination and sought a stay of enforcement pending outcome of trial. The court granted enforcement. There was no apparent justification provided by the defendant to stay enforcement.

His Honour Judge Richard Seymour QC. TCC. 16th August 2002.

**AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd [2007] EWHC 1360**

The court was called upon here to determine whether or not an adjudicator's decision was reached within the HGRCA timeframe and extensions of time granted by the applicant and or agreed by the parties. There was a statutory extension – together with a request for 2 additional days in response to late submissions by both parties of additional considerations. One party asked – the other acquiesced by conduct and continuing participation and submission. This amounted to implied / express consent to the final extension of time. The decision was delivered in time and was enforceable. ***Macob v Morrison*** [1999] ; ***Bouygues v Dahl Jensen*** [2000]; ***C&B Scene v Isobars*** [2002]; ***Discain v Opecprime (No 2)*** [2001] ; ***Balfour Beatty v LB Lambeth*** [2002]; ***AMEC v Whitefriars*** [2004]; ***Carillion v Devonport*** [2006]; ***Barnes & Elliot v Taylor Woodrow*** [2004]; ***Ritchie v David Philp*** [2005]; ***Simons v Aardvark*** [2004]; ***Hart v Fidler*** [2006] ; ***Cubitt v Fleetglade*** [2006]; ***Epping v Briggs & Forrester*** [2007] ; ***Aveat v Jerram Falkus*** [2007] considered.

In addition, the respondent was estopped by conduct from denying the extension - ***The Stolt Loyalty*** [1993] 2 LLR 281 considered.

As to whether the statutory period is mandatory or merely advisory ***Cowlin Construction v CFW Architects*** [2003]; ***R v. Soneji*** [2006] 1 AC 340, ***Brodyn v Davenport*** (2004) 61 NSWLR 421 considered.

HHJ Anthony Thornton. 23rd May 2007

**Adonis Construction Ltd v Mitchells and Butler [2003] Adjudication Soc Dec 2003**

A dispute between the parties to an "*alleged*" construction contract was referred to adjudication. One party objected that a contract had not been concluded between the parties and hence there was no relevant construction contract for the purposes of HGCRA adjudication. The parties refused to give the adjudicator the jurisdiction to determine the matter. In order to resolve the issue one of the parties applied for a declaration in respect of the existence or otherwise of the contract, which was heard by Her Honour Judge Frances Kirkham. The court approved of the application since the nub of the matter turned on the determination of this issue. Her Honour Judge Frances Kirkham. TCC. 21st August 2003.

**Comment :** It is becoming increasingly clear that as with arbitration, where under the Arbitration Act 1996 the courts play a significant role in supporting the process, that the courts are equally prepared to not only scrutinize the adjudication process but also to accord support to it in relevant circumstances. Whilst speed is necessary in order to take advantage of this facility it is clearly a sensible approach to the question of jurisdiction and appears to be very effective. Tony Bingham has pointed out in his column in Building a number of times that when it comes to the question of his or her jurisdiction an adjudicator has a vested interest in the issue and to ask him to decline jurisdiction is an invitation to turn down remunerative work. On the other hand, the claimant has much to lose if the process is rendered invalid by a subsequent ruling

that the adjudicator lacked jurisdiction. The cases demonstrate that on a significant number of occasions adjudicators have made the wrong choice. A declaration provides an effective insurance policy against such eventualities. Even if the declaration goes the wrong way the claimant may be able to redirect efforts and adopt other means to resolve the matter.

Jurisdictional challenges are common, with parties routinely throwing the issue into the pot but continuing the adjudication without prejudice. Should a claimant seek a declaration when it appears that the challenge is somewhat half hearted and thrown in simply on the off chance that it might work? Providing the applicant for a declaration can recover the costs of the declaration from the challenger then the claimant has little to lose. In such an instance, a notice advising an intention to seek a declaration would likely result in the other party rapidly withdrawing the challenge in order to avoid throwing costs away needlessly.

**Aedas Architects Ltd v Skanska Construction UK Ltd [2008] ScotCS CSOH_64**

Rather than adjudicate, Aedas submitted an application for summary decree in respect of outstanding stage payments in respect of a number of school renovation contracts, asserting that the withholding notices issued by the employer did not fulfil the requirements of the Construction Act 1996 – in that they were general in nature, progressively accumulating asserted set offs against progress applications, each set off equalling or exceeding the sums claimed, without any degree of specificity.

The court noted that neither party had brought into contention whether or not the withholding notices were issued in time.

Regarding validity of notices two extracts are illuminating :

1) *"….. The ongoing set-off figure had increased by the end of the year to over one million pounds. However, the schedule showing attribution, in each production, merely attributes the whole figure to all the calculated grounds (5 out of 9). It is the same figure in each counter notice. As I have already said this sharply raises the question of whether the counter notice has made an effective attribution."* at para 14
2) *"The contract demands attribution to each ground. It does not ask for any apportionments and in my view it is a competent way to proceed by debiting all sums. The Statute speaking of "each ground" says attribution "to it" must take place. In my view that also is what the counter notice has done. All the grounds which can be calculated have so been and a global figure debited. That in my opinion is compliance."* at para 18.

That being the case, there was a triable issue as to validity of notice of withholding and validity of the sums withheld and hence the application for summary decree refused. The court noted that either party could refer the various disputes to adjudication if so desired.

***Henderson v 3052775 Nova Scotia Limited*** 2006 SC (HL) 85. ***Melville Dundas Limited* v *George Wimpey UK Limited*** 2007 S.C. (H.L) 116. ***Reinwood Limited* v *Brown and Sons Limited*** [2008] U.K.H.L. 12; ***Humber Oils Terminal Trs Limited* v *Hersent Offshore Limited*** (1981) 20 BLR, 16 ; ***Thomas Vale Construction Plc* v *Brookside System Limited*** [2006] EWHC 3637 (T.C.C.) considered.

Opinion of Lord McEwan, Outer House Court of Session. 17th April 2008.

**Ale Heavylift v MSD (Darlington) Ltd [2006] EWHC 2080 (TCC)**

This concerned a contract for the hire of cranes on the Wembley development. It commenced with a written contract which was followed by asserted unwritten contract variations, which it was later alleged fell outside the scope of the HGCRA raising further issues of contract interpretation: ***Macob v Morrison*** [1999]; ***Bouygues v Dahl-Jensen*** [2000] ; ***C & B v Isobars*** *[2002];* ***Carillion v Devonport*** [2006]; ***Grovedeck v Capital Demolition*** [2001] ; ***RJT v DM Engineering*** [2002] considered.

- The defendant sought to establish a right to set off for subsequent events during enforcement proceedings. ***Interserve v Cleveland Bridge*** [2006]; ***Modem Engineering v Gilbert Ash*** [1974] considered.
- The fairness of the process and natural justice was raised as a potential defence. ***Amec v Whitefriars*** [2005] considered.
- Issues arose as to withholding notice procedure. ***VHE v RBSTV*** [2002] ; ***Balfour Beatty v Serco*** [2004]; ***Rupert Morgan v Jervis*** [2004] ; ***Ferson v Levolux*** [2003] ; ***Gleeson v Devonshire*** (2004) considered.
- Finally the financial insecurity of applicant was asserted in furtherance of an application for stay of enforcement. ***Herschell v Breen*** (2000); ***Wimbledon v Vago*** [2005] considered.

All aspects of the challenge were rejected and enforcement ordered. The principal judgement relates to the jurisdiction challenge which was not raised during adjudication proceedings. The court held that there had been a waiver – it was too late to raise at this late stage. The paperwork involved a great deal of duplication which raised issues as to costs and the case went to the cost judge to sort this out, though interest was agreed on the day. HHJ Toulmin. TCC. 31st July 2006.

**Allen Wilson Shopfitters v Buckingham [2005] EWHC 1165 (TCC)**

This concerned a contract for work in excess of £550K to a residential property. Initially a QS firm acted as contract administrator. Subsequently the QS was dismissed and interim application 12 & 13 were submitted directly to the employer, who paid part of application 12 but none of application 13. The contract was terminated – perhaps unlawfully by one of the parties – though allegedly by the contractor on the grounds of non-payment. The dispute was successfully referred to adjudication. This action was for enforcement of the adjudicator's decision with interest and fees. The defendant mounted a jurisdictional challenge.

The response to the referral was limited to jurisdiction only, on the following grounds (a) no written contract (b) contract terminated ending right to adjudication (c) dwelling house outside scope of HGCRA adjudication (d) agreement to adjudicate contrary to UTCCR 1999. The response expressly excluded defence on the merits and made it clear that proceedings for delay, defective works and recovery of cost of completing the works would be issued shortly. The adjudicator dismissed all 4 points and found for the claimant. The defendant in court denied liability under applications 12 & 13 but provided no breakdown of the account, issued no withholding notice, details of cross claim or defects and had yet to issue further proceedings.

His Honour Judge Peter Coulson found that contractual relations were formed on the basis of a letter of intent that incorporated the JCT Form 1998, which includes an adjudication provision at Clause 41A article 5. The claimant signed and returned the letter of intent but no formal contract was concluded. Consequently, work was carried out by implication on the written terms of the JCT and hence there was a written contract that satisfied the HGCRA. Subsequently the employer, wishing to extend the scope of the works tried to negotiate a lump sum for £650K+ and issued a second letter of intent, which was never signed and the contractor specifically wrote stating that the terms and conditions of the 2nd letter or intent were not accepted or binding. The employer asserted that this resulted in the subsequent works, which included those under dispute, were thus not part of a written contract and not subject to adjudication. The court found that this was not the case. The subsequent instructions were, in the absence of agreement, continuations of instructions under the 1st letter of intent and thus subject to adjudication.

A further issue regarded which contract payment process applied. The court, applying ***C&B Scene v Isobars***, held that the adjudicator had jurisdiction to decide what was due. Whether his choice of payment process was right or wrong is of no concern to the court. Since there was no defence to entitlement or quantum put forward in response, there were no grounds to challenge the way the decision was reached. Furthermore, since the employer had taken on the role of contract administrator it was his job to issue certificates and or withholding notices. He had, in breach of duty, failed to do either but had paid part of application 12, confirming that he had taken on the administrator role.

Arguably the payment provisions of the Scheme may have implied by implication. However, even if the Scheme does not apply, by failing to provide an alternative payment mechanism, the employer was in breach of duty, and applying ***Croudace v Lambeth*** *[1986] 33 BLR 20,* cannot take advantage of his own default and argue that a viable mechanism of payment such as that in the Scheme should not apply.

Applying the separability rule (semble s7 Arbitration Act 1996), the parties rights that accrue under a contract include the expressly stated resolution procedure and do not terminate with the contract.

The court, having referred to ***Westminster v Beckingham, Picardi v Cuniberti*** and ***Bryen & Langley v Boston*****,** found that since the terms of the contract were negotiated, with professional advice, they were not unfair. There was no breach of good faith and there was no imbalance between the parties.

His Honour Judge Peter Coulson. TCC. 27th May 2005.

**Air Design (Kent) Ltd v Deerglen (Jersey) Ltd [2008] EWHC 3047 (TCC)**

This dispute involved a Mechanical Services contract on Intermediate terms and an application for summary enforcement of an adjudication decision. The key issue here was whether three succeeding arrangements amounted to new contracts (or in one case a mere letter of intent) or whether they were merely variations of the original contract.

The court held that whilst the adjudicator had no jurisdiction - express or implied to rule on jurisdiction - the finding by him that the subsequent arrangements were variations and thus part of the contract which both parties accepted gave him jurisdiction, were findings of mixed fact and law that, whether right or wrong could not be challenged on enforcement. His Honour also agreed that they were variations, and ordered enforcement accordingly.

As to the scope of jurisdiction the ***Fiona Trust*** case [2007] UKHL 40 was referred to. As to a stay of enforcement regarding an alleged adverse financial situation of the claimant, ***Wimbledon Construction Co 2000 v Derek Vago*** [2005] BLR 374 applied. Akenhead Mr Justice. TCC. 10th December 2008.

**Allen Wilson Joinery Ltd v Privetgrange Construction Ltd [2008] EWHC 2802 (TCC)**

Written contract for the purposes of HGCRA : Failed application for summary enforcement : No jurisdiction over dispute, or over award of interest.

Regarding "*evidenced in writing*" ***RJT Consulting v DN Engineering*** [2002] BLR 217. ***Stratfield Saye v AHL Construction*** [2004] EWHC 3286 (TCC) considered. As to the status of a written contract in the light of implied terms ***Connex v MJ Building*** [2004] BLR 333, ***Galliford Try v Michael Heal*** [2003] EWHC 2886 (TCC) referred to.

As to the jurisdiction of an adjudicator to award interest, ***Carillion v Devonport*** [2006] BLR 15 considered.

Mr Justice Akenhead. TCC. 17th November 2008

**Allied London v Riverbrae Construction [1999] Scot.Cs 170**

Riverbrae submitted payment disputes to an adjudicator who found for Riverbrae and determined that Allied London should pay Riverbrae within 14 days. Allied London in this action sought to have monies paid into an account pending the outcome of larger disputed claims by Allied against Riverbrae, on the basis that they feared Riverbrae would not be financially able to meet those claims, if successful. Lord Kingarth agreed with the adjudicator that neither the arbitrator nor the court had the power to order payment into an escrow account. Accordingly the application was refused.

***C.C.S.U.* v *Minister for Civil Service*** 1985 A.C. 374, ***Anisminic* v *Foreign Compensation Commission*** 1969 2 A.C. 147, ***Macob Civil Engineering* v *Morrison*** 1999 considered.

Lord Kingarth. Outer House, Court of Session. 12th July 1999.

**COMMENT :** It should be noted that the other claims arose out of other contract and the legal personalities concerned were not identical to those in this action. No evidence had been adduced to show that Riverbrae were insolvent and in the absence of evidence the outstanding claims may have been merely speculative. The outcome may have been different if genuine issues of insolvency had been raised and if legal action had already commenced elsewhere. Equally, if judgement had already been secured in other actions there would have been the potential for set off of prior debts – but none of this applied here.

**All In One Building & Refurbishments Ltd v Makers UK Ltd [2005] EWHC 2943 (TCC)**

This concerned contracts for extensive refurbishment work to blocks of flats. Whilst the initial stages ran smoothly a point arrived where co-operation between employer and contractor deteriorated significantly. The employer proposed outsourcing work on 27 flats and the contractor countered that they would be prepared to withdraw entirely in exchange for a significant compensation package. It was not in dispute that the contract was then terminated, but by whom was not clear. The claimant contractors submitted an account which was not paid. They then referred to adjudication the question whether or not the employer had wrongly repudiated the contract and application for sums outstanding and a further sum for lost profit on outstanding works.

The adjudicator was unable to decide on the lost profit issue because of an absence of proof. The applicant duly provided details and agreed an extension of time to enable the employer to respond. A further problem emerged regarding whether or not an employee of the employer had ordered the applicants off site. The

employee at first provided an affidavit denying he had done so, but his contract of employment having been determined he subsequently retracted that denial – but the paperwork on this was poor. The adjudicator attempted to set up a mini-hearing but due to the non-availability of the ex-employee this did not go ahead. The adjudicator, having signalled that no more submissions were to be made on the matter, went ahead and decided the matter on the basis of what had already been made available to him, determining that the employer had wrongfully determined the contract and ruled on sums due.

During enforcement proceedings the defendants asserted that there was no dispute because the due date for payment had not yet passed. His Honour Judge David Wilcox noted that a dispute as to breach can precede the due date of payment. A dispute had crystallised.

The defendant asserted there was a breach of due process because the adjudicator had not extended time and convened a hearing once the ex-employee had become available. The court held that once an adjudicator is in a position to answer a question there is no breach of due process if he does not dig deeper into an issue.

Finally the defendant sought a stay of enforcement due to the poor financial state of the contractor. The court noted that the financial status of the claimant management company had not altered in any significant way from when it was first hired and thus determined that there was no reason to stay enforcement.

***Collins v Baltic Quay*** [2005] 1 BLR. ***Amec v SS for Transport*** 2004. ***Fast Track v Morrison*** [2000] 1 BLR 171 ***KNS v Sindall*** [2000] Con LJ 170. ***Amec v White Friars City Estates*** [2005] 1 BLR 1. ***Wimbledon v Vago. Bouygues v Dahl-Jenson*** [2000] BLR p.522 considered.

His Honour Judge David Wilcox. TCC. 19th December 2005

**Alstom Signalling Ltd. v Jarvis Facilities Ltd [2004] EWHC 1285 (TCC)**

Jarvis sought and obtained an adjudicator's decision to enforce payment of an application for payment on the grounds that no withholding notice had been issued. The court held that the sum due was the amount certified not the amount applied for and that in the circumstances it was not necessary to issue a withholding notice against the application. Accordingly, it was finally settled that no sum was due under the application. There was no need to refuse to enforce the adjudicator's decision since it ceased to be operative. The adjudicator should have decided afresh how much was due by opening up and examining the certificate but had failed to do so and this is what needed to happen next to determine how much if any at all was in fact due to Jarvis. His Honour Judge Humphrey Lloyd provides an analysis of the application of the payment provisions of the Scheme in relation to the IChemE Sub-Contract and the Special Gain and Pain provisions adopted by the parties.

- **Regarding implied terms** : ***BP Refinery (Westernport) Pty Ltd v. Shire of Hastings*** *[1978] 52 ALJR 2.* applied.
- **Regarding agreement to agree :** ***Pagnan v Feed Products*** *[1987] 2 Lloyds Rep. 601 at 610/61.* ***Walford v Miles*** *[1992] 2 AC 128.* considered. Compare ***F&G Sykes v Fine Fare*** *[1967] Lloyds Rep 53..* ***Sudbrook Trading v Eggleton*** *[1983] AC 444.* ***Queensland Electricity Generating Board v. New Hope Collieries*** *[1988] 1 Lloyds Rep 205,.* ***Didymi Corp v Atlantic Lines*** *[1989] 2 Lloyds Rep 108.* ***Mamidoil-Jetoil Greek Petroleum v Okta Crude Oil Refinery*** *[2001] EWCA Civ 406.*
- **Regarding the availability of quantum meruit for pain and gain claims :** ***Crown House Engineering v. AMEC Projects*** *(1989) 48 BLR 37* applied.

His Honour Judge Humphrey Lloyd. TCC. 28th May 2004.

**Amber Construction Services Ltd v London Interspace HG Ltd [2007] EWHC 3042 (TCC)**

Costs – defence withdrawn at last moment. Whether only fixed costs should be payable if the defendant to an issued claim admits or pays the sum claimed within a few days of the issue on or before the Acknowledgement of Service. Court allowed substantial costs since the defendant had forced the claimant to prepare to deal with allegations of absence of jurisdiction of the adjudicator.

The Claimant sought to enforce an Adjudicators decision, which the Defendant had failed to comply with and was disputing for various reasons, albeit these issues did not form the basis of this hearing. The Claimants solicitors had advised the Defendant that if they failed to comply with the Adjudicators decision they would, without further need for notice, seek Summary Judgement. Amongst other correspondence disputing the decision and threatening a counterclaim, the Defendants solicitors issued a "without prejudice save as to costs" letter containing an offer to settle at a reduced sum.

The Claimant subsequently and without further notice issued a Part 7 Claim form, requesting payment in accordance with the Adjudicators decision and that the Defendant shall pay all costs of the Claim. The Defendants filed an Acknowledgement of Service which admitted the full amount claimed by the Claimant. The Defendant argued that the Claimants costs should be limited to £100, per CPR 45.1 and 45.3, which it claimed is said to be the fixed amount when liability in full is admitted. The Claimant argued that the rules regarding fixed costs do not apply in this case and in any event the Court has jurisdiction to order fuller costs.

The Court noted that some four weeks had elapsed from the Adjudicators decision before enforcement proceedings were commenced. The Claimants solicitors had provided a clear warning that failure to comply with the Adjudicators decision would result in proceedings without further notice. Also the Defendants solicitors had stated various reasons why they would not pay and the without prejudice letter also made it clear that they did not accept the Adjudicators decision. For these reasons the Court held that the Defendants argument that the Claimants solicitor had acted secretly in incurring substantial costs was without foundation. The Court did not consider it fair that the Claimant, having complied with the steps called for in the Rules and the Guide, should be limited to the £100.00 for costs.

Held: Summary assessment of the Claimants costs £6,162.00.

*Summary Nick Turner.* Judgment : Mr Justice Akenhead. TCC. 18th December 2007

**Amec Capital Project Ltd v White Friars City Estate Ltd [2003] EWHC 2443. TCC.**

A payment dispute arose and was referred to adjudication. The applicant sought a stay on the basis that the wrong adjudicator had been appointed and that any disputes about who was the relevant adjudicator were to be referred to adjudication. Thus the stay was pending the arbitrator's determination of which adjudicator had jurisdiction. His Honour Judge Humphrey Lloyd determined which of the various potential contract provisions actually applied and noted that in consequence the wrong adjudicator had been appointed. However, he refused a stay to arbitration since under the HGCRA it is the court, not an arbitrator, who has jurisdiction to determine who has jurisdiction under the HGCRA to act as adjudicator. ***Macob v Morrison*** *[19991 BLR 93.* ***Absolute Rentals v Gencor*** *17 Con. LR 322.* ***Comsite v Andritz*** *[2003] EWHC 958.* ***Bouygues*** considered. His Honour Judge Humphrey Lloyd. TCC. 19th September 2003.

**Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWHC 393 (TCC)**

Whitefriars terminated a contract with Amec. The final two applications for payment were outstanding and Amec commenced adjudication. The JCT Standard Form of Building Contract with Contractors Design, 1998 Edition with amendments. It provided for reference of disputes to *"George Ashworth of Davis Langdon & Everest, or in the event of his unavailability a person nominated by him."* There was no such person. There was a Geoffrey Ashworth. Amec applied to RIBA who appointed M.Biscoe. He found for the applicants. Whitefriars resisted enforcement on the basis that Biscoe had no jurisdiction and had breached due process. The court held he had no jurisdiction because the appointment procedure in the contract had not been followed. In the meantime Geoffrey Ashworth died and Amec reapplied to RIBA who in turn reappointed Biscoe who again found for Amec. Whitefriars again resisted enforcement on the same grounds as before. The court held that Biscoe had jurisdiction in the circumstances but upheld allegations of breach of due process, namely actual / perceived bias and an inability to respond to undisclosed legal advice received by the adjudicator. Amec appealed.

- **Regarding appointment of the wrong adjudicator,** ***Macob v Morrison*** *[1999] BLR 93 at 97:* ***Nittan v Solent Steel*** *[1981] 1 Lloyds Rep. 633 at 637.* ***Whittam v W. J. Daniel*** *[1962] 1 QB 271 at 277* considered.
- **Regarding bias,** ***Porter v Magill*** *[2002] 2* AC 357. ***Re Medicaments*** *[2001]* 1 WLR 700. ***Carter v Nuttall*** *[2002]* BLR 359. ***Pring v Harper*** *[2002]* EWHC 1775. ***Bouygues v Dahl-Jensen*** [2000] PLR 522. considered. The ***Nikko Hotels v MEPC Plc*** *[* 1991] 2 EGLR 103 – Test : *"If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."* applied.

  His Honour Judge Richard Toulmin. TCC. 27th February 2004.

**Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWCA Civ 1418**

The CA agreed with Thornton J that Biscoe's second appointment was valid and went on to consider an assertion of perceived bias, the other grounds of breach of due process having been dropped. The test for apparent bias is whether a fair-minded and informed observer, having considered all the circumstances

which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased: ***Porter v Magill*** [2001] UKHL 67, [2002] 2 AC 357 para 103. Reversing the finding of perceived bias, the CA held that without more, the re-engagement of the same adjudicator was insufficient to establish perceived bias. Attempts to establish further grounds were rejected. In particular, whilst an adjudicator must share legal advice he receives that contributes to the decision with the parties and afford an opportunity to comment, advice on jurisdiction leads to a personal decision to continue with the adjudication, not to a binding decision and so does not have to be shared. It might however be sound practice to consult with both parties.

***In re Medicaments (No 2)*** [2001] 1 WLR 701 para 37: ***Locabail v Bayfield*** [2000] QB 451. ***R v Gough*** [1993] AC 646. ***Ealing L.B.C. v Jan*** [2002] EWCA Civ 329 considered.

**Regarding jurisdiction,** ***Discain v Opec Prime*** *[2000] BLR 402* applied.

CA before Lord Justices Kennedy; Chadwick and Dyson. 28th October 2004.

**Amec Capital Projects Ltd. v Whitefriars City Estates Ltd. [2004] EWCA Civ 1535**

In a short hearing for the handing down of the judgement set out above, the Court of Appeal cursorily dealt with a short challenge based on the double jeopardy rule. The court held that Clause 9(2) of the Scheme prevents contradictory decisions by two separate adjudicators. It does not apply where the first adjudicator's decision has been held to be a nullity. CA before Lord Justices Chadwick and Dyson. 28th October 2004

**Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339 (TCC)**

Amec were contractors for the Thelwall Viaduct. Subsequently problems arose with the viaduct. The S.S. referred the problems to an engineer for a preliminary decision without advising Amec. The S.S. then advised Amec of the decision and advised that unless Amec indicated acceptance of the decision, the matter would be referred to an arbitrator. Amec challenged the arbitrator's appointment. The arbitrator found that he had jurisdiction. Amec unsuccessfully challenged that decision.

His Honour Judge Jackson considered the principal arbitration and adjudication cases on what constitutes a dispute. The court found 1) that there is no requirement of notification to refer to an expert for preliminary determination, since the expert could have reached a decision without receiving submissions from Amec. Further, if the expert had wished to hear from Amec he could have asked; 2) that Amec were fully aware of the situation and it was clear that Amec would not simply accept liability. The requirement to respond by a 5pm deadline the very day of notification, whilst at first sight unreasonable, was more a formality than anything else. The parties were already in dispute. Amec had no intention of agreeing. No injustice was done to Amec. The Secretary of State had to act quickly as both parties were fully aware because the statutory time limit was imminent.

- **Regarding s67 Arbitration Act 1996 challenge to an arbitrator's decision on his own jurisdiction** and proceedings by way of rehearing rather than review ***Electrosteel Castings v Scan-Trans Shipping & Chartering*** *[2002] EWHC 1993 (Comm);* ***Peterson Farms v C&M Farming*** *[2003] EWHC 121 (Comm)* considered.
- **Regarding the meaning of dispute,**: ***Monmouthshire C.C. v Costelloe & Kemple*** *(1965) 5 BLR 83.* ***Tradax v Cerrahogullari*** *[1981] 3 All ER 344.* ***Ellerine v Klinger*** *[1982] 1 WLR 175.* ***Cruden Construction v Commission for New Towns*** *(1995) 2 Lloyd's Law Reports 37.* ***Halki v Sopex Oils*** *[1998] 1 WLR 726.* ***Fastrack v Morrison*** *[2000] BLR 168.* ***Sindall v Solland*** *2001.* ***Beck Peppiatt v Norwest Holst*** *2003 EWHC 822* considered.
- **Regarding procedural unfairness and engineer's decision** : ***Sutcliffe v Thackrah*** *[1974] AC 727.* ***Hounslow LBC v Twickenham Gardens Dev*** *[1971] Ch. 233.* ***Panamena Europea Navigacion v Frederick Leyland & Co*** *[1947] AC 428.* ***AC Hatrick (NZ) v Nelson Carlton*** *[1964] NZLR 72.* considered.

His Honour Judge Jackson. TCC. 11th October 2004.

**Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291**

Lord Justices May and Rix dismissed an appeal, providing a clear account of the role of the certifier under Clause 66 of the ICE contract. Rix LJ considers that even if an engineer's decision is flawed (in this case potentially because the defendant may have been denied an opportunity to express views about responsibility for the defects), since the decision is subsequently opened up and re-examined in adjudication,

such flaws have no impact upon the outcome of the dispute. In such circumstances it is a valid decision for the purposes of referring the dispute onwards to adjudication.

**Regarding the meaning of dispute,** ***Monmouthshire CCC v Costelloe*** *(1965) 63 LGR 429.* ***Ellerine v Klinger*** *[1982] 1WLR 1375.* ***Halki v Sopex Oils*** *[1998] 1 WLR 726.* ***Collins Contractors v Baltic Quay*** *[2004] EWCA Civ 1757.* ***F & G Sykes v. Fine Fare*** *[1967] 1 LLR 53.* ***Hayter v Nelson*** *[1990] 2 Lloyd's Rep 265* considered.

**Regarding an engineer's decision,** ***Hounslow LBC v Twickenham Gardens*** *[1971] Ch. 233,* ***Panamena v Leyland*** *[1947] AC 428.* ***Hatrick v Nelson Carlton*** *[1964] NZLR 72.* ***Beaufort Developments v Gilbert Ash*** *[1999] AC 266.* ***Canterbury Pipe Lines v Christchurch Drainage Board*** *(1979) 16 BLR 76.* ***Sutcliffe v. Thackrah*** *[1974] AC 727.* ***Page v. Llandaff & Dinas Powis RDC*** *(1901) 2 Hudson's B.C.* ***Amec Capital Projects v Whitefriars*** *[2004] EWCA Civ 1418* considered.

CA before Lord Justice May; Rix and Hooper. 17th March 2005

**Andrew Wallace Ltd v Artisan Regeneration Ltd [2006] EWHC 15 (TCC)**

Negotiations for a construction contract on SFA/99 standard terms commenced at a time when the architectural contractor was in the process of incorporating. The original intention was to incorporate as Andrew Wallace Architects Ltd but in the end incorporation was in the truncated form of Andrew Wallace Ltd. A payment dispute arose during the course of the project which was referred to adjudication. The adjudicator found for the applicant and ordered sums to be paid by the defendants.

Here, the defendants resisted enforcement of the adjudicator's decision on three grounds, Namely:-

1) The content of the contract was questioned (fabricated identity).
2) They had contracted with Andrew Wallace as an individual and not with the company
3) The alleged illegal conduct of claimant in respect of TAX, VAT, Register of Business name & fabrication of documents and the illegal conduct of claim together invalidated the decision.

Initially the defendants had complained that the adjudication decision related to Andrew Wallace Architects Ltd, a non-existent company and was thus unenforceable but withdrew this since it was clear the court was prepared to accept amendment of the name. They then shifted their ground to assert that they had not intended to contract with a company at all, but rather with the individual and asserted that documents had been subsequently manufactured to support the assertion that the correct contracting party was a company. They further asserted that individuals named in documents had not signed them or been present at meetings. The court rejected any prospect of these allegations being proven, since the assertion that the contract was with an individual, rather than with the wrongly named company, had only just emerged. Since it was not an issue at in 2003 it would be unlikely that documents would have been fabricated at that time. Furthermore, monies had been paid to the company, showing that there was no objection to dealing with a company rather than an individual.

The defendants invited the court to find that the claimants had acted fraudulently in respect of business names and VAT registration numbers. ***Total M&E Services v ABB Building Technologies*** *[2002] EWHC 248* considered. The court noted that as a civil, not a criminal court, this was not its business and the standard of proof was quite different. ***Swain v Hillman*** considered. Furthermore, whilst there were problems with the change over from an individual to a company in terms of heading paper, stationary and registrations etc, there was nothing to indicate fraud. The court would not enforce a decision which assisted fraud but this was not such a situation. There was no reasonable prospect of the defence prevailing and accordingly enforcement was ordered. Her Honour Judge Frances Kirkham. TCC. 10th January 2006

**Ardmore Construction Ltd v Taylor Woodrow Construction Ltd [2006] SCHOS3**

Various disputes arising out of sub contract works to a harbour were referred to adjudication. The adjudication held that sums were due to the claimant on all heads of claim. During enforcement proceedings, all directions for payment were sustained apart from one, which formed the basis of the current hearing. This head of claim concerned a dispute regarding the legal liability for overtime payments arising out of an alleged acceleration order and if so, how much if any was due.

The adjudicator found as a fact that a letter from the employer was an acceleration order aimed at remedying delays which were not the fault of the applicant and accordingly monies were due. However, he

then found that the scope of the written order was limited to 2 sectors of the work. He further found that the order was either verbally extended to other sectors or alternatively that the extension was acquiesced to.

The defendant objected to this finding on the grounds of breach of the rules of natural justice. The verbal instructions and acquiescence issues were not addressed anywhere during the adjudication process. If they had been raised the defendant would have brought evidence to refute the allegations of verbal instructions and to show that the mere fact that there had initially been a payment for additional sectors established nothing. These were interim payments which could be revised and thus did not amount to acquiescence. It was for the claimant to prove that the claims were proven, i.e. that they related to delays which the claimant was not responsible for and to further prove their value. The court concurred with the defence. These matters were not discussed and could not form the basis of a decision.

***Costain Ltd* v *Strathclyde Builders*** *2004,* ***Palmac Contracting Ltd* v *Park Lane Estate Ltd*** (2005) and ***Amec Projects Ltd v White Friar City Estate Ltd*** (2005) applied. ***Carilion Construction Ltd* v *Devonport Royal Dockyard Ltd*** (2005) distinguished. Lord Clarke. Outer House, Court of Session. 12th January 2006.

**COMMENT :** The court found that an important meeting convened by the adjudicator had been an informal affair, not a proper hearing or arbitration. The adjudicator did not establish or maintain control or operate from an agenda. Matters progressed in an ad hoc, free for all manner. Discussions had been somewhat heated. It was possible that people had talked over each other so that things may have been said by one side which were not heard by the other. The consequence was that the outcomes were ill defined and there was no cheque on procedures, paving the way for the adjudicator to fall into error.

**A.R.T. Consultancy Ltd v Navera Trading Ltd [2007] EWHC 1375**

The parties concluded a JCT Minor Works Contract and a separate oral contract for design works. Disputes arose under both contracts that were submitted to adjudication. The adjudicator declined jurisdiction regarding the design disputes and made an award for payment in respect of the works contract. Enforcement was resisted on the grounds that the contract was not sufficiently in writing for HGCRA purposes. The court found that the JCT contract was entirely in writing and there was no evidence of additional written terms. ***RJT Consulting v DM Engineering*** [2002]; ***Trustees of Stratfield Saye v AHL Construction*** [2004], ***Bennett v Inviron*** [2007] considered.

Application for stay on basis of financial vulnerability declined. ***Hershel v Breen*** [2000] ; ***Ashley House v Galliers*** [2002] considered. HHJ Peter Coulson. TCC. 31st May 2007

**Ashley House v Galliers Southern Ltd [2002] EWHC 274 (TCC).**

Ashley House, pre-empting an enforcement action to an adjudication decision sought a stay of execution due to the parlous financial state of Galliers who had effectively ceased trading. Ashley House had commenced legal proceeding for summary judgement (also tabled to be heard by Seymour J) and it was clear that once Galliers had settled outstanding debts to others, which is what it intended to do once put in funds from the adjudication, it would not then be in a position to repay the money in the advent of an arbitral award in Ashley House's favour.

Galliers asserted that their case fell on all fours with the decision of Judge Seymour in ***Rainford House Ltd v Cadogan Ltd.*** Nothing had changed in the financial situation of Galliers from the time it undertook the contract. Thus this was a risk that Ashley House had undertaken. Seymour J did not agree. What was different was the evident insolvency of Galliers and the fact that it had effectively ceased trading – though he noted that the reason Galliers had ceased trading was the non-payment by Ashley House. Despite this observation, Seymour J concluded that Gallier's precarious financial situation was not due to the non-payment and existed independently of it. Gallier had £120K of outstanding CCJs. In the event he found judgment for Galliers to the tune of £162K+, but entered a stay pending the outcome of the arbitration.

His Honour Judge Richard Seymour. TCC. 15th February 2002.

**Comment :** The moral of the story appears to be that if Galliers had managed to keep trading for a very short period longer than they did, they may well have received the cash in hand rather than having to wait for it. Whether any injustice was done is not clear. Perhaps in the circumstances Seymour J anticipated that Ashley House had a strong case (*it would appear that the papers were already in his possession so he would have been in a position to take a prelimary view on that matter*) in the pending trail (*it was noted in the trial that Galliers was*

*involved in an adjudication with RAP Developments Ltd defending a claim of £176K but with a counter-claim of £226K – but no conclusions can be drawn from this since the outcome could be to either bankrupt Galliers or to put them further in funds*) and thus a degree of protection was appropriate – or alternatively anticipated that the time scale for the pending trail was short and thus no injustice would be caused.

**Atlas Ceiling v Crowngate [2000] CILL 1639**

Work commenced on a construction project, before the HGCRA came into force, on the basis of a letter or intent that stated that once concluded, the contract would have retrospective effect and embrace all works done under the letter of intent. ***Fillite (Runcorn) Limited v Aqua-Lift*** *(1989) 45 BLR 27* considered. The concluded contract post dated commencement of the provisions of the HGCRA. Consequently the Act applied to the contract and the duly appointed adjudicator had jurisdiction to determine the dispute. The adjudicator's decision stood. His Honour Judge Anthony Thornton. TCC. 18th February 2000.

**Austin Hall Building Ltd v. Buckland Securities Ltd [2001] EWHC TCC 434**

A construction contract was concluded after the HGCRA came into force but before the Human Rights Act. A dispute arose after the Human Rights Act came into force. The dispute was referred to adjudication. The contractor sought enforcement of that decision. The employer sought to resist enforcement on the grounds that the HGCRA adjudication process does not comply with the Article 6 Human Rights Convention requirement of a fair, public trial (*no criticism of the conduct of the adjudicator was made*). His Honour Judge Bowsher indicated that he was not, without more evidence, prepared to consider whether or not a declaration of incompatibility should be issued. He further noted that since the adjudicator had to comply with the HGCRA, Article 6 in the strict sense, did not apply to the adjudication at hand.

However, in the light of assertions of entitlement to a public trial and a public award, Bowsher J considered in further depth, whether or not the HRA applied to the HGCRA. Unlike arbitration where the parties freely agree to a private process without publicity, adjudication is mandated by the HGCRA so that at least one party have no real choice over the matter. He noted the decision of Havery J in ***Elanay v Vestry*** *[2001] BLR,* to the effect that since adjudication is not finally determinative of the rights and duties of the parties, the HRA does not apply. However, as noted in ***Robins v UK*** *[1997] 1 EHRR 455,* even if not finally decisive, such a decision can have a major impact on the rights of the individuals, so that is not sufficient of an answer to the issue. Bowsher J concluded that by looking to the entire process from determination through to enforcement, the enforcement element involves a public trial and public award. Thus there is no breach of Article 6. On the other-hand, reviewing ***Macob, Discain v Opecprime*** *and* ***Glencot v Barrett*** it is clear that the conduct of the adjudicator is subject to the concepts of natural justice and due process.

His Honour Judge Bowsher. TCC. 11th April 2001.

**Aveat Heating Ltd v Jerram Falkus Construction Ltd [2007] EWHC 131 (TCC)**

Court held that a contractual requirement that the 28 day time limit runs from receipt of referral is compliant. The date of posting a referral was unreliable since the document might not arrive or might be delayed – an event outside the control of the referring party. Clause 38A5 JC Works / SC provided that a decision would be valid even if delivered after 28 days or after any agreed time. Following ***Epping*** such a provision is non-compliant with s108 HGCRA and hence the Scheme applies.

The court acknowledged that the parties could validly refer a dispute to a non-HGCRA adjudicatory process but this would have to be expressly set out an agreed by the parties. It was not in this case since the GC Works alleged to comply with the HGCRA.

As above regarding contractual references, time runs from receipt under the Scheme (***Ritchie*** distinguished). A decision sent on the due date will be deemed to be valid even if sent after business hours. The court will not work in parts of days – only complete days.

The court further held that the dispute as set out in the notice and the referral essentially the same and the dispute had crystallised. Accordingly the decision was enforced except for the portion related to costs which – was not allowed under Scheme. This was provided for under the invalid GC Works reference and hence not enforceable.

***Epping v Briggs*** [2007]: ***Ritchie v Philp*** [2005]: ***Mowlem v Hydra-Tight*** *(2002):* ***Pegram v Tally Weijl*** [2003]: ***AMEC v Whitefriars*** [2004]: ***Ken Griffin v Midas Homes*** 2000: ***Edmund Nuttall v Carter Ltd*** [2002]: considered. His Honour Judge Richard Havery QC. TCC. 1st February 2007

**COMMENT** : The consequences of the respective judgements in ***Epping v Briggs, Cubbit v Fleetgate*** and ***Aveat v Jerram*** will be that many of the standard form adjudication provisions in current use are likely to be treated as non-HGCRA compliant and could give rise to successful challenges to otherwise enforceable adjudication decisions. Perhaps in the longer term as the standard forms are corrected, the result will arguably be a sounder regulatory system, but in the meantime adjudicator's will need to take extra care to ensure that the Scheme is applied and that the parties expressly consent to the process, to avoid later problems. In the absence of agreement, much time, cost and effort might be avoided if the parties seek declarations to clarify their specific situation. None of this can be what was originally intended by the HGCRA and whether or not it will have been worth all the effort and disruption is questionable.

**Avoncroft Construction Ltd v Sharba Homes (CN) Ltd [2008] EWHC 933 (TCC)**

The defendant resists the application for enforcement of an adjudicators decision on the ground that it is entitled to set off LADs against the sum awarded. Alternatively, the defendant seeks a stay of execution, or an order that the money be paid into court and not distributed until the outcome of a second adjudication.

As to the claim to set off LADs it was accepted that the defendant had taken over partial possession of the property. Whilst ostensibly the rule under ***Bramall & Ogden v Sheffield City Council*** (1983) 29 BLR 73 applied regarding non-availability of LADs post partial possession, the defendant asserted that the applicant had to come to the court with clean hands but did not do so since, following rejection of an application for payments, the applicant had barricaded a show house, preventing viewers access, denying the benefits of partial possession. The court rebuffed this argument. The claim was founded in law not in equity. Either there had been partial possession or there had not. The implication here is that if any remedy exists for the applicant's conduct in barricading the property, this was not an appropriate way to recover it.

***Balfour Beatty Construction Ltd v Serco Ltd*** [2004] EWHC 3336 applied regarding the basis for allowing set off against a decision. At para 53 Jackson J stated

*(a) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision…..*

*(b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case."*

As to a) whilst the adjudicator had referred to LADs in passing the central remit of his decision related to a decision in respect of extension of time. Reference to certificates of non-completion, which are a condition precedent to entitlement to LADs was made. The adjudicator observed that LADs are the remedy that Sharpa might seek for late completion, but as the court noted LADs were not claimed in the adjudication. The issue was never argued. Accordingly the adjudicator did not decide LADs were due.

Given the above decision, a point taken by Avoncroft regarding invalidity of a withholding notice ceased to be relevant, but the court dealt with the matter as a point of general interest. The question is whether or not a defendant can issue a withholding notice against an adjudicator's decision. The first step was to consider whether the notice related to an interim payment or a final certificate as per clause 30.1.1.4 or clause 30.8.3. of the JCT contract. Here it did not so clause 30.8 provisions did not apply. The HGCRA requires contracts to provide for withholding notices against sums due under the contract, which was the case here, but in the absence of an express provision the default rule under s111 is for 7 clear days notice. Since the adjudicator required peremptory payment within 7 day, it was not possible to give 7 days clear notice. Thus there was and could never have been service of a valid notice. Whether fair or not is immaterial. This is what the statute states and the court must enforce the statutory regime.

Sharpa procured two very negative reports from credit agencies on the financial position of Avoncroft. The court expressed concern about the relevance of such a reports since they are assess creditworthiness and

whether or not the target is a suitable candidate for a loan. The court noted that Aovncroft had £11,150 worth of CCJ's outstanding. Against this Avoncroft's parent company had provided a guarantee for £300,000. The mere fact that the guarantee contained a subrogation clause did nothing to detract from its significance. There is a guaranteed ability to repay the adjudication sum.

***Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd*** [2006] EWHC 741 (TCC) was considered regarding whether or not a stay pending a second adjudication be granted. Here Sharba was claiming £600.000. Given the size of the claim and the financial insecurity of Avoncroft, did this justify a stay? Her Honour was not persuaded that the size of that claim altered the status quo and provided a ground for a stay - ***Wimbledon Construction Co 2000 Ltd v Derek Vago*** [2005] BLR 374 test for security applied, viz

*(d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1 rendering it appropriate to grant a stay (see **Herschell**)*

*(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:*

*(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see **Herschell**) or*

*(ii) the claimant's financial position is due, either wholly, or insignificant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see **Absolute Rentals**)."*

HHJ Frances Kirkham. Birmingham District Registry. 29th April 2008.

**AWG Construction Services Ltd v Rockingham Motor Speedway Ltd [2004] EWCH 888**

When attempts to negotiate claims in respect of alleged problems with the Rockingham Speedway Race circuit and infrastructure reached an impasse, Rockingham referred three distinct claims to adjudication, the parties agreeing that all three issues be dealt with at the same time.

As the adjudication progressed the basis of the claim in respect of water-holding defects to the surface of the speedway shifted, from an assertion that the foundation strata was impermeable, lacking drainage and the entire track needed to be rebuilt because it was not fit for purpose, to an assertion that drainage should be introduced between layers of specific areas of the track. The adjudicator awarded damages to cover this restatement work and damages in respect of the other claims.

AWG resisted enforcement on the grounds that this was not the dispute referred to adjudication and was thus outside the adjudicator's jurisdiction, asserting that the entire decision should fail. AWG were ambushed into having to defend allegations of negligence which were not contained in the referral. Having reviewed the cases on "**what is a dispute and the meaning of a dispute**" the CA agreed that this was not the dispute as referred and should thus fail, but nonetheless, held that the other decisions could stand, since that aspect did not go to the basis of the other two decisions.

**Regarding the suitability of the dispute for settlement by adjudication,** ***Edmund Nuttall v R. G. Carter. Dyball v Grubb. Balfour Beatty LB. Lambeth*** *[2002] BLR 288***.** considered.

**Regarding what is a dispute,** ***Nuttall v. Carter*** *[2002] BLR 212.* ***Dean & Dyball v Kenneth Grubb*** *[2003] EWHC 2465.* ***Monmouthshire CC v Costeltoe & Kemple*** *[1965] 5 BLR 83.* ***Halki v Sopex*** *[1998] 1 WLR 727.* ***Ellerine v Klinger*** *[1982] 1 WLR 1375.* ***Sindall v Solland. Cowlin v C.F.W. Architects*** *[2003] BLR 241.* ***Beckpeppiett v Norwest Holst*** *[2003] BLR 316. In* ***London & Amsterdam Properties v. Waterman*** *[2003] EWHC 3059.* considered.

**Regarding obviousness of design faults,** ***Brickfield Properties v. Newton*** *[1971] 1 WLR 862* considered.

**Regarding the nature of the adjudication process,** ***Pegram Shopfitters v Tally Weijl*** *[2003] 91 CLR 173.* ***Macob v Morrison*** *[1999] 64 CLR 1* considered.

**Regarding challenges to adjudicators' decisions,** ***Thomas- Frederic's v Wilson*** *[2003] 91 CLR 161.* ***Amec Capital v Whitefriars*** *[2004] EWHC 393.* ***Glencott v Barratt*** *[2001] BLR 207.* ***Ballast v Burrell*** *[2001 ] BLR 529.* ***Fastrack v Morrison*** *[2000] BLR 168.* ***Discain v Opek Prime No 1*** ***[****2000] BLR 402.* considered.

**Regarding natural justice,** ***Discain No 2*** *[2001] BLR 287.* ***Balfour Beatty v LBL*** *[2002] BLR 288***.** considered.

**Regarding stay of enforcement,** ***Bouyges v Dahl-Jensen*** *[2000] BLR 522. in* ***Herschell v Bream*** *[2000] BLR 272,* ***Rainford House v Cadogan*** *[2001] BLR 48*. considered.

His Honour Judge Toulmin. TCC. 5th April 2004.

**COMMENT :** This is an important case because the court provides a review of all the previous decisions regarding ***"What is a dispute in respect of adjudication?"*** and reconsiders the "cherry picking" issue yet again. AWG contended that if one aspect of the decision fails the entire decision fails. The court disagreed stating that *"Where the parties have agreed that three discrete claims can be heard together, I can see no reason why the decisions on those claims which are not subject to challenge should not be enforced immediately."*