

ADJUDICATION CASE SUMMARIES L



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Lafarge (Aggregates) Ltd. v London Borough of Newham [2005] EWHC 1337 (Comm) (24 June 2005)

Lafarge contracted to carry out highway works for LBN. A dispute arose as to applicable rates under the contract which Lafarge referred to adjudication. Subsequent to the adjudication LBN referred the dispute onwards to arbitration. Lafarge disputed the arbitrator's jurisdiction. The arbitrator made a preliminary ruling on jurisdiction finding that he had jurisdiction and went on to hear the issue and render an award. Under s67 Arbitration Act 1996 Lafarge challenges his finding on jurisdiction on the grounds that the terms of the contract stipulated that any reference to arbitration had to be made within 3 months of the adjudication decision and that LBN was out of time when it made its referral.

The critical factors turned on when the adjudication decision was made and when the notice of adjudication became effective. If it was made on the date the hard copy was received, the notice of arbitration was out of time. If it was made on the day it was stated to be issued (an email version was also sent and received on that day) then there was a small chance that the arbitration was made in time – but subject to one complication – under the contract the applicable day had to be received on a “working day” – in the event this was a Saturday. The arbitrator found that Saturday was a working day. Mr Justice Cooke held firstly that the decision was issued on the day it was signed and posted by the adjudicator – but disagreed about Saturday being a “working day.” In consequence the arbitration notice was too late, and by the terms of the contract, the adjudication decision became final and binding.

Reference was made to *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1WLR 896, *R v Westminster Unions Assessment Committee* [1917] 1KB 832, *International Bottling Co Ltd v Collector of Customs* [1995] 2 NZLR 579, *Godwin v Swindon B.C* [2002]1 WLR 997 and *Anderton v Clwydd C.C. (No 2)* [2002] 1 WLR 3174.

Mr Justice Cooke. Commercial Court. 24th June 2005.

Lathom Construction Ltd v Brian & Ann Cross [1999] CILL 1568LTL 10/1/2000

A construction dispute having been referred to adjudication, the parties brokered a compromise agreement and the adjudication lapsed. Disagreement arose as to whether or not the compromise was binding and enforceable. A second reference was made to the same adjudicator who first decided that there was a binding enforceable compromise and secondly ruled upon the construction of that agreement.

His Honour MacKay J held that whilst the adjudicator was validly appointed both times, once he had found that there was a binding compromise he ceased to have jurisdiction over interpretation of the terms and impact of that compromise. There was thus a triable issue for the court and the matter was accordingly set down for trial. *Macob v Morrison* [1999] BLR 93. *The Project Consultancy Group v The Trustees of the Grey Trust* referred to.

His Honour Judge MacKay. TCC. 29th October 1999.

Lead Technical Services Ltd v CMS Medical Ltd (2007) Lawtel AC9400739

Appeal from the summary enforcement of an adjudication decision by Grenfell J with regard to a payment / fees dispute over planning permission services. The CA overturned the summary enforcement decision. There was an arguable case that there was a valid deed that supplanted the original construction contract, to the effect that the relevant ANB was governed by the T&C.Solicitors Rules and that there was an oral £20,000 fee capping agreement in place which ran contrary to the £90,000 claimed for professional services, which fell outside the scope of the HGCRA since it was not a construction contract evidenced in writing as per s107. The judge had failed to explain why this evidence was dismissed and thus to justify summary enforcement (*presumably, if he had been able to, and had so done, summary enforcement would have been valid*).

Carillion Construction Limited v Devon-port Royal Dockyard [2005] considered on importance of not nit-picking adjudication decisions; *Pao On & Others v Lau Yiu Long* [1980] Appeal Cases page 614 considered regarding whether an agreement might be valid in the absence of price specification.

CA. Buxton LJ, Rix LJ, Moses LJ. 30th January 2007.

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COMMENT : Presumably in the absence of any negotiated settlement, the case could be remitted to the High Court for a determination as to whether or not the deed prevailed and if so what impact that had upon the dispute between the parties followed by a determination as to whether or not the oral capping agreement prevailed as a variation to the terms of the deed.

Leading Rule v Phoenix Interiors Ltd [2007] EWHC 2293 (TCC)

Suspension – non payment of VAT on decision. Whether or not notice of suspension of works valid for non-payment of VAT on an adjudicator's decision. Application for preliminary issues. Case on-going.

Mr Justice Akenhead. TCC. 3rd October 2007

Ledwood Mechanical Engineering Ltd v Whessoe Oil and Gas Ltd [2007] EWHC 2743 (TCC)

Pain & Gain – impact on payment of adjudication decision. (1) Is the risk/reward régime to be applied to all applications or only those after completion? The risk/reward régime, referred to as "pain and gain", limits Ledwood's entitlement to payment of costs by reference to target hours. (2) Should the Adjudicator's decision be given effect by applying his decision to Application 19 or Application 22? (3) If the risk/reward régime applies to applications for payment prior to completion, can the Joint Venture set off a sum in respect of an adjustment for risk/reward?

A dispute arose out of the defendant Joint Venture's assessment of their interim application 19. An adjudicator held that the JV had wrongly withheld £1.2m. No challenge was made to the decision, but the JV claimed their right to set off against the decision.

Ledwood made application 19 in July 2007. A further three applications had been made prior to the issuing of the adjudicator's decision. The JV took account of the decision in application 22 and set off against the risk/reward element within the contract.

Mr Justice Ramsey had to decide whether it followed logically that the JV was entitled to recover a specific sum by adjustment of the risk/reward element. The judge held that whilst there was a natural corollary of the decision was that it increased the number of expended hours in the pain/gain calculation, the calculation of the effect was not undisputed or indisputable. In this instance the position differed from the calculation of liquidated damages and as such it was held that Ledwood was entitled to the summary judgement.

Regarding payments, cases referred to included *Balfour Beatty Construction v Serco* [2004] EWHC 3336.

Summary Rachel Ewin.

Judgment Mr Justice Ramsey. TCC. 20th November 2007

Levolux A.T. Ltd v Ferson Contractors Ltd [2002] BLR 341

Enforcement of decision : *KNS v Sindall* 2000; *VHE v RBSTB* [2000]; *Northern Developments v Nicol* [2000]; *Solland v Darayden* 2002 considered. Compare *Bovis* : Contract provided that on termination of contract no further sums payable : Could a post adjudication termination defeat decision? NO.

His Honour Judge David Wilcox. TCC. 26th June 2002.

Levolux A T Ltd v Ferson Contractors Ltd [2002] EWCA Civ 1382

Application to Appeal the high court decision of HHJ David Wilcox TCC.

CA before Lord Justices Pill and Jonathan Parker. 8th August 2002.

Cross Reference : the later appeal *Ferson v Levolux* [2003] EWCA. Civ 11.

Liberty Mercian Ltd v Dean & Dyball Construction Ltd [2008] EWHC 2617 (TCC):

Application for preliminary declarations in support of adjudication : whether sectional completion schedule void for uncertainty by failing to define sectional completion dates : whether liquidated damages provisions (LADs) amounted to a penalty in that the initial delay to section 1 cascaded down to sections 2-5 giving rise to further LADs ; validity of EOT's – 4 weeks or 8 – or alternatively should the original 4 week delay be disregarded in relation to sections 2-5.

Regarding liquidated damages provisions and assertions of penalty, *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, *Philips Hong Kong v The A-G of Hong Kong* (1993) 61 BLR 49. *Bramall & Ogden Ltd v Sheffield City Council* (1983) 29 BLR 73, *Braes of Doune Windfarm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111 considered.

Mr Justice Coulson. TCC. 31st October 2008

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Linaker Limited v Riviera Construction [1999] Adj.L.R. 11/04

Linaker applied for enforcement of an adjudication decision and in addition, by application to amend, asked for payment of retention monies which, by virtue of the adjudication decision, had also become due. The judge determined from the submissions of defence that there was no apparent defence to enforcement action in respect of what he determined was a valid adjudication decision, both in respect of the sum awarded and the defendant's portion of the adjudicator's fees. The court held that this was an appropriate case to invoke the multi-track procedure, noting that speed is of the essence for adjudication enforcement actions. The court ordered interest payable at 8% awarded from the time when payment became due.

The final part of the judgement provides a short break down of allowable costs in respect of the enforcement action. His Honour Judge Thornton Q.C. TCC. 4th November 1999

Lloyd Projects Ltd v John Malnick [2005] TCC. Brewer.

An agreement to convert three offices into flats was concluded on the telephone between the developer and the contractor. Work then got underway. Subsequently, attempts were made to define the scope of Construction Contract in an exchange of letters. A dispute arose which was referred to adjudication. The responding party resisted jurisdiction from the outset on the basis that as an oral contract it did not fall within the scope of the HGCRA adjudication scheme but the adjudicator went ahead nonetheless and delivered a decision. Her Honour Judge Frances Kirkham held during enforcement proceedings before the TCC that the agreement fell outside the scope of the HGCRA adjudication provisions firstly because subsequent writing does not convert an oral into a written agreement in circumstances where the work has already been substantially performed and secondly because important questions about the scope of the contract were not settled by the correspondence.

RJT v DM Engineering [2002]. *Hollins v Russell* [2003] 1 WLR 2487; *Stratfield Saye v AHL* 2004; *Debeck Ductwork v T&E* 2002; *Connex v MJB* [2004]; *Branlow v DenMaster* 2004, *Sheriff of Lothian & Borders at Linlithgow*; *Carter v Nuttall* 2000. *Pegram v Tally Weijl* [2004] considered.

Her Honour Judge Frances Kirkham. TCC. 22nd July 2005.

London & Amsterdam Properties Ltd v Waterman [2003] EWHC 3059 TCC

An adjudicator can bill by hourly rate or by fixed fee. A dispute as to entitlement is permitted even in absence of quantum details. Ambush established.

Edmund Nuttall v Carter [2002]; *Carter v Edmund Nuttall* [2002]. *Monmouthshire CC v Costelloe* [1965] 5BLR. *Beck Peppiatt v Norwest Holst* [2003]. *Sindall v Solland* 2001. *Fast Track v Morrison* [2000] . *Hitec v MCI* [2002]. *Cruden v New Towns* [1995] 2 Lloyds Reports 387, *Cowlin v CFW Architects* [2002]. *Glencot v Barrett* [2001]. *Discain No.2* 2001. *Balfour Beatty v LBC Lambeth* [2002]. *RSL v Stansell* [2003]. *Discain (No.1)*. *Anisminic v FCC* (1969) 2 AC 147; *O'Reilly v Mackman* 1983 2 AC 287. *Ex Parte Page* (1993) 682. *Re Racal* 1981 AC 374. *Boddington v B.T.Police* 1999 AC 143. *R v Wicks* 1998 A.C. *Macob; Outwing. Bouygues v Dahl-Jensen* [2000]. *Nikko Hotels v MEPC* [1991] 2 EGLR 103. *CB Scene v Isobars* [2002]. *Northern Developments v Nichols, Sherwood v. Casson* considered.

His Honour Judge David Wilcox. TCC. 18th December 2003.

London Underground Ltd v Metronet Rail BCV Ltd [2008] EWHC 502 (TCC)

De novo trial : contract interpretation : general principles : was the adjudicator (non HGCRA stepped resolution program) correct in rejecting an interpretation because it led to an absurdity? Held : Not absurd and should be applied.

The Antaios [1985] AC 191; *Mannai Limited v. Eagle Star Life Assurance Co Ltd* [1997] AC 749; *ICS v. West Bromwich* [1998] 1 WLR 896; *Wickman Machine Tools v. Schuler* [1974] AC 235; *BCCI v. Ali* [2002] 1 AC 251 considered. Mr Justice Ramsey. 14th March 2008

Lovell Projects Limited v Legg and Carver [2003]BLR 452

Voluntary adjudication : Residential contract – with contractual adjudication : Held complied with UCTA 1977 : Precarious finances of contractor due to non-payment. Pay up.

London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51. *Director General of Fair Trading v First National Bank* [2002] 1 AC 481. *Zealander v Laing Homes* 1999: *Picardi v Cuniberti* [2002]. *Watkin Jones v Lidl*. *Cowlin Construction v CFW Architects* [2003] EWHC 60.. *Halki v Sopex* [1998] 1 WLR 726.

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Nuttall v Carter [2002]. *Modern Engineering v Gilbert Ash* [1974] AC 689. *Parsons Plastics v Purac* [2002].
Bouygues v Dahl-Jensen [2000] considered. His Honour Judge Moseley. TCC. 17th July 2003.

LPL Electrical Services Ltd v Kershaw Mechanical Services [2001] EWHC HT 00/427 (TCC)

Jurisdiction : Assertion that adjudicator only had jurisdiction for a specific interim payment : Held :
Adjudicator interpreted contract : Right or wrong, enforceable.

His Honour Judge Richard Havery. TCC. 2nd February 2001.