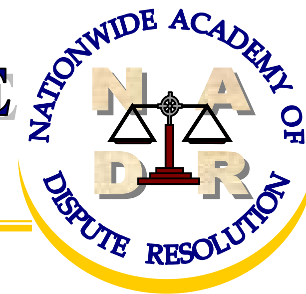
ADJUDICATION CASE SUMMARIES S



LAST UPDATED 4th MAY 2008

Saint Andrews Bay Development Ltd v. HBG Management Ltd [2003] ScotCS 103

An adjudicator attempted to enforce her terms for appointment, which required each party subject to joint and severable liability to pay the adjudication fees, before release of the decision. The one party refused to pay and the other provided an assurance that they would settle the entire account. The adjudicator issued the decision two days late. The objecting party then sought, relying on Judge Toulin's dicta in ***Bloor v Bowmer*** *[2000] TCC 764*, to have the decision set aside, on the basis that once the due date for a decision had passed, either party has the right to serve a fresh notice for the appointment of a new adjudicator.

Lord Wheatley considered the decision in ***Ballast v Burrell*** *[2003] SLT 137*, where Lord Reed stated that despite procedural errors, unless the decision was a "*fundamental nullity*", it should be upheld and enforced. If the adjudicator acted ultra vires, that is to say in excess of jurisdiction, erred in law in respect of jurisdiction or unfairly, the decision would be vitiated.

Whilst the HGCRA & the Scheme are silent on communication of a decision, expressly requiring only that the decision be made within the statutory time frame, it is implicit from the statutory objective of achieving timely determination of a dispute that the decision be promptly communicated to the parties. Promptness would in the circumstances require a fax rather than first class post. Furthermore, para 39A.6.3 of the Scottish standard contract conditions not only reflects the statutory time scale for the making of the decision but in addition requires that the adjudicator shall *"forthwith send that decision in writing to the parties."*

Whilst holding that the adjudicator had committed a technical breach of the statutory provisions and a breach of the construction contract, the court held that the breach did not render the decision a fundamental nullity, particularly since on balance in the present circumstances neither party was prejudiced. The decision amounted to a mutual benefit enforcing elements of both the claim and the counter-claim.

Lord Wheatley. Outer House, Court of Session. 4th April 2003.

Conclusion : Where both parties agree to terms requiring both parties to pay before issue of a decision, whilst a step outside the spirit of the statutory scheme, that agreement may be binding. Certainly it should not result in a late decision being set aside. However, care should be taken by an adjudicator before seeking to impose such terms that they do not conflict with the construction contract terms. Where such a device is employed the adjudicator is advised to reach a decision several days in advance of the deadline for issuing a decision, so that payment can be made and the decision thus issued in time. However, it would appear that since the adjudicator has to issue the decision or risk being in breach of the statutory requirements, there is little that an adjudicator can do to make the parties comply with the request for payment.

Samuel Thomas Construction Ltd v Bick & Bick [2000] Exeter ZN 900750

Construction Contract :Conversion of a barn to a residence still a residential occupier contract even though occupation not possible till completion. Outside HGCRA. ***Macob v Morrison*** *(1999)*; ***Project Consultancy v Gray Trust*** *(1999)* considered. His Honour Judge Overend. Exeter County Court. 28th January 2000.

Scottish Coal Company Ltd, Re Petition for Suspension and Interdict [2004] ScotCS 186

Binding Adjudication : Non-Construction case - non-HGCRA case - on nature of binding adjudication and jurisdiction of adjudicator. Discusses right to retentions. ***Brodie v Ker*** 1952 SC 216. ***Bank of East Asia v Scottish Enterprise*** 1997 SLT 1213. ***Redpath Dorman Long v Cummins Engine Co*** 1981 SC 370, ***McEwan v Middleton*** (1866) 5 M 159). ***Strathmore v Greig*** 2000 considered.

Lord Bracadale. Outer House Court of Session. 29th July 2004.

Scrabster Harbour Trust v. Mowlem Plc (t/a Mowlem Marine) [2005] ScotCS CSOH_44

Lord Clark of the Outer Court of Session considered a dispute concerning a contract to build a breakwater on ICE 5th ed terms as amended 2001. Clause 66, in compliance with the HGCRA, provided for adjudication, but further stated that if the decision was not given effect a party could issue a notice of referral to arbitration, such notice to be issued within three months of the decision, otherwise the decision would

become final and binding. Mowlem referred a dispute to an adjudicator. The decision was delivered on the 25th June. Mowlem were dissatisfied with the decision and accordingly gave a disputed ***"notice"*** of reference to arbitration on the 15th / 16th September.

Scrabster sought a declaration that the notice was ineffective because it failed to comply with the requirements of the applicable arbitration rules in that it lacked the details stipulated by those rules.

Lord Clark held that compliance with the requirements of Clause 66(6) ICE was required in order to submit the dispute onwards to arbitration but concluded that in the circumstances of the case the requirements were fulfilled, albeit that some of the detail set out in the Scottish Arbitration Rules were absent. The rules however were more relevant to the procedure of the arbitration than the reference. The required substance for a valid notice was present and Scabster suffered no impediment from the minor omissions.

Fernandez* v *McDonald [2004] 1 W.L.R. 1027. ***Burman* v *Mount Cook Land*** *Ltd* [2002] Ch.256. ***Mannai* v *Eagle Star*** [1997] A.C. 749. ***Douglas Milne Ltd* v *Borders Regional Council*** 1990 S.L.T. 558. ***Christiani & Nielsen Ltd* v *Birmingham C.C.*** 52 Con. L.R. 56. considered.

Lord Clarke. Outer House, Court of Session. 23rd March 2005.

Scrabster Harbour Trust v Mowlem plc [2006] CSIH 12

As noted in the first instance report, a construction contract provided that a notice of arbitration was required within 3 months following the decision of an adjudicator, otherwise the adjudication decision became final. At first instance Lord Clarke held the notice to be adequate. On appeal, the validity of notice was upheld but on different grounds, namely that the terms regarding commencement of arbitration were too imprecise to require strict adherence. The crucial factor was that notice – in the commercial sense of the word, was given. Whilst a Code was specified, a non-compliant example detracted from strict compliance.

Mannai* v *Eagle Star [1997] AC 749, ***Burman* v *Mount Cook*** [2002] Ch 256: ***Fernandez* v *McDonald*** [2004] 1 WLR 1027) : ***Muir Construction* v *Hambly*** 1990 SLT 830. considered.

Lord President; Lady Cosgrove; Sir David Edward, Q.C. First Division, Inner House, Court of Session. 22nd February 2006.

Shalson v D.F.Keane Ltd [2003] EWHC 599 (Ch)

Shalson engaged Keane to carry out construction works on JCT Intermediate form. On final completion a dispute arose as to payments on a number of interim certificates which were not honoured. The contractor went down the insolvency route – applying for a statutory demand as a precursor to winding up proceedings. Shalson wished to set off these debts against a counter claim and in this appeal against the statutory demand sought to stay the proceedings pending the outcome of arbitration proceedings on the counter claims. The question therefore for the court was whether a statutory demand, as a form of commencement of legal proceedings be subject to a stay to arbitration or alternatively to adjudication under the Housing Grants and Construction Act 1996 both of which were the prescribed dispute resolution processes under the contract. The court refused a stay. In particular the court stated that an a applicant cannot sit back and refrain from instituting adjudication/arbitration proceedings yet procure a stay (discretionary in the circumstances) against the statutory demand. It might well have been a different matter if adjudication/arbitration proceedings had been applied for or were prospective. In the circumstances this was simply a ploy – clearly the court was not convinced about the substance or even of the quantum involved in the counter-claim. Mr Justice Blackburne. Ch.Div. 21st February 2003.

COMMENT : If no withholding notice has been issued, employers need to aware of the possibility of a statutory demand. If issued they will need to pay up – then argue later. Thus, where presented with a payment application, deal with it promptly and issue a withholding notice. Even if they are too late in doing so they would still be advised to commence adjudication / arbitration if they wish to pursue a set off. Otherwise it may well be too late to do so once a statutory demand is set in motion. If they have the funds to stave off insolvency proceedings they can be forced at that stage to pay now and argue later – putting them on the defence rather than the attack. Not a good plan, since momentum and cash flow is lost. If they enter administration the receiver may or may not chose to pursue their counter-claim – which is not that patent may not appear in the best interest of creditors. You will not be the trustees main priority.

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Shepherd Construction v Mecright Ltd [2000] EWHC HT 00/282 (TCC) : BLR 489

Construction Dispute : Factors which might vitiate a contract, eg duress, mistake etc are not construction contract disputes. Was a settlement due to duress ? Litigate for answer. ***Lathom v Cross*** 1999 considered

His Honour Judge Humphrey Lloyd. TCC. 27th July 2000.

Sherwood & Casson Ltd v Mackenzie [2000] CILL 1577

Following the decision of an adjudicator on an interim application, a dispute over the value of the final account was referred to a different adjudicator. The adjudicator delivered his decision which the applicant sought to enforce in these proceedings. The defendant resisted enforcement on the grounds that the second decision rehearsed the same ground as the first decision and accordingly by virtue of Rule 9(2) of the Scheme, the adjudicator should have resigned where as here the dispute was the same or substantially the same as one previously referred to adjudication. The central issue therefore was whether or not the same dispute had been referred to the second adjudicator or whether it was in fact a different dispute.

His Honour Judge Anthony Thornton held firstly that contrary to the assertions of both counsel an adjudicator cannot resign from part of a dispute. If there is a question of duplication he either resigns or affirms his appointment to the dispute referred to him.

The first adjudication concerned interim applications 2 & 3. Application 3 was essentially the last application for work done post practical completion. It excluded retentions. A range of alleged variations and contra-charges were considered. Allowing contra-charges etc Sherwood recovered a mere £1,844 of the £14K+ claimed.

The second adjudication adduced further evidence in relation to both in support of the alleged variations and against the contra-charges, plus partial release of retentions and a loss and expense claim.

Mackenzie's case was that the adjudicator only had jurisdiction over the loss and expense claim and that the other issues were a duplication of the previous adjudication and that the adjudicator could not re-open and reconsider those issues.

The adjudicator found 1) that this was a final account dispute and not the same as the previous dispute 2) interim application sums are paid on account 3) Mackenzie had submitted no evidence as to why variations G & M were incorrect in the absence of which they were accepted 4) the contra-charges had already been determined by the previous adjudicator and those figures were therefore to be applied 5) he dismissed the loss and expense claim 6) awarded £7K+ for the variations and 7) made two discount allowances for retentions at 2½%.

Thornton J summarised the combined effect of ***Macob, PCF v Gray Trust*** and ***Bougues No1*** as follows:-

1. *A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced (**Macob**).*
2. *An decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced (**Bouygues**).*
3. *A decision may be challenged on the ground that the adjudicator was not empowered by the HGCRA to make the decision, because there was no underlying construction contract between the parties (**Project Consultancy**) or because he had gone outside his terms of reference (**Bouygues**).*
4. *The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference (**Bouygues**).*
5. *An issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the court on the balance of probabilities with, if necessary oral evidence (**Project Consultancy**).*

Thornton J concluded that Mackenzie has mounted a jurisdictional challenge. Unlike the question whether or not a contract exists, which cannot be decided by the adjudicator, a question as to duplication can be decided by the adjudicator – but if he gets it wrong, the decision is subject to review since the Scheme requires an adjudicator to resign in the event of duplication and this can only be enforced by review.

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He further found that the dispute concerned revaluations of the interim accounts for the purpose of the final account and was accordingly different. It also included a loss and expense claim. Whilst the contra-charges issue was a duplication it was not a substantial part of the prior decision. In determining the final account the variations and contra-charges had to be taken into account and could not be separated off.

In conclusion the court held that whilst errors of jurisdiction invalidate an adjudication decision, a wrong decision of fact does not and the decision will be enforced pending final settlement.

His Honour Judge Anthony Thornton. TCC. 30th November 1999.

Shimizu Europe Ltd. v Automajor Ltd [2002] EWHC 1571 (TCC)

Errors of Adjudicator : Parties cannot cherry pick parts of a decision – it applies all or nothing : If adjudicator gets damages award wrong – challenge in arbitration.

His Honour Judge Richard Seymour. TCC. 17th January 2002.

Shimizu Europe Ltd. v LBJ Fabrications Ltd. [2003] EWHC 1229 (TCC)

LBJ had referred a dispute to adjudication in January 2003, in respect of an interim valuation previously submitted to Shimizu in December 2002. The adjudicator issued a decision in February, deciding that Shimizu should pay LBJ the amount of £47,718.39 plus VAT *"without set-off"*.

It was a condition precedent of the sub-contract agreement that, prior to payment becoming due *"[LBJ] shall have delivered to [Shimizu] a VAT invoice or authenticated VAT receipt in respect of the relevant interim payment…"* LBJ had not complied with this condition. LBJ had not issued a VAT invoice / receipt as Shimizu had not informed them of the payment, if indeed any, that was to be made. Upon receipt of the adjudicator's decision, LBJ issued a VAT invoice in the amount stipulated as being due by the adjudicator on the 21 February. Shimizu responded with a withholding notice on the 25 February. The withholding notice provided reasonable detail with regards to the reasons for deductions.

Amongst other issues, Shimizu sought declaration from the court that the adjudicator's decision did not prevent them from issuing a withholding notice in respect of the VAT invoice received from LBJ, dated 21 February. LBJ contended that to concur with Shimizu could have a disastrous effect on the Construction Act. It was suggested that this decision could encourage others to contract on similar terms that stipulate that payment only becomes due upon receipt of a VAT invoice or receipt. If a party is not informed of the sum to be certified they cannot realistically issue a VAT invoice let alone a receipt.

The court held that the condition precedent prevented payment "becoming due", until such time as a VAT invoice or receipt had been submitted to Shimizu. Since no VAT invoice was issued until the 21 February, after the adjudicator's decision, Shimizu, in accordance with the sub-contract, were entitled to issue a withholding notice at anytime up to five days before the final date for payment. The full report should be read in order to appreciate and consider all the discussions.

Ferson v Levolux [2002]. ***VHE v RBSTB*** [2000]. ***Construction Centre v Highland Council*** [2002]. ***Bovis Lend Lease v Triangle*** [2003]. ***British Steel Corporation v Cleveland Bridge & Engineering Co Ltd*** 24 BLR 94. considered. Her Honour Judge Frances Kirkham. TCC. 29th May 2003.

COMMENTARY : (By Nick Turner). Whilst the decision of the court appears to have interpreted the terms and conditions correctly in a literal sense, the decision could be argued to be inequitable. Shimizu clearly failed to adhere to their contractual obligations in advising LBJ of the payment to be made, thereby preventing LBJ from issuing a VAT document, which in turn would have started the payment clock ticking. To be fair, Shimizu had advised LBJ with regards to set-off issues prior to the submission of the interim application in December. However that earlier letter could not be held to constitute a valid withholding notice, as it had not been issued in respect of a valuation. In order to kick-start the payment process in future, in similar circumstances, it might be possible that firms when making interim applications for payment, where no agreement has already been reached between the respective surveyors, could issue a VAT invoice for the full amount. In the event that the full amount is not certified for payment the previous invoice could be superseded or adjusted by a credit. It is quite likely that your accounting staff will have some comments to make in respect of the headache this might cause. Alternatively, service providers would be well advised not to contract on similar terms, without amendment to provide for the consequences of a failure to provide necessary information in order to raise a VAT invoice.

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Sim Group Ltd v Neil Jack [2002] ScottCS 2705

End of jurisdiction : Once an arbiter delivers his final decision he becomes functus officio and cannot without fresh appointment go on to determine further issues. ***West v SS Scotland*** 1992 S.C. 380. ***Kyle & Carrick DC v A.R. Kerr & Sons*** 1992 S.L.T. 629. ***Naylor v Greenacres Curling*** 2001. ***North British Railway Company v Barr*** (1855) 18 D. 102 referred to. Lord Clarke. Outer House, Court of Session. 5th June 2002.

Simons Construction Ltd. v Aardvark Developments Ltd. [2003] EWHC 2474 (TCC)

Late decision : A late decision was upheld because neither party had repudiated the appointment either expressly or impliedly by calling for another adjudicator. ***St. Andrews Bay v HBG Management*** [2003]. ***Barnes & Elliott v Taylor Woodrow*** referred to.

His Honour Judge Richard Seymour. TCC. 29th October 2003.

Sindall Ltd v Abner Solland [2001] EWHC HT 01/129 (TCC) : [2002] Con LRHT 01/129

Meaning of Dispute : Entitlement to an EOT was an integral issue of whether or not contract lawfully terminated and thus within jurisdiction of adjudicator.

London Borough of Merton v Leach (1985) 32 BLR 51. ***West Faulkner Associates v London Borough of Newham*** (1994) 71 BLR 1. ***GLC v Cleveland Bridge and Engineering Co*** (1986) 34 BLR 50. ***Fastrack v Morrison*** [2000]. ***KNS v Sindall*** (2000). ***Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*** [1999] 1 AC 266 considered. His Honour Judge Humphrey Lloyd. TCC. 15th June 2001.

Skanska Construction UK Ltd v. The ERDC Group Ltd [2002] ScotCS 307

Double Jeopardy : Application to stay adjudication on grounds of trying same dispute : Court held, whilst same contract, issues concerned different stages of contract. ***Holt v Colt; Sherwood v MacKenzie; Watson v Harrison,*** 2001 referred to. Lady Paton. Outer House, Court of Session. 28th November 2002.

SL Timber Systems Ltd v Carillon Construction Ltd [2001] ScotCS 167

Withholding notice : Payment ordered by adjudicator because of absence of withholding notice : Held : Must prove entitlement : Adjudicator wrong but still enforced.

'In my opinion the words "sum due under the contract" cannot be equiparated with the words "sum claimed". The section is not, in my opinion, concerned with every refusal on the part of one party to pay a sum claimed by the other. It is concerned, rather, with the situation where a sum is due under the contract, and the party by whom that sum is due seeks to withhold payment on some separate ground. Much of the discussion of the section in the cases has been concerned with what circumstances involve "withholding" payment and therefore require a notice. Without the benefit of authority, I would have been inclined to say that a dispute about whether the work in respect of which the claim was made had been done, or about whether it was properly measured or valued, or about whether some other event on which a contractual liability to make payment depended had occurred, went to the question of whether the sum claimed was due under the contract, therefore did not involve an attempt to "withhold... a sum due under the contract", and therefore did not require the giving of a notice of intention to withhold payment. On the other hand, where there was no dispute that the work had been done and was correctly measured and valued, or that the other relevant event had occurred, but the party from whom payment was claimed wished to advance some separate ground for withholding the payment, such as a right of retention in respect of a counterclaim, that would constitute an attempt to "withhold ... a sum due under the contract", and would require a notice of intention to withhold payment.'

Watson Building Services (2001), ***Northern Developments v Nichol*** [2000]. ***VHE v RBSTB*** [2000]. ***KNS v Sindall*** 2000, ***Woods Hardwick v Chiltern Air Conditioning*** [2001]. ***Whiteways v Impressa*** 2000. ***Homer Burgess v Chirex*** 2000; ***Macob v Morrison*** [1999]. ***Bouygues v Dahl-Jensen*** [2000]. ***Rainford House v Cadogan*** 2001, ***Absolute Rentals v Gencor*** considered.

Lord MacFadyen. Outer House, Court of Session. 27th June 2001.

Solland International Ltd. v Daraydan Holdings Ltd. [2002] EWHC 220 (TCC)

Set off : Could an adjudication decision be set off against liquidated damages claim during enforcement proceedings. Held No.

VHE v RBSTB [2000]. ***Northern Developments v Nichol*** [2000]. ***Bloor v Bowmer*** [2000]. ***David Maclean v Swansea HA*** 2001. ***Glencot v Barrett*** [2001]. ***Austin Hall v Buckland*** [2001] considered. Compare ***C&B Scene v*** **Isobars.** His Honour Judge Richard Seymour. TCC. 15th February 2002.

Cross Reference : ***Isobars.***

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South West Contractors Ltd v Birakos Enterprises Ltd [2006] EWHC 2794 (TCC)

The claimants entered into two contracts with the respondents viz 1) a Fee Contract for *3% of the total of all the work and the prelim content of a 65 week program of works to cover the* Claimant's profit element and 2) a Management Contract on JCT Standard Form of Domestic Sub-Contract 2002 edition terms, related to the Claimant's costs involved in managing the works.

The respondents terminated the project. The claimants submitted disputes in respect of unlawful termination to adjudication, claiming £152K + VAT for the terminated management cost contract and 3% of £4.2M less sums paid to date, in respect of the Fee Contract. The same adjudicator was appointed to both disputes. This action concerned an enforcement action in respect of the Fee Contract – the adjudicator having awarded and the respondent having failed to pay the sums of £72K and a further £21K on practical completion. The court firmly resisted assertions that there was no dispute. ***All In One Building and Refurbishments Limited and Makers UK Ltd.*** 2005 EWHC 2493 (TCC) applied.

The respondent asserted that the adjudicator had failed to address whether or not the claimant had taken sufficient steps to mitigate his losses between termination and practical completion, whereas the issue was fully aired in the Management Contract adjudication. The court rejected this assertion. The two awards were closely related and could be read together. It is clear that the mitigation issue was fully canvassed and taken into account by the adjudicator – but he had not replicated the discussion in the second decision. It was clear from ***Carillion Construction Ltd v Devonport Royal Dockyard*** (2005) 1 BLR 324 that an award should not be minutely examined to identify minor / technical blemishes. A complaint that the adjudicator had not considered a potential set off was dismissed. There were no grounds for a set-off. Summary enforcement ordered. His Honour Judge David Wilcox : TCC. 7th November 2006

Specialist Ceiling Contractors v. ZVI Construction [2004] EWHC 4T-0006 1 (TCC)

The claimant disclosed the existence of, but not details of, a rejected without prejudice offer. The defendant resisted enforcement of the adjudicator's decision alleging that knowledge of the existence of settlement negotiations prejudiced the mind of the adjudicator and influenced his decision. The adjudicator had made it clear that he had paid no attention to the matter and that he assumed that settlement negotiations are par the course in most adjudications but that no inference in respect of admissions of liability could be drawn from the fact that they had taken place. The court approved the approach of the adjudicator and held that in this instance there had been no bias and the decision should be enforced. However, as a decision based on its facts, a similar revelation could result in a decision being set aside if the adjudicator does not similarly spell out how he has dealt with the disclosure.

Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700. ***R v Gough*** [1993] AC 646. ***Berg v IML London Ltd*** [2002] 1 WLR 3271, ***Discain v Opecprime*** [2001], ***Glencot v Barrett*** [2001] considered

His Honour Judge S.P.Grenfell. 27th February 2004.

Staveley Industries Plc v Odebrecht Oil & Gas [2001] TCC

Construction Contract : Land below watermark is not land within England, Wales or Scotland, so sea bed construction is outside HGCRA. ***Nottingham Community HA v Powerminster*** [2000] B.L.R. 759. ***Palmers v ABB Power*** [1999]. ***Argyll & Bute D. C. v. Secretary of State for Scotland*** [1976] S.C. 248 considered.

His Honour Judge Richard Havery. TCC. 28th February 2001.

Stiell Ltd v Riema Control Systems Ltd [2000] ScotCS 174

Security : Arrestment : Money arrested as a security by the court even though the sum seized exceeded the amount the adjudicator had held to be due. Not oppressive. ***Homer Burgess* v *Chirex*** 2000. ***Costain* v *Scottish Rugby Union plc*** 1993 S.C. 650. ***Allied London* v *Riverbrae*** 1999; ***Macob* v *Morrison*** 1999. ***Rippin Group Limited* v. *I.T.P. Interpipe S.A.*** 1995 S.C. 302 considered.

Lords Prosser, Philip and Caplan. Extra Division, Inner House, Court of Session. 23rd June 2000.

Stirling v. Westminster Properties Scotland Ltd [2007] ScotCS CSOH_117

Work carried out by company promoter - contract concluded pre-incorporation. Following failure to honour application No 6 post certification, in the absence of a withholding notice, notice of adjudication given first in company's name then later in the promoters name. This enforcement action followed and the defence was that there was no dispute.

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Lord Drummond Young held that crystallisation occurred by date of final notice though not necessarily directly after due date for payment. Some reasonable period of time required during which the subject matter of the dispute could be clearly communicated and an opportunity afforded to explain why no payment was forthcoming. ***Amec Civil Engineering Ltd* v *Secretary of State for Transport*,** [2005] 1 WLR 2339. ***Fastrack Contractors Ltd* v *Morrison Construction Ltd*,** [2000] BLR 168.

As to personality, the defenders tried to have it both ways, first denying a relationship with the company but then asserting that all correspondence having been in the name of the company there was no correspondence or communication with the claimant prompoter. The court held that company correspondence acted as agent of the promoter. ***Charrington & Co Ltd* v *Wooler***, [1914] AC 71, ***Prenn* v *Simmonds*,** [1971] 1 WLR 1381; ***Reardon Smith Line Ltd* v *Hansen-Tangen*,** [1976] 1 WLR 989, ***Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd*,** 1994 SC 351, ***Bank of Scotland* v *Dunedin Property Investment Co Ltd*,** 1998 SC 657, ***Waydale Ltd* v *DHL Holdings (UK) Ltd (No 2)*,** 2002 SLT 224, ***Glasgow City Council* v *Caststop Ltd*,,** 2002 SLT 47 referred to. Lord Drummond Young : Outer House, Court of Session. 9th July 2007.

COMMENT : There are a few odd features about this judgment : it is quite likely that there are more facts that are not referred to in the judgment which would have filled in the gaps.

Following non-payment the employers were advised that there was a possibility of withdrawal from site - but it is not clear whether or not this occurred. This gives the impression at least that work was on going and that the application was for an interim payment rather than a final account. However, Lord Drummond Young refers to the purpose of the payment processes under clauses 4.2.1 & 4.2.4 of the JCT form as intended for interim payments - but it is far from clear whether Application No6 was in fact a final application as opposed to an interim payment. Which ever is the case - it is not immediately clear to the reader why a dispute should not crystallize immediately on non payment after the due date in the absence of withholding notice. Why there should be a reasonable period thereafter before crystallization is a mystery.

In addition, why it is too simplistic to say that the subject matter of the dispute has not been clearly communicated when a certified application has been made? What more is there to say? The certificate states clearly what is being claimed and why and approval by the contract administrator gives it the rubber stamp. Surely, if there is to be any doubt in the mind of the employer this must arise out of issue of a withholding notice - stating how much is to be paid - if any - and the reasons for withholding.

There is after all a difference between crystallization of a dispute and stating that in the absence of a withholding notice there is a final right to payment (a mechanism sometimes used in contracts). If this was a final certificate then the adjudicator could determine whether or not the sums had in fact been earned - so whichever way allowing the dispute to go to adjudication at an early stage should not be problematical. There is no obvious element of an ambush here. The problem with this approach is that it could create uncertainty as to when a dispute crystallizes and thus give rise to further disputes.

It is submitted that Lord Young protests too much here. He refers to May LJ's additions to Jackson J's first instance summary of the law - but not to Jackson J's original list distilled from case law including ***The Halki* -** where a failure to pay once a sum is due is sufficient to constitute a dispute.

Still the common sense approach to personality is to be welcomed.

Stratfield Saye Estate Trustees v AHL Construction Ltd [2004] EWHC 3286 (TCC)

A contract was concluded on a cost plus basis to render an old building water-tight. The developer cancelled after 6 days of work. The builder claimed loss of profit. An adjudicator awarded loss of profit. The developer resisted asserting no written contract as required by HGCRA. The court disagreed stating *"An agreement is only evidenced in writing for the purposes of section 107, subsections (2), (3) and (4), if all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing."* The court held that in the event the works (albeit variable as needs arose) were defined and a formula for work rates established. Work was to be completed within a reasonable time – anticipated at about 3 months. Enforcement of decision ordered. ***Abbey v PP Brickwork*** [2003]. ***RJT v DM Engineering*** [2002]. ***Grove Deck v Capital Demolition*** [2000] considered.

His Honour Mr Justice Jackson. TCC. 6th December 2004.

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Strathmore B.S. Ltd v C.S.Greig [2000] ScotCS CA 18/00

Withholding notice : A withholding notice must come after, not before an application and must be in writing in order to be effective.

Albyn Housing Society v Taylor Woodrow Homes Ltd 1985 S.C. 104; ***Parochial Board of Greenock v Coghill & Son*** *(1878) 5 R. 732,* ***Mackay & Son v Leven Police Commissioners*** *(1893) 20 R. 1093;* ***Woods v Co-operative Insurance Society*** *1924 S.C. 692.* ***Redpath Dorman Long Ltd v Tarmac Construction Ltd*** *1982 considered.* Lord Hamilton. Outer House, Court of Session. 18th May 2000.

Straume Ltd v Bradlor Dev. Ltd [1999] CILL 1520

A contract was entered into on a modified JCT 1980 Private without Quantities Form for construction and renovation work to a derelict mill. Some extensions of time were granted but completion was not achieved. The contractors went into administration and the administrators issued a referral notice in respect of £172K of outstanding payments. The employer served a notice to recover £268K for liquidated damages, rectification work and delay.

His Honour Behrens J held that under s11(3) of the Insolvency Act 1986 leave of the court is required to commence any legal proceedings against a company in administration. He further held that HGCRA adjudication is a relevant legal proceedings and is not on par with expert determination and valuation. He further considered whether or not it was desirable to have two adjudications or even one adjudication in such circumstances. Since any application for set off would be considered by the court in insolvency proceedings, there was no advantage in holding adjudication proceedings so the application to consent was denied. ***Macob v Morrison*** 1999. ***Re. Paramount Airways*** [1990] BCC 130. ***Carr v British International Helicopters*** EAT considered. His Honour Judge Behrens. Chancery Division. 7th April 1999.

Stubbs Rich Architects v W H Tolley Ltd [2001] BP001105

Adjudicator's fees : Recorder's decision that adjudicator's fees were unreasonable overturned : immunity in absence of bad faith. Prevents courts nit-picking fees.

Mr Recorder Lane. Gloucester County Court. 8th August 2001.

Surplant Ltd. v Ballast Plc (T/A Ballast Construction South West) [2002] EWHC TC33/02 : LV 290236

Sub-contractors undertook highway works under JCT Form 1998 with Contractor's Design. A dispute arose in respect of the final account – valuation No8. The dispute was referred to adjudication. The adjudicator determined that £276,973.17 +VAT, adjudicator's fees and expenses. Surplant paid the adjudicator's fee. The sums being outstanding Surplant commenced this action to enforce payment. The principal defence of Ballast to the adjudication was that there were jurisdictional errors and there were reiterated to oppose the application for enforcement.

Ballast maintained 1) that there could be no dispute until the due for payment had passed so the notice of intention was prematurely issued 2) the adjudicator did not deal with an asserted set off claim. date for payment had passed.

The notice of intention to refer was potentially issued too soon in that there is an outside possibility that Ballast might have re-evaluated their position. As it was they confirmed their position prior to the issue of the referral document – giving rise to the assertion by the claimant that by so doing Ballast ratified the existence of a dispute.

MacKay J concluded that there was a dispute when the notice was made, but if he was wrong on that point went on to state that there was a dispute the following day before the referral was issued. There was in the court's view no need for the claimant to have issued a fresh notice of intention. The adjudicator had jurisdiction under the terms of the contract and had not taken it upon himself to interfere with the terms of the contract.

The court applied ***Levelux v Ferson*** to the effect that in the absence of a withholding notice there can be no set off against the decision of the adjudicator for sums not claimed or due prior to the adjudication. Since there was no reasonable prospect of resisting the application, enforcement ordered.

His Honour Judge MacKay. Liverpool District Registry. 28th October 2002.

COMMENT : This is an unusual, but significant point. Providing there is no change to the asserted position of the parties, the relevant time for the crystallisation of a dispute is prior to the issue of the referral

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document, not prior to the issue of the notice of intention to refer. It is quite common for payment to be deferred until the last moment. Receipt of a notice of intention to refer will frequently result in payment or at least the commencement of genuine negotiations, once the debtor realises the other party is about to get tough. The sooner a party can issue a notice of intention the sooner pressure can be brought to bear on the non-paying party. However, care should be taken not to abuse the process, since there may be a danger that a successful allegation of ambush could be brought which might invalidate an adjudicator's decision. It is probably safer to issue a fresh notice of intention prior to the appointment of the adjudicator and the issue of the referral document rather than try to rely on the concept of subsequent ratification of the dispute particularly since the dispute referred should be compatible with the terms of the notice of intention.

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