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T & T Fabrications Ltd v Hubbard Architectural Metal Work Ltd [2008] EWHC B7 (TCC)

Assignment of rights of suit under a construction contract between T&T Fabrications (A Firm) and T&T Fabrications Ltd : dispute as to whether all terms of contract in writing as per s107 HGCRA & thus whether adjudicator had jurisdiction. Enforcement refused. Long standing dispute - small sum involved - suggests County Court would have been the best way to proceed.

RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited [2002] 1 WLR 2344 considered. Wilcox J. TCC. 21st April 2008.

Tera Construction Ltd v Yung Ton Lam [2005] EWHC B1 (TCC)

The claimant referred a dispute in relation to extensions of time (EOT), valuation of works and nature of defects asserted by the defendant. The defendant in turn had purported to determine the contract on the basis of alleged outstanding defects. The works had been completed later than the contract date and a certificate issued. The adjudicator held that the termination was invalid and that the defendant was in breach for non-payment. Defects admitted by the claimant were not taken into account. The defendant resisted enforcement on the grounds that the validity of the termination and non-payment were not within the scope of the reference.

The court held that the matters were within the scope of the reference. The sums due had been outstanding for over a year and enforcement should not be delayed on the basis of an unproven and uncertain counterclaim which had arisen after payment became due. An attempt to avoid enforcement because of the "parlous" state of the claimant was rejected. There was nothing to show the claimant's financial state was any worse now than when they first entered into the contract.

KNS Industrial Services v Sindall 2000 : *Herschel Engineering Ltd v Breen Property Ltd* 2000 : *Absolute Rentals Ltd v Gencore Enterprises Ltd* 2000 : *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* 1999 referred to.

His Honour Judge Christopher Clarke. 25th November 2005.

Thomas-Fredric's (Construction) Ltd v Wilson [2003] EWCA Civ 1494

This case concerned an appeal against enforcement of an adjudicator's decision. The appellants maintained that the contract was made with the Company not with a director in a personal capacity. The two central issues were first whether or not the agreement was in writing and secondly whether or not the parties had agreed to give the adjudicator jurisdiction to determine jurisdiction and in particular to determine who the parties to the contract were.

The court at first instance concluded that the contract was in fact with the company and that the adjudicator was wrong in his determination and then correctly asserted that once an adjudicator has been given jurisdiction to determine jurisdiction, that decision, even if wrong is enforceable. The error rather lay in that on the facts the director had never consented to the adjudicator having jurisdiction over jurisdiction.

Simon Brown LJ : "The position can I think be summarised in the following 2 propositions. (1) If a defendant to a Part 24 (2) application has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue. (2) Even if the defendant has not submitted to the adjudicator's jurisdiction in that sense, then he is still liable to a Part 24 (2) summary judgment upon the award if the adjudicator's ruling on the jurisdictional issue was plainly right."

RJT Consulting Engineers Ltd v DM Engineering Ltd [2002] 1 WLR 2344 : *Project Consultancy Group v Trustees of the Gray Trust* [1999] BLR 377 : *Westminster Chemicals & Produce Ltd v Eicholz & Loeser* [1954] 1 LLR 99 : *Nordot Engineering Services Ltd v Siemens Plc* 2000 : *Whiteways Contractors (Sussex) Ltd v Impresa Castelli Construction UK Ltd* 2000 : *Fastrack Contractors v Morrison* [2000] BLR 168 considered.

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Whilst the court was fully aware of the danger of making it too easy to challenge adjudicator's decisions on jurisdictional grounds, thereby undermining the objectives of the HGCRA, the answer lay firstly in the parties contracting on clear terms and on adjudicators being vigilant to ensure jurisdiction in the first place.

CA before Lord Justices Simon Brown, Judge and Jonathan Parker. 21st October 2003.

Thomas Vale Construction Plc v Brookside System Ltd [2006] EWHC 3637 (TCC)

Following the adjudication of a final account TVC submitted an application for and interim payment. BSL issued a withholding notice which was challenged here on basis that it sought a set off against an adjudication decision contrary to *William Very v LB Cambden* [2006]. The court held that a final account does not give rise to a right to immediate payment. Outstanding snagging meant that sums could continue to be withheld. The withholding notice was validly issued. HHJ Francis Kirkham. 14th November 2006

Tim Butler Contractors Ltd v Merewood Homes Ltd [2000] TCC 10/01

This concerned an application for enforcement of an adjudication dispute in respect of two applications for payment pursuant to a construction contract. There was no doubt that this was a construction contract within the remit of the HGCRA. The issue before the court was whether or not the contract was stated to be for less than 45 days or not, since this acts as the trigger under the Scheme for entitlement to stage payments.

A subsidiary question then arises as to whether or not such a decision as to the terms of the contract goes to the jurisdiction of the adjudicator. The court held that it did not. Accordingly the adjudicator had jurisdiction to determine whether or not the 45 day rule applied. The adjudicator had found that the 45 day exception did not apply and thus there was an entitlement to stage payments. That decision was enforceable.

Homer Burgess 1999 : *Anisminic Ltd v Foreign Compensation Commission : Macob : Northern Developments* 2000 referred to. His Honour Judge Gilliland. TCC. 12th April 2000.

Total M&E Services v ABB Technologies [2002] EWHC 248

This concerned a payment dispute arising out of a labour only sub-contract for electrical installation works. The contract prescribed no mechanism for variation. There were no provisions in the contract governing work beyond the scope of that described in the contract, or payment for such work. Substantial work beyond the original scope of works was performed by Total using labour provided by a 3rd party, LSM. It was at all times accepted by the Defendants that the additional work should be paid for, and some additional payment was in fact made. The additional works were the subject of a draft final account valuation. Since the additional works were not the subject of the variation of the contract or a price agreed, a reasonable sum was claimed.

The defendants issued a "without prejudice" draft final account which valued (a) the original work performed on the basis of it being 90% complete, (b) the additional work and (c) identified contra charges. The Claimants were invited to provide a final account if there continued to be any substantial dispute as to the amount due. They did not do so as throughout have relied upon the timesheets as indicating the additional scope and cost of work. The claimants referred their disputed claim for additional monies to adjudication.

The defendants resisted the adjudication on the ground that the name of the claimants was incorrect (Viz Total Mechanical and Electrical Services Limited not Total M&E). The court ordered amendment of the error.

The defendants further asserted that the additional works were the subject of a series of separate contracts which could not therefore on the basis of *Grovedeck v. C Demolition Limited* [2000] *Build L R* 181 be lumped in with another contract since only disputes arising out of one contract can form the subject matter of an adjudication. Pursuant to s107 HGCRA they further asserted that there must be a written contract and that that written contract could not be orally varied, relying upon *Goss v. Lord Nugent* (1833) 5 B & Ad 58. *New Hart Builders v. Brindley* [1975] Ch. Page 42 and *McCausland v. Duncan Lawrie Limited* [1997] 1 WLR page 38 CA. The court held that there is no requirement for amendment and instruction to be in writing provided they referred, as per s107 to a written contract. They did and so the orders were s107 compliant. This was exactly the type of insignificant challenge that *Bouyges v. Dahl-Jansen* [2001] 73 Con LR seeks to deter.

The defendants sought to exercise a set off and counterclaim arising out of the draft final account. The adjudicator declined to treat this as a withholding notice, stating that it was merely a negotiation gambit.

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The defendant also claimed £300K on the grounds that the claimant had not issued a final account – but had merely relied upon time sheets to establish additional claims. The court declined to imply that there was a duty for the claimant to issue an additional final account. *Trollope & Colls v North West Metropolitan Regional Hospital Board* [1973] 2 WLR page 601 applied.

The court ordered payment of sums due to the claimant and considered whether or not a stay was justified and determined that it was not. *Herschell Engineering Ltd v Breen Property Ltd* 2000. *Absolute Rentals Ltd v Gencor Enterprises Ltd* 1999 considered.

The court however declined to order that the claimant recover costs of the adjudication.

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

Treasure & Son Ltd v Dawes [2007] EWHC 2420 (TCC)

This was an action for summary enforcement of an adjudicator's decision in respect of an application for additional payments for works and overheads for works done over three years after practical completion on a major residential project. Dawes resisted enforcement on the grounds of oral variations to the contract and an absence of signature on the adjudicator's decision.

The court noted that whilst the JCT Prime Cost contract was in respect of residential works and outside the remit of s107 by virtue of s106, the parties had agreed to non-statutory adjudication. The wording in the notice viz "*In the Matter of an Adjudication pursuant to the [HGCRA 1996] and the contract*" did not convert it into a statutory adjudication. The prescription against major oral variations established in *RJT v DM Engineering* [2002] BLR 217 distinguished on the basis that RJT concerned statutory adjudication. *Dean and Dyball v Kenneth Grubb* [2003] EWHC 2465 (TCC) noted. Accordingly oral variations would not be fatal to the jurisdiction of the adjudicator.

Even if this conclusion is not correct, the court did not consider that there had been any significant variations. The contract envisaged post practical completion works with regard to outstanding works and any additional works ordered by the architect – which continued to be governed by the contract payment provisions. The contract did not conclude on practical completion – a new oral contract did not come into play. In the alternative Dawes asserted on the authority of *KNS v Sindal* [2000] EWHC 75 (TCC) that the adjudicator dealt with a different dispute to that contained in the notice. The court disagreed. All the matters dealt with by the adjudicator were in the notice.

Whether or not responses to the notice in writing could constitute a written agreement, reference was made to *Grovedeck v Capital Demolition* [2000] EWHC 139 (TCC) where Hansard was referred to as to the intention of parliament, following *Pepper v Hart* [1993] AC 593. The court here disagreed. There was no ambiguity in the statute, and allusions in Hansard to an intention to refer to other adjudication proceedings, but not to written material in the instant adjudication were thus to be ignored.

With regard to the requirement of a signature or otherwise. *Barnes & Elliott Ltd v Taylor Woodrow* [2004] BLR 111, *Bloor v Bowmer & Kirkland (London) Ltd* [2000] BLR 314 noted. However the court concluded that there is no statutory requirement that the decision be signed.

Written contract – variations – signature on decision : inability to repay. Enforcement application : whether variation of a contract impacted upon its status and jurisdiction of adjudicator – here a non HGCRA adjudication – held adjudicator had jurisdiction : whether a failure to sign a decision renders it unenforceable – held – signature not a requirement. No stay allowed on grounds of insolvency in the circumstances of the case.

As to an application for a stay on the grounds of insolvency *Wimbledon Construction v Derek Vago* [2005] BLR 374 considered and the analysis of relevant cases at para 26 by HHJ Coulson noted. In the circumstances there was no evidence of insolvency and a stay accordingly refused.

Mr Justice Akenhead. TCC. 25th October 2007

Treasure & Son Ltd v Dawes [2008] EWHC 2181 (TCC)

This follows on from the previous case and involved the payment or otherwise of the resultant judgment debt arising out of the summary enforcement of an adjudicator's decision. The question here was "*Is the debt discharge if paid by a third party - here a member of the debtor's family?*"

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For inexplicable reasons Treasure's accountant was worried that the fact that it was paid by a third party might have implications for any subsequent arbitration, any order to repay sums and for tax / VAT liability. Most of the money had been put into a separate account in the interim period – though the account had been used to pay the adjudicator. Dawes had failed to respond to enquiries as to whether or not the payment was to be regarded as having been paid by the third party or on behalf of Dawes. The court held that the judgment debt had been discharged on behalf of Dawes. Costs were reserved subject to agreement by the parties but the court noted that if Dawes had responded promptly things might not have progressed so far, with costs implications. Otherwise the court was mystified as to why this issue had not been sorted out earlier and why a hearing had been necessary.

Crantrave Limited v Lloyds Bank plc [2002] All ER (Comm) 89. *Simpson v Eggington* (1855) 10 Exch 845 at 847. *Smith v Cox* [1942] 2 KB 558 considered. Mr Justice Coulson. TCC. 15th September 2008

Trentham (Barrie) v Lawfield Investments [2002] ScotCS 126

This action concerned litigation for payment of sums due. It did not involve an adjudication, but the general principles are equally applicable to applications for summary enforcement of adjudication decisions where questions of the insolvency of the debtor are involved. Also, the judgment adds to the understanding of *Karl Construction v Palisade* and *SL Timber v Carillion*, two adjudication cases.

The parties contracted on Scottish Building Contract Contractor's Designed (without quantities) 2000 for conversion work on a property. A contract administrator was not appointed and the JCT payment scheme was thus redundant. They agreed an uplift payment package to replace it. The pursuer submitted an interim payment (No17) for £364,864.29, due on 25th February. The defender did not issue any withholding notices pursuant to s110 / 111 HGCRA. It would appear that the defender's financial position was precarious and in line with *Karl Construction Ltd v Palisade Properties PLC, 2002 S.L.T. 312* the pursuer's summons contains a warrant for inhibition on the dependence of the action. The defender here moved for recall of the inhibition on the ground that the continued use of inhibition was contrary to the European Convention on Human Rights. *Pow v Pow, 1987 S.C. 95* and *Campbell v Cullen, 1848, 10 D. 1496*, referred to regarding the convergence between practical and actual insolvency and the existence of a significant risk that debts will not be discharged.

The pursuer had also issued a further application (No18) against which the defender had issued a withholding notice, but this notice was not relevant to the present action. *SL Timber Systems Ltd v Carillion Construction Ltd, [2001] B.L.R. 516* applied.

Whilst the defender had a potential counterclaim waiting in the wings, nonetheless the court found on the facts that there was a significant risk of the defender's insolvency and declined to remove the inhibition on the property. Lord Dummond Young. Outer House, Court of Session. 3rd May 2002.

Triodos Bank v Dobbs [2004] EWHC 845 (Ch)

Whilst albeit a minor matter in the larger scheme of this insolvency litigation, the question arose as to whether or not a temporarily final adjudication decision in a debtor's favour reduce the trading debts of the debtor's company and thus affect the right of creditors to call in loans? The adjudicator found that LAD's were due to Dobbs – which had implications for a tripartite relationship between Dobbs, the developer, Countryside a contractor and the financing bank. Mr Justice Lewison cast doubts on the impact that a temporary entitlement should have on fiscal rights and duties.

Re Kaytech International plc [1999] 2 BCLC 351 *S.S. Trade & Industry v Tjolle* [1998] 1 BCLC 333. *Re PTZFM Ltd* [1995] 2 BCLC 354. *Emanuel Management Pty Ltd v. Fosters Brewing Group* [2003] QSC 205. *Bunbury Foods Pty Ltd v. National Bank of Australasia Ltd* (1984) 51 ALR 609, *Bank of Boroda v Panessar* [1987] Ch. 335 considered. Mr Justice Lewison. Chancery Division. 19th April 2004.

Trustees of Harbour of Peterhead v Lilley Construction [2003] CA 229/02

Two issues were considered here. Firstly whether an adjudication decision should be enforced or the payment application sisted to arbitration and secondly whether by engaging in adjudication the applicants had waived the contractual right to arbitration.

The court held that there is no conflict between the ICE 6 arbitration provisions and HGCRA adjudication, which provides a statutory temporarily final and an immediately enforceable decision pending final

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settlement by arbitration. *Macob v Morrison* [1999] B.L.R. 93. *Watson Building Services v Harrison* 2001 S.L.T. 846. *CCG v Highland Council* 2002 SLT 1274 considered.

Lord Mackay of Drumadoon. Outer House, Court of Session. 1st April 2003.

Try Construction Ltd v Eton Town House Group Ltd [2003] EWHC 60

This case considered the role of expert reports within the adjudication process and whether or not reliance on an expert report by an adjudicator amounted to an unlawful delegation of the adjudicator's decision making role to the expert. The parties had consented to the commissioning of a programming report regarding Extension of Time and Loss & Delay. It was held that in the circumstances the adjudicator was allowed to rely on the report.

Regarding fairness and natural justice in the adjudication process *Glencot v Barrett* (2001) BLR 207. *Macob v Morrison* (1999) BLR 93. *Balfour Beatty v L.B. Lambeth* (2002) BLR 288. *Discain (No 1)* considered.

His Honour Judge David Wilcox - for His Honour Judge Richard Seymour. 28th January 2003.

Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd [2007] All ER (D) 86 (Jul)

Post adjudication challenge to decision that contractor not liable for loss due to fire. Contract required the employer to provide joint insurance against the risk and had failed to do so. *CRS v Taylor Young Partnership Ltd* [2002] applied. *GD Construction (St. Albans) Limited v Scottish & Newcastle Plc* [2003] EWCA Civ 16; *The Board of Trustees of the Tate Gallery v Duffy Construction* [2007] EWHC (TCC) 361. *London Borough of Barking & Dagenham v Stamford Asphalt Co. Limited* (1997) 82 BLR 25 ; *Dorset County Council v Southern Felt Roofing Co. Ltd.* (1990) 48 BLR 96. referred to.

HHJ Gilliland . TCC. 29th June 2007

Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd [2008] EWCA Civ 286

Fire : Insurance : recovery of adjudication award. Successful appeal : sums paid out pursuant to an adjudication recoverable under terms of insurance policy.

Co-operative Retail Services Ltd v. Taylor Young Partnership Ltd [2002] UKHL 17; *Hopewell Project Management Ltd v Ewbank Preece Ltd* [1998] 1 Lloyd's Rep 448; *London Borough of Barking and Dagenham v. Stamford Asphalt Company Ltd* [1997] 82 BLR 25; *Surrey Heath Borough Council v. Lovell Construction Ltd* [1990] 48 BLR 108 ; *Dorset County Council v Southern Felt Roofing Company Ltd* (1989) 48 BLR 96, *Mark Rowlands Ltd v Berni Inns Ltd* ; *Scottish and Newcastle plc v. GD Construction (St Albans) Ltd* [2003] EWCA Civ 16, *Harris v Poland* [1941] 1 KB 462 ; *Deepak Fertilisers and Petrochemicals Corporation v. ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387 ; *The Yasin* [1979] 2 Lloyd's Rep 45, *Petrofina (UK) Ltd v. Magnaload Ltd* [1984] QB 12, *Mark Rowlands Ltd v. Berni Inns Ltd* [1986] 1 QB 211, *Stone Vickers Ltd v. Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288 and *National Oilwell (UK) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582. *Samuel & Co Ltd v. Dumas* [1924] AC 431, *General Accident Fire and Life Insurance Corporation Ltd v. Midland Bank Ltd* [1940] 2 KB 388, *State of Netherlands v. Youell* [1997] 2 Lloyd's Rep 440 considered.

CA before MR. Rix LJ; Keene LJ. 2nd April 2008