

JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX. TCC. 23rd June 1999

The Application

- 1 The Claimant seeks to enforce the decision of 8th March 1999 of Mr Maxwell J McCoy as Adjudicator appointed in accordance with the Housing Grant Construction and Regeneration Act 1996 ("the Act") and the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme"). The application to enforce the decision is made by way of an application for summary judgment.
2. Directions for the disposal of the Claimant's application were given by Dyson J on the 30th April 1999. It was ordered that the CPR were to apply to the case and to this application.
3. This application is made under CPR Part 24. I set that out below so far as is relevant:
24.2 *The court may give summary judgment against a Claimant or Defendant on a particular issue*
(a) *If it considers that,*
(ii) *the Defendant has no real prospect of successfully defending the the claim or issue;*
and
(b) *There is no other reason why the case or issue should. be disposed of at trial.*

The Practice Direction shows that the burden of proof is upon the Claimant under 24.2 (a)(ii) and upon the Defendant under part 24.2 (b).

4. The claim is set out in the Statement of Claim endorsed on the writ.
5. The Claimant was a sub-contractor for general Building Finishes who were undertaking work at Ashdown School. The Defendant was the main contractor.
6. By paragraph 2 of the Statement of Claim, the Claimant avers:
"Work was carried out and completed by the Plaintiff in accordance with the contract between the Plaintiff" and the Defendant that was made on 10 July 1998. The contract was a construction contract for purposes of the Housing Grants Construction and Regeneration Act (the Act). The contract did not make provision for the adjudication of disputes under the contract in accordance with Section 108 (1) to (4) of the Act. Accordingly, an accordance with Section 108 (5) of the Act and the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations, 1998 applied to disputes under the contract.
3. *A dispute arose under the contract between the Plaintiff and the Defendant and this dispute was referred for adjudication under the Scheme for Construction Contracts (England and Wales) Regulations 1998 by the Plaintiffs notice dated 1st February 1999.....*
4. *An adjudicator.... was appointed on 8th February 1998 under the Scheme for Construction Contracts (England and Wales) Regulations 1998.*
5. *On 8th March 1999 the adjudicator gave his decision that the Defendant shall pay the Plaintiff the sum of £103,665.80. "*
This sum comprised the principal sum of adjudicator's fees and interest awarded pursuant to paragraph 20 (c) of the Scheme.
7. *The Defendant has failed to comply with the Adjudicator's Decision. Further, the Plaintiff has given notice to both the Defendant and the Adjudicator pursuant to paragraph 24 of the Scheme for Construction Contracts. "*
6. The work undertaken by the Claimant included the installation of a boiler and flue at Ashdown School. There was subsequently a fire which seriously damaged part of the school accommodation and the Defendant contends that the boiler and flue caused the fire and makes complaint that the Claimant's work was incomplete and defective.
7. There is before me affidavit evidence, including that of Anthony Yates, Mr Ellington Benjamin and Michael Craigie, showing that there is a substantial claim against the Claimant. This is made in a separate Action 1988 TCC 170, seeking the recovery of damages for breach of contract in respect of the matters of which it complained in the adjudication. Miss Dumaresq, for the Defendant, contends that there was not a relevant construction contract within the meaning of the Act. In the Action 1998 TCC 170, the Defendant set out the contractual position relied upon by them in that action. In the first four paragraphs of that Statement of Claim, the history of the agreement between the Claimant and the Defendant is set out, with particular reliance upon Bills of Quantities in the main contract setting out the

extent of work and prices and a Sub-contract Order 00235 of 10th July 1998 confirming the sub-contract works to be undertaken in accordance with the Bills of Quantities. In paragraph 5, the Defendant's case as to the formation of the contract is set out:

"5. (i) The sub-contract for *the work referred to in paragraph 1. above for the fixed price of £58,350 was negotiated and concluded between the aforementioned Mr Adams of A & D and Mr Dodd and Mr Holness of Pagehurst. The sub-contract is evidence in the Sub-contract Order dated 10 July 1998 and subject to the terms and conditions set out therein.*

The express terms of the Sub-contract Order were relied upon and the customary implied terms as to workmanship and material are pleaded in paragraph 7. That contract is clearly a construction contract within the meaning of Section 104 of the Act. It is an agreement in writing and evidenced by the Sub-contract Order 000235. The provisions of Part II of the Act only apply to agreements in writing which are defined in Section 107.

"(1) The provisions of this Part apply only *where the construction contract is in writing, and any other agreement between the parties as to the matter is effective for the purposes of this Part only if in writing.*

The expressions "agreement", "agree", "agreed" shall be construed accordingly.

(2) *There is agreement in writing.*

(c) *If the agreement is evidenced in writing.*

8. Also material to this submission is Section 107 (5) which provides:

"..... an exchange of written submissions, adjudication proceedings, or in arbitral or legal proceedings in which the existence of legal proceedings otherwise than in writing is alleged by one party against another party and not denied by the other party in his response, constitutes as between those parties an agreement in writing to the effect alleged.. "

There was clearly a contract within the Act. The **contract did not expressly** make provision for adjudication compliant with Section 108 of the Act. Accordingly Part 1 of the Scheme applies pursuant to Section 108(5) of the Act. Pursuant to Section 114(4) the provisions of the Scheme take effect as implied terms of the contract.

- 9 The Claimant commenced work on site on 30th July 1998. They issued Invoice AD0010 in the sum of £84,212,50 including VAT on 5th August 1998. On the 6th August 1998, the Defendant issued Valuation No. 1 and paid £16,869.33. This represented 5% retention and 2.5% main contractor's discount as *provided for*. On 6th September 1998, against the Claimant's Invoice AD0012, the £33,771.18 (inclusive of VAT), the Defendant's issued a Valuation No. 2, £31,280.55, being the sum claimed net of retention and discount. The 4th October 1998 was the date appointed for the completion of the sub-contract. No extension of time was sought or granted. On 5th October 1998, the Claimant issued a third Invoice AD0419, in the sum of £42,684.48 (including VAT). On the 28th October 1998, the Defendant wrote to the Claimant giving notice that, unless the sub-contract work was completed by 9th November 1998, the sub-contract would be determined. They enclosed a copy of the employer's letter of that date giving notice of serious delay to the progress of the sub-contract works. On 13th November 1998 the Claimant asserted that they had completed the sub-contract works, and on the 14th November 1998 issued the 4th invoice AD0020 in the sum of £52,284.35 (including VAT).
10. On the 19th November 1998 the main contract was determined. The reason given was serious defects and default in the Claimant's work, and on the same date the Defendant purported to determine the Claimant's sub-contract, *and gave notice* of intention to withhold further payments until completion of works and making good of defects. On 27th November 1998, a Schedule of Works Outstanding was issued, and on the following day, 28th November 1998 a fire occurred causing considerable damage to the school extension and damage to the main school. The loss adjusters for the Employer, on 28th December 1998 reported that the cause of the fire was the *"negligent installation of the boiler"*.
11. The reference to adjudication was on 8th February 1999. The balance of the invoices outstanding. Namely £98,802.64 was claimed.
12. Notice of adjudication was sent to the Defendant on 1st February 1999. On 2nd February 1999, the Claimant made a request to the Academy of Construction Adjudicators for nomination of an

Adjudicator pursuant to Section 108(1) of the Act. Mr McCoy was nominated and the Statement of Dispute was sent to the Defendant by the Claimant on 8th February 1999. On 16th February 1999, the Defendant wrote to the Claimant and to the Adjudicator and, in summarising their position, stated:

"Further, as the contract was determined in November 1998, the one narrow dispute referred to adjudication is not appropriately determinable by adjudication due to the other disputes in dispute between A & D and our client. Further, the aim of the Scheme is for disputes to be determined during the term of the contract so that when a contract comes to an end, the dispute is then finally determined by arbitration or legal proceedings. The contract in this instance had come to an end and it is our client's intention to commence legal proceedings against A & D for the losses they have suffered directly consequential to A & D's work

In the circumstances, we do not consider that the issue in dispute identified in the Notice of Adjudication can be determined by adjudication in isolation and our client is not content for the other matters in issue to be determined by adjudication and intends to commence legal proceedings against A & D. We would therefore ask that you confirm your agreement to the adjudication process being suspended, failing which we consider that our client would have no alternative but to commence legal proceedings immediately against A & D in which our client would seek an order restraining the continuation of the adjudication. "

13. The Defendant did not attempt to restrain the Adjudication. They filed the response on the merits, relying upon the Claimant's default and the fire to defend the adjudication claim. It is right that, at paragraph 16 of this response, they maintained their contention that the adjudication process was no longer the appropriate forum to decide the dispute between the parties because they argue that the sub-contract had ended and that the process of adjudication is primarily supposed to be used for minor disputes during the course of the contract until they can be finally resolved by either arbitration or legal proceedings once the contract was at an end.

"Furthermore, notwithstanding the alleged breach of the Scheme for Construction Contracts, the respondent considers there are several complicated issues in question. The issue of the Claimant's alleged outstanding payments cannot be decided in isolation by an Adjudicator and should be referred to a Court of Law. Furthermore, as a result of the fire, third parties are likely to be referring the issue to their insurers and, as such, litigation once again is the most appropriate procedure in which legal arguments are set off and a counterclaim can be determined. "

At paragraph 19 it was said that:

"19. Should the Claimant and/or Adjudicator decide that the adjudication should proceed, the Respondent will immediately issue a High Court writ in respect of those issues described and not referred to by the Claimant in it's Statement of Dispute. "

14. A reply followed from the Claimant and the Defendant submitted yet a further submission entitled a reply to the reply to the Statement of Response.
15. In the course of the lengthy submissions, both parties made reference to the subcontract. Whilst the parties do not agree upon the precise terms evidenced by the subcontract confirmation form, nonetheless there is sufficient, in my judgement to warrant finding that those exchanges in the reply and response complied with Section 107(5) of the Act. In other words there was a further and alternative basis for holding that there was an agreement in writing under the Act to which the Scheme applied.
16. The Defendants participated in the adjudication. They could have challenged the Adjudicator as they threatened to do so, or sought an immediate ruling by the Adjudicator as to his jurisdiction which could have been the subject of an immediate challenge. They did not do so. There is an issue about the terms of the contract, and about the termination of the contract. I assume, for the purposes of this application, that the contract came to an end on 19th November 1998. The Defendant argues that, since the contract came to an end, then so did the implied terms. Accordingly there was not in being at the relevant time, any subsisting contract and the adjudication provisions Miss Dumaresq submits do not survive the termination of the contraction as would arbitration provisions post repudiation.
17. Section 108(1) provides:

"(1) A party to a construction contract has the right to refer a dispute arising under this contract for adjudication under a procedure complying with this section. For this purpose "dispute " means any difference.

(1) The contract shall.

(a) Enable the party to give notice at any time of his intention to refer a dispute to adjudication... " (My Emphasis)

18. Even if the contract had been terminated, the matters referred to the Adjudicator remain disputes under the contract. Where there is a contract to which the Act applies, as in this case, and there are disputes arising out of the contract to be adjudicated, the adjudication provisions clearly *remain operative just as much as an arbitration clause would remain operative.*
19. Had it been *the* intention of Parliament to limit the time wherein the party could give notice of his intention to refer a matter to adjudication, in the exercise of his right under Section 108(1), it could have imposed a clear limit. Precise limits as to the appointment of *Adjudicators* and the time tabling of the process of adjudication are clearly set out in the Scheme. By contrast there is no such limitation under the Act or *the Scheme* as to when a notice of intention to refer a matter to adjudication may be made. By analogy, with arbitration provisions, there is clear authority to the proposition that those terms governing reference to arbitration survive *the* determination of the contract. See Hem. D (1942) AC Page 356. Doubtless the position in relation to arbitration was in the minds of the legislators when the clear words of Section 108 were enacted.
20. This claim arises out of the Adjudicator's decision following a reference properly made under the Act relating to a dispute under a construction contract in writing and the Defendant participated in that adjudication.
21. Section 108(3) of the Act and Clause 23(2) of the Scheme, applicable here, provides that:
"(23)(2) The decision of the Adjudicator shall be binding on the parties and they shall comply with it until the dispute is formally determined by legal proceedings by arbitration (... if the parties.. agreed to arbitration..) or by agreement between the parties "
22. Miss Dumaresq, by necessary implication, invites the court nonetheless to open up and examine the adjudication. She submits that certain of the invoices raised by the Claimant did not become payable under the timetable laid down in the Scheme, and should not form part of the Adjudicator's decision. The Powers of the Adjudicator under the Scheme are wide. They are set out in paragraph 12, 13, 14, 15 and. 16 of the Scheme. Paragraph 20 provides:
Adjudicator's Decision
20(1). The Adjudicator shall decide the matters in dispute.
20(2) He [The adjudicator] may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication which are matters under the contract which he considers are necessarily connected with the dispute. In particular he may:
 - (a) Open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,*
 - (b) Decide that any of the parties to the dispute is liable to make a payment under the contract (whether in Sterling or some other currency) and subject to Section 111(4) of the Act, when that payment is due and the final date of payment.*
 - (c) having regard to any term of the contract relating to the payment of the interest decide the circumstances in which, and the rate at which, the periods for which simple or compound interest should be paid, "*
23. It is clear that matters complained of by Miss Dumaresq are matters that are within the competence of the Adjudicator, because of the very wide powers conferred upon him.
24. These payments and such matters as set off under the contract or abatement may *properly be* within his remit, as matters arising under the contract. Given that the Adjudicator has been properly appointed under the Scheme and the timetable laid down has been properly observed, he would have the jurisdiction to consider the types of issues raised as to the payment of these invoices. The correctness of

his decision is not a matter that falls to be considered at this time *by this court which is* considering the limited issue arising out of the Claimant's claim, namely the enforceability of the Adjudicator's decision. For this court to review the Adjudicator's decision - given that he has been properly appointed under the Scheme and was considering matters arising *under the contract, properly* within in his remit would be to go behind the intention of Parliament that his decision should be binding. The correctness of the decision may be reviewed, revised, challenged where appropriate in subsequent arbitration proceedings or legal proceedings or by way of an agreement. In the instant case there are the pending legal proceedings commenced by the Defendant under 1988 TCC 174, where the disputes between the parties, now provisionally adjudicated by the Adjudicator, will be finally determined by the court.

25. I return to Part 24.2 under which this application is made. The Claimant, in my judgement, has discharged the burden of showing that the Defendant has no real prospect of successfully defending the claim, which depends upon the binding nature of the adjudication at this time. The Defendant has not discharged the burden of showing that there are other reasons why the case or issue should be disposed of at trial. Matters of abatement and claims for damages for breach of contract could all have been canvassed before the Adjudicator and it seems that they were, but they are all matters that will be dealt with in the other Action_ Were there not another Action pending I would not have been disposed to give leave to defend in this Action. I am mindful of the overriding objectives set out in Part I of the Civil Procedure Rules of 1998, particularly as to paragraphs 2C and 2D. It is undesirable in most cases to have duplication of proceedings. In some cases it may be necessary, I adopt the observations of His Honour Judge Humphrey LLoyd QC in **Outwing Construction. Ltd v H Randell Son Ltd** 1999 TCC 100, judgment delivered on 15th March 1999.

"Action to enforce an Adjudicator's decision is not comparable to the ordinary process of recovering an apparently undisputed debt. The HGCRA (and the statutory instruments made under it) constitute a remarkable (and possibly a unique) intervention in very carefully selected parts of the construction industry whereby the ordinary freedom of contract between commercial parties (without regard to bargaining power) to regulate their relationships has been overridden in a number of areas, one of which is in dispute resolution. The overall intention of Parliament is clear: Disputes are to go to adjudication and the decision of the Adjudicator has to be complied with, pending final determination. There is no provision for a "stay of execution " (unless it is part of the decision itself, presumabl), since that would undermine the purpose which is finality, at least temporarily. In addition, the provisions of the Scheme for the enforcement of peremptory orders, which is, thought to be a quick and effective procedure, reinforce the conclusion that Parliament intended that adjudicated decisions and orders, if not complied with were to be enforced without delay. It is clear that the purpose of the Act is that disputes are resolved quickly and effectively and then put to one side and revived, if at all, in litigation or arbitration, the hope being that the decision of the Adjudicator might be accepted or form the basis of compromise, or might usefully inform the parties as the possible reaction of the ultimate tribunal. "

26. This is a proper case for summary judgment, I give judgment for the Claimant against the Defendant in the sum of £144,392.41, which sum includes interest. The Defendant should bear the costs of the Claimant in this application.
27. This is a case where I think it is appropriate to give leave to appeal.