JUDGMENT : MR JUSTICE DYSON : QBD : 16th July 1999

Introduction :

1. This is an application for summary judgment pursuant to Part 24 of the Civil Procedure Rules for the sum of £64,975 plus VAT, which was awarded by Mr G Martin in a decision made on 24 April 1999. He was appointed as an adjudicator pursuant to the provisions of the Housing Grants and Regeneration Act 1996 ("the Act"). The claim which was the subject of the adjudicator's decision was for fees for professional services provided by the claimant for the defendant in respect of the conversion of Sherwood House, Linby into a nursing home. There is no doubt that if a contract was concluded between the parties, it was a *"construction contract"* within the meaning of section 104 of the Act. It is not in dispute that Part II of the Act does not apply to construction contracts which were entered into before 1 May 1998: see s104(6) of the Act. The adjudicator decided that a construction contract was concluded between these two parties on 10 July 1998, and that accordingly he had jurisdiction to make a decision on the dispute that had been referred to him. On behalf of the defendants, it is submitted that the contract was made in April 1997, the adjudicator's decision to award money to the claimant was one which he therefore had no jurisdiction to make, and that they ought to be given leave to defend these proceedings.

The issues :

2. The following issues arise:
   (i) Is it open to a defendant in proceedings to enforce a decision of an adjudicator, to challenge the decision on the grounds that the adjudicator had no jurisdiction to determine the dispute? This involves the true construction of section 108(3) of the Act, and I shall refer to it as ***"the construction issue".***
   (ii) If upon the true construction of the Act, a decision may be challenged by a defendant in enforcement proceedings on the ground that the adjudicator had no jurisdiction to make the decision, is the defendant precluded from making such a challenge on the facts of the present case because it was agreed that the adjudicator should determine the question of his jurisdiction?
   (iii) Do the defendants have a real prospect of defending the claim on the grounds that the adjudicator's decision was wrong because (a) the contract was concluded before 1 May 1998, or (b) no contract was ever concluded between the parties? I shall refer to this as "the contract issue".
   (iv) Do the defendants have a good defence of abatement to the claim for fees on the grounds that the work done was worth less than that which has been claimed? I shall refer to this as "the abatement issue".

The Act :

3. So far as material, section 108 of the Act provides:
   "(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference.
   "(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
   "(5) If the contract does not comply with the requirements of sub-sections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

The construction issue :

4. On behalf of the claimant, Ms Rawley submits quite simply that the adjudicator's decision to award £64975 plus VAT was a decision within the meaning of section 108(3) of the Act, and is binding on the parties until the dispute is finally determined by legal proceedings or agreement (there is no arbitration clause in the present case). She relies on my decision in ***Macob Civil Engineering Ltd v Morrison Construction Ltd*** [1999] BLR 93, where I said that the word *"decision"* in section 108(3) should be given its plain and ordinary meaning, and held that *"a decision whose validity was challenged was nevertheless a decision within the meaning of the Act and the Scheme"* (page 99).

5. But that was a case in which the alleged invalidity arose from what was claimed by the defendant to have been procedural error which amounted to a breach of natural justice. I said at page 98:
   "If his decision on the issue referred to him is wrong, whether because he erred in on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all".

6. In my view, different considerations apply where the adjudicator purports to make a decision which he is not empowered by the Act to make. One example of this would be where an adjudicator decides a dispute

arising under a contract which is not a construction contract within the meaning of s104(1) of the Act. In that event, there is no right to refer the dispute for adjudication under s108(1), since it is not a dispute falling within the scope of that sub-section. It is only a party to a construction contract who has the right to refer a dispute under the contract for adjudication. It is only such a contract that is required by sub-section (3) to provide that the decision of the adjudicator is binding until the dispute is finally determined. Another example is where the contract does not come within the reach of s108 because, although it is a construction contract, it was entered into before the commencement of Part II of the Act: see s104(6). S108(1) and (3) have no application to such a construction contract. Accordingly, a decision purportedly made under s108(3) in respect of a contract which is not a construction contract at all, or which is a construction contract entered into before Part II came into force, is not a decision within the meaning of the sub-section, and is, therefore, not binding on the parties. I reach this conclusion as a matter of straightforward statutory interpretation. It seems to me that no other construction of the words of the statute is possible.

7. Ms Rawley draws an analogy between the position of an adjudicator and that of an arbitrator as it was at common law before section 30 of the Arbitration Act 1996 came into force. At common law, an arbitrator was able to inquire into his jurisdiction in order to determine what course of action to follow, but the result of his inquiry could have no effect on the rights of the parties. She draws my attention to ***Christopher Brown Ltd v Genossenschaft Oesterreichischer*** [1954] 1 QB 8, 12-13. I do not find this analogy helpful. The question in the present case is one of statutory interpretation: what does "decision" in section 108(3) mean? I do not see how the common law position of arbitrators in relation to their own jurisdiction can shed any light on that. In any event, it is to be noted that Devlin J said that the result of an arbitrator's inquiry as to his own jurisdiction *"has no effect whatsoever upon the rights of the parties"*. A decision by an adjudicator does have an effect on the rights of the parties in the sense that, if an adjudicator decides to make an award, the paying party is obliged to pay up at once, since the decision is binding until the dispute is finally resolved by one means or another.

8. Ms Rawley also submits that, if a defendant can resist enforcement proceedings on the grounds that the adjudicator has no jurisdiction to make the award, the plain intention of Parliament that adjudicators' awards should be honoured pending final resolution of disputes will be frustrated. It will, she suggests, be easy enough for an imaginative defendant cynically to invent an argument that there was no contract, or that any contract made was concluded before 1 May 1998. In my view, these fears are exaggerated. It will only be in comparatively few cases that such arguments will even be possible. Where they are advanced, the adjudicator and the court will be vigilant to examine the arguments critically.

9. I conclude, therefore, that it is open to a defendant in enforcement proceedings to challenge the decision of an adjudicator on the grounds that he was not empowered by the Act to make the decision.

Ad hoc submission of the jurisdiction issue to the adjudicator? :

10. Ms Rawley submits that with the agreement of the parties the adjudicator was asked to decide the question of jurisdiction, namely whether the contract was concluded before or after 1 May 1998. She argues that this issue was plainly before the adjudicator, and the defendant did not make it clear that its continued participation in the adjudication was under protest, and without prejudice to its contention that the adjudicator lacked the necessary jurisdiction. Accordingly, she contends that the adjudicator's decision on the date of the contract, (and thus the question of jurisdiction), is binding on the parties.

11. Before I examine this argument, it is necessary to set out some of the relevant factual material. In its notice of reference to adjudication, the claimant identified the contract as being contained in the letter of 10 July 1998. Paragraph 10 of the notice stated that it was agreed between the parties that the Act applied. The defendants' solicitors responded by letter dated 9 March 1999. They said that the contract was entered into on 19 March 1997, and continued as follows:

"The Act cannot apply and your Notice of Reference to Adjudication is invalid. We suggest that in the circumstances adjudication is inappropriate and enquire whether you intend to withdraw the Reference.

"If however your client proceeds with adjudication, our client shall dispute the Adjudicator's jurisdiction. If the Adjudicator makes a decision notwithstanding the objection to jurisdiction, our clients will not comply with any award made on the basis that it was made without jurisdiction. These issues will be placed before the Court should your client issue any application for enforcement of the Adjudicator's award.

"Without prejudice to the above, if you proceed with the adjudication, we reserve our clients' rights generally, and in particular to appear and present their case to the Adjudicator."

12. On 6 April 1999, the defendants submitted their response to the adjudicator. They stated (paragraph 5) that they disputed the contractual position as set out by the claimant. They said that the issues that must be addressed by the adjudicator included the question of when the contract was entered into, the answer to which *"could impact upon the adjudicator's jurisdiction to determine this matter"*. The defendants' case as set out was that the contractual relationship between the parties *"crystallised"* well before May 1998, and the Act could not apply. The document concluded with a section headed *"Award sought"*. This included: *"The contract is a pre May 1998 contract and the Adjudicator has no jurisdiction to decide the dispute. The Reference by PCG must therefore be dismissed"*.

13. The adjudicator wrote to the parties on 9 April 1999 saying that, on the basis of his consideration of the documents, he was then of the view that the contract was one to which the Act applied. He intended to hold separate meetings with the parties if he thought that oral evidence was required. He held such meetings on 16 April. He issued his award on 24 April.

14. Ms Rawley submits that, by putting forward their case to the adjudicator that the contract was made before 1 May 1998, and that for that reason he had no jurisdiction, the defendants were submitting the question of jurisdiction to the adjudicator for his decision, and agreeing to be bound by it. She relies on the principles enunciated by Devlin J in ***Westminster Chemicals & Produce Ltd v Eicholz & Loeser*** [1954] 1 LLR 99, 105-6. Although that case concerned an arbitration, I agree that what Devlin J said was equally applicable to an adjudication. He said that if two people agree to submit a dispute to a third person, then the parties agree to accept the award of that person, or, putting it another way, they confer jurisdiction on that person to determine the dispute. If one of the parties thinks that the dispute is outside the agreement that they have made, then he can protest against the jurisdiction of the arbitrator.
"If he protests against the jurisdiction of the arbitrator, which is merely an elaborate way of saying: "I have not agreed to abide by your award," if he protests in that form it is held that he can take part in the arbitration without losing his rights, and what he is doing, in effect, is that he is merely saying: I will come before you, but I am not by my conduct in coming before you and arguing the case, to be taken as agreeing to accept your award, because I am not going to do so". In those circumstances he may or may not be allowed to take part in the arbitration. Customarily I think he is, but whether that be so or not, if he protests it is well settled that he enters into no agreement to abide by the award."

15. In my view, the defendants' solicitors' letter of 9 March 1999 stated in the clearest terms that the defendants protested the adjudicator's jurisdiction, and that they would not recognise and comply with any decision to award money to the claimant. The letter also made it clear that, if the adjudication proceeded, they reserved their right to participate, but without prejudice to their contention that there was no jurisdiction. I do not consider that there can be any reasonable doubt as to the meaning of the letter. The only real question is whether, by participating in the adjudication process, the defendants waived the jurisdiction point, and agreed to submit to abide by the decision of the adjudicator on that issue. The only material relied on by Ms Rawley is the content of the defendants' response to which I have already referred. But, in their response, the defendants continued to assert that the adjudicator had no jurisdiction. This stance was entirely consistent with what was said in the letter of 9 March. It is a question of fact whether a party submits to the jurisdiction of a third person. Ms Rawley referred me to the unusual case of ***Higgs & Hill Building Ltd v Campbell Denis*** 28 BLR 47, 72-4. On the particular facts of that case, the judge found that, despite an earlier reservation of rights, there was an ad hoc submission of a jurisdiction issue to the arbitrator. I do not consider that this authority provides any assistance in determining whether, on the facts of the present case, there was an ad hoc submission by the defendants to the jurisdiction of the adjudicator. In my view, the defendants never departed from the position which they expressed very clearly in their solicitors' letter of 9 March 1999. They did not submit to the jurisdiction of the adjudicator.

Th**e contract issue :**

16. Ad hoc submission of the jurisdiction issue to the adjudicator? In her first skeleton argument, Ms Dumaresq contended that there was a contract, and that it was concluded in September 1997 or, at the latest, on 23 April 1998. In her first skeleton argument, Ms Rawley supported the adjudicator's decision that the contract was made on 10 July 1998. During the course of her oral submissions, it became clear that Ms Dumaresq was

putting forward an alternative argument, namely that, if a contract was not concluded at the latest on 23 April 1998, no contract was ever concluded. This contention had never been advanced before, and it became necessary to adjourn the application, in order to enable Ms Rawley to deal with the point. Further evidence was adduced, and supplementary skeleton arguments exchanged. Ms Rawley maintains her position that a contract was concluded, and submits that it was made on 10 July 1998.

17. With that bald introduction, I must now turn to the evidence. In so doing, I remind myself that this is an application for summary judgment, and that the question for me is whether the defendants have a real prospect of showing that the adjudicator was wrong in holding that a contract was concluded after 1 May 1998.

18. The claimant was engaged in the first place to provide consultancy services up to the planning permission stage. Planning permission was granted on 11 March 1998. For this service, the claimant was paid a fee of £65225. An important meeting took place on 23 April 1998. The meeting was attended by some of the trustees and representatives of Messrs Eversheds, their solicitors, as well as Mr Pargeter, the claimant's managing director. It was agreed that the claimant would provide professional services in connection with the construction of the project. There was at this stage no agreement as to either the scope of the work or the fees that were to be payable to the claimant. It was agreed that site work with an estimated value of £70,000 would be put in hand as quickly as possible, and that agreements between the claimant and the defendants would be drawn up for approval at the next meeting of the trustees.

19. Mr Pargeter recorded his understanding of the position that had been reached by the end of this meeting in some notes which he made at the time, and which he sent to Eversheds under cover of a letter dated 27 April. In that letter, he invited comments from the defendants. He received none. The material part of Mr Pargeter's notes reads as follows:
"Fees and services generally as detailed in initial submission by Project Consultancy Group Limited, however full schedule of services to be provided and associated fees to be produced by Project Consultancy Group Limited—June 1997.
"Project Consultancy Group Limited proceeding to procure initial contract works and proceed with further items as detailed in these notes on an "at risk" basis, i.e. if work does not proceed Trust will not be liable for any further fees beyond that recently invoiced/paid."

20. On 24 June, the claimant sent to Eversheds a number of draft documents, including "Proposals for Consultancy Services" to be provided by the claimant, and an updated budget estimate as at June 1998. The budget estimate gave a total figure for the project, which included £164,388 for the claimant's fees. The "Proposals" document was in the most general terms. Thus, in relation to the "Scheme Design", it stated "generally such services to be as recommended by the RIBA modified as necessary to suit the eventual method of Contract Procurement". In relation to quantity surveying, the document stated "generally such services to be as recommended by the RICS modified as necessary to suit the eventual method of Contract Procurement". Under the heading of "Fees", the document stated:
"In general terms the overall fee will be based on the relevant professional bodies recommended scales with a stated percentage added to cover all associated recoverable expenses. The fee will be based on the final agreed budget cost, will be all inclusive and will only be varied should the final account vary with client's agreed variations.
"The fee will be recovered in accordance with completion of various stages of work and/or an agreed periodic recovery method i.e. monthly."

21. On 24 June, Mr Holwell of Eversheds wrote to the claimant saying that the *"Proposals"* document would need to be revised following the meeting with the trustees. Mr Holwell added that he envisaged a formal letter of appointment, and enclosed a copy of his standard letter of appointment for a lead consultant.

22. A further meeting took place between the claimant and the defendants on 29 June. The trustees agreed to accept a tender that they had received from a contractor for preliminary site work. Prior to the meeting, Mr Pargeter had submitted to the defendants a projected cash flow in relation to the initial site works and associated fees. The total of £118,328 included £13135 for the claimant's fees. Mr Pargeter says that at the meeting the trustees gave a limited approval to the claimant to proceed with the preliminary works contract. Thus it was that on 3 July, he submitted an interim invoice in respect of fees in connection with the preliminary works in the sum of £11162.

23. The next and critical event was the trustees' letter of 10 July. It is necessary to set this out in full:
"I am pleased to confirm on behalf of the Gray Trustees that the proposals for the consultancy service of Project Consultancy Group Ltd regarding the renovations and new build at Sherwood House and the Cottages, Linby have been approved, subject to the agreement of terms of a formal engagement letter.
"The fees agreed are as set out in the updated budget estimate as at June 1998, being £164,388 plus VAT.
"I understand Chris Holwell has sent to you the type of letter of engagement that would normally be used and I have asked him to contact you direct to agree the substance of the letter."

24. It is common ground that subsequently Mr Pargeter and Mr Holwell orally agreed the terms of Mr Holwell's draft letter of appointment. Apart from that, no further agreements were reached between the parties. In particular, it appears not to be in issue that, subject to the effect of the letter of 10 July, the parties never agreed the services to be provided by the claimant, or their fee. During the following months, work progressed with the main project, and the claimant provided the relevant consultancy services in connection with it. Negotiations did take place. I have not been provided with a complete account from either side as to what happened during the second half of 1998. There is no doubt that from time to time the claimant produced revised versions of the *"Proposals"* document. According to Ms Rawley, this was solely because the trustees were introducing variations to the scheme. On 12 November 1998, Eversheds wrote a letter to Mr Pargeter which included the following:
"The Trustees were keen to see a formal appointment document in place for your firm and were concerned about why that had not been done already. I explained to them that until they had taken a final decision about the procurement route, you did not know what services you were going to be expected to provide and therefore what or even how you would charge for providing them. Since, however, the procurement route is now settled I think it would be in everyone's interests for you to have a formal appointment setting out what services you are to provide and the fee payable for providing them.
"You said some months ago that you were happy with the Eversheds standard appointment document and it was only the fee and services arrangements which were outstanding...."

25. With that brief summary of the relevant history, I need to consider whether a contract was concluded on 23 April (as contended by the defendants), or on 10 July (as contended by the claimant), or whether no contract was concluded at all.

23 April 1998 :

26. Ms Dumaresq submits that at the meeting of 23 April 1998 (if not earlier) what she describes as a "simple contract to provide consultancy services for the whole project" was concluded, and that it was an implied term of this contract that the claimant would be paid a reasonable fee for its work. In my view, the contemporaneous note made by Mr Pargeter (and apparently agreed by the defendants) is fatal to this submission. It was understood and agreed that the claimant would proceed with work after 23 April on an "at risk" basis. This was no doubt because there had been no agreement as to the services that were to be provided by the claimant or as to the fee. Ms Dumaresq relies on the fact that on 3 July the claimant submitted an invoice in respect of the preliminary works. She argues that this shows that a contract had been concluded on 23 April. In my view, the submission of that invoice is explicable by reference to the events of the meeting of 29 June. It does not prove that the effect of the meeting of 23 April was other than as so clearly recorded in Mr Pargeter's contemporaneous note.

Letter of 10 July :

27. The adjudicator found that the contract was concluded on 10 July, but he gave no reasons for his finding. Ms Rawley contends that the letter of 10 July amounted to an acceptance of the offer contained in the documents submitted by the claimant on 24 June. I agree that the *"proposals"* which were accepted by the letter were those contained in the *"Proposals"* document sent to Eversheds on 24 June, and that the "updated budget estimate" was that which was also sent on that date. But in my view, the defendants have a real prospect of showing that the letter of 10 July was not an acceptance of an offer giving rise to a contract. My reasons are as follows.

28. First, it is arguable that the scope of the services to be provided had not been agreed by 10 July and that agreement of this was an essential pre-requisite for a contract. The description of the services in the June Proposals document was uncertain, e.g. *"generally such services to be as recommended by the RIBA modified as*

necessary to suit the eventual method of Contract Procurement". It was the scope of the services to be provided that was the subject of inconclusive negotiations during the second half of 1998. As I stated earlier, as late as 12 November Eversheds were writing to the claimant recording that agreement of the services was still outstanding. So far as I am aware, the claimant did not respond to this letter saying that the scope of the services had been agreed.

29. Secondly, it is at least arguable that the fees had not been agreed. Ms Rawley submits that the fees were agreed when the defendants by their letter of 10 July accepted the Fee Estimate in the Proposals document which I set out earlier in this judgment. There are, at least arguably, a number of difficulties with this.

30. It is not clear whether the words *"the fees agreed are as set out in the updated budget estimate as at June 1998, being £164,388 plus VAT"* meant that the fee was to be a fixed fee in that amount. If, upon its true construction, the letter of 10 July purported to *"agree"* a fixed fee of £164,388 plus VAT, then that was a counter-offer, since the claimant's fees offer was that contained in the *"Proposals"* document, i.e. a fee "based" on the scale fees recommended by the relevant professional bodies. If it was a counter-offer, there is no evidence that it was ever accepted by the claimant.

31. On the other hand, if, as Ms Rawley submits, the agreement of the fee of £164,388 was merely an acceptance of the budget figure, and the fee offer that was accepted by the letter was that which was contained in the *"Proposals"* document, then it seems to me that it is at least arguable that the fee was too uncertain to support a contract. The fee estimate in the "Proposals" document was "in general terms" to be *"based"* on the scales recommended by the relevant professional bodies. I was told that the scale fee recommended by the RIBA for this class of work was 18%. The figure of £164,388 is 12% or 12.5% of the budget estimate given in June 1998. If the fee that was proposed by the claimant was not £164,388, what was it? Was it 18% of the final agreed budget cost? Or was it, as Ms Rawley suggested, 12% or 12.5% of the final agreed budget cost. In putting forward this suggestion, Ms Rawley was basing herself on the ratio of £164,388 to the June 1998 budget figure. Moreover, what do the words "in general terms based on" mean? A yet further difficulty is that the fee estimate stated that there would be a "*stated percentage to cover all associated recoverable costs"*. So far as I am aware, this percentage was never stated, still less agreed. It is not, therefore, surprising that in their letter of 12 November 1998, Eversheds recorded that, after the claimant had said that it was happy with Eversheds' standard terms of appointment (i.e. after 10 July), the fee arrangements were still outstanding.

32. In my view, the question whether, and if so when, a contract was ever concluded in this case is by no means straightforward. I have heard prolonged argument, and been taken through many documents as well as a number of witness statements. I find it quite impossible to resolve these issues with any degree of confidence. I am by no means certain that I have seen all the relevant documents, or that I know the full story. Quite apart from the facts, the issues of law that have not been argued as fully as they would be at a trial are not easy to resolve. I have come to the conclusion that it is at least arguable that no contract was concluded on 10 July, and that no contract was ever concluded between the parties, save probably in relation to the services rendered in connection with the preliminary works. It is accepted on behalf of the defendants that, if there was no contract, the claimant is nevertheless entitled to a reasonable sum for its work on a quantum meruit. I assume that this is on the footing that, once terms were agreed in relation to the preliminary works, the claimant was no longer carrying out work on *"at risk"* basis. Ms Rawley advanced an alternative argument that the letter of 10 July gave rise to an *"ancillary"* contract, and she drew my attention to ***Turriff Construction v Regalian Knitting Mills*** 9 B.L.R. 20 and ***British Steel Corporation v Cleveland Bridge*** [1984] 1 AER 504. But I am quite satisfied that it is not possible to resolve these issues by summary process, and without full evidence and argument.

The abatement issue :

33. In view of my decision on the contract issue, it is not necessary for me to increase the length of this judgment by dealing with the abatement issue, and I do not propose to do so.

Conclusion :

34. For the reasons given, this application must be dismissed.