JUDGMENT : HIS HONOUR JUDGE ANTHONY THORNTON QC *:* 30th November 1999

Introduction

1. The claimant ("Sherwood") seeks summary judgment pursuant to Part 24.2 of CPR against the defendant ("Mackenzie") for a debt allegedly arising out of a decision in its favour by an adjudicator appointed pursuant to the statutory Scheme for adjudications set up under the HGCRA 1996. The adjudicator, Mr J.E.Price, published a decision dated 30 September 1999 to the effect that Mackenzie should pay Sherwood a sum of money which totalled £12,803.14. That sum is made up as follows:

Payment for work carried out:	£ 9,324.59
VAT:	£ 1,631.80
RICS Application fee (inclusive of VAT):	£ 235.00
Sherwood's costs of Reference:	£ 1,395.00
Total:	£12,586.39

   The application in fact claimed a total of £12,880.14 but, in view of the figures that I have set out, I will confine the application to the slightly smaller sum of £12,586.39. The decision also directed that the balance of the adjudicator's fee of £1,621.80 (inclusive of VAT) should be paid by Mackenzie but only £1, 611.87 of that remains outstanding and is claimed in this application.

2. The adjudicator's decision arose out of a construction contract within the meaning of section 104 of the HGCRA. The work involved the provision of steelwork and cladding for the new Main Grandstand being constructed for Barrow-in-Furness RLFC. This subcontract was entered into on 14 September 1998 and was for a lump sum price of £63,550. The work was to have been completed by 30 October 1998 but was delayed somewhat so that Sherwood left site by 27 November 1998. Practical Completion of its work occurred on that date, as is recorded in its claim submission to the adjudicator. [Schedule of Supporting Information and Detail dated 30 June 1999, MAW1/76. Although Sherwood had not completed work to the cleader rails, because there was a dispute as to who should detail them, this work was not carried out by Sherwood. Although Sherwood's claim submission treated the effective date for completion as 18 December 1999, the document also stated that Practical Completion of the Steelwork had occurred on 27 November 1999.] Sherwood had submitted 2 applications for interim payment during the course of the work, in October and November. A further application was submitted on 18 December 1998. This was not responded to [sic] be Mackenzie and, by a referral notice dated 16 February 1999, Sherwood gave notice of the reference of a dispute to adjudication. This led to an earlier adjudication to the one that I am concerned with and it was concerned with the lack of any payment following Sherwood's interim application of 18 December 1998 and with an underlying dispute as to whether or not the subcontract was a design and build contract.

3. The adjudicator who was appointed, Mr P.Jensen, published a decision dated 29 March 1999 to the effect that Mackenzie should pay Sherwood £6,631.30 plus VAT and that the subcontract was not a design and build contract. Sherwood then prepared a Final Account document which claimed substantially the same as had been claimed in the interim application that had been dealt with by Mr Jensen save for the addition of a claim for loss and expense allegedly arising because of the delayed completion of the subcontract work. This led to a second referral notice and to the appointment of Mr Price. The dispute that Sherwood referred to Mr Price was as to the sum payable pursuant to the Final Account. This led to this second adjudicator's decision being published on 30 September 1999 containing the directions that I have already summarised.

4. The principal question raised by these enforcement proceedings is whether the second adjudicator was correct in deciding that the dispute he was concerned with was not substantially the same as that that the first adjudicator had been concerned with. Had Mr Price decided that it was, the Scheme pursuant to which he was conducting the adjudication required that he should resign, at least from those parts of the dispute which were substantially the same as those that had already been dealt with. Mackenzie now submits that Mr Price should have decided that there was a substantial identity between the two disputes, that Mr Price had no option but to resign and that his decision is unenforceable as having been rendered in excess of jurisdiction. As a necessary concomitant to those submissions, it is suggested that the court both can and must itself decide whether there was a substantial overlap between the two disputes.

5. It follows that the issues for me to determine are:
   1. Should the court embark on its own enquiry as to whether or not there was a substantial overlap between the two adjudicators' respective adjudications and decisions?
   2. If so, what is the nature of the enquiry that the court should conduct?
   3. Was there a substantial overlap?
   4. If there was a substantial overlap, what is the consequence and may Sherwood have the second decision enforced?

2. ***The Statutory Framework***

6. The HGCRA provides, in section 108, that:
"(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 included 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 agree to arbitration) or by agreement.
"(4) 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.

7. The subcontract contained no provisions for adjudication so the Scheme for Construction Contracts, set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998 was applicable to the adjudication. The material paragraphs of the Scheme provide:

"1(1) Any party to a construction contract (the "referring party") may give written notice (the "notice of adjudication") of his intention to refer any dispute arising under the contract to adjudication.

(2) The notice of adjudication shall be given to every other party to the contract.

(3) The notice of adjudication shall set out briefly
(a) the nature and a brief description of the dispute and of the parties involved,
(b) details of where and when the dispute has arisen,
(c) the nature of the redress which is sought, and..

9(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.

Adjudicator's decision

20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute.

22. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision."

8. It is to be noted that, apart from stating that a "dispute" includes any "difference, no definition is provided for that word. Furthermore, the HGCRA and the Scheme both envisage that only one dispute will be referred to an adjudicator at one time. That dispute is whatever is encompassed within the referral notice. Although it is obviously possible to seek to enshrine more than one dispute in a single notice, the Scheme envisages that each dispute will be the subject of a different notice and a different appointment of an adjudicator, albeit that the same adjudicator could be appointed to determine simultaneously more than one dispute. It must follow that a "dispute" within the meaning of the Scheme, can encompass several causes of action, issues or claims arising out of the same construction contract.

9. It should also be noted that the requirement to resign only arises if there is a substantial overlap between the adjudication in question and a previous adjudication. The test is whether the disputes in each case are the same or substantially the same. That requires the dispute in each case to be considered in the round and for the two disputes to be considered in their entirety. Thus, there appears to be no possibility of the adjudicator resigning from determining part of the dispute referred to him. He must either resign from the dispute in its entirety or confirm his appointment in its entirety. It follows that I cannot accept the view advanced by both counsel that the adjudicator could resign from part of what had been referred to him whilst retaining jurisdiction to determine the balance of the reference.

3. ***The Terms of the Subcontract***

10. The subcontract was signed by both parties and was dated 14 September 1998. The material parts of it recited that the subcontract works involved the structural steelwork for the New Stand at Barrow RLFC

and that the fixed price was £63,550.00. On the reverse of this document was printed a list of conditions. The following are material for present purposes:

"l. The subcontractor shall be deemed to have notice of all the provisions of the main contract...

2. The terms and conditions of the Main Contract are deemed to be incorporated herein except that the terms and (sic) of this agreement are to take precedence wherever they conflict with any other terms and conditions.

21. Interim and Final claims for payment must be submitted by the Sub-Contractor to the Contractor in writing giving full details of work executed material on site variations etc. with reference wherever applicable to the Bills of Quantities items together with all supporting invoices and receipts for previous payments etc. to reach the Contractor on dates which the Contractor will advise to the Sub-Contractor in writing."

11. The Main Contract incorporated the 1980 with Quantities Edition of the JCT Form of Main Contract. This contained material conditions concerning applications for payment and payment for the Main Contract works which, given the incorporation of the main contract conditions into the subcontract, have to be read with, and given effect to in conjunction with, clause 21 of the subcontract conditions. These are:

"30.1 The Architect shall from time to time... issue Interim Certificates stating the amount due to the Contractor from the Employer...

30.2 The amount stated as due in an Interim Certificate shall be the gross value referred to in clause 30.2...

.1 There shall be included the following...

.1 the total value of the work properly executed by the Contractor...

30.5.1 Within 3 months of Practical Completion the Contractor shall submit the Final Account... for agreement by the Employer and the Contractor shall supply the Employer with such supporting documents as the Employer may reasonably require."

4. ***The Disputes***

12. It is necessary to consider with some care what disputes were referred to adjudication in each case. The first adjudication was concerned with the dispute referred by Sherwood's notice served on Mackenzie on 3 March 1999. This defined the dispute being referred as:

"(i) Sherwood's Application no 2 should be paid immediately in full less contract retention monies, and previous payments on account.

(ii) Sherwood's Application no 3 should be paid immediately in full, less contractual retention monies and previous payments on account."

The reference also contained claims for payment of part of the retention; a declaration of the date by which payment should be made and for the payment of a penalty in the event of late payment; and for costs.

13. Application no 3 was dated 18 December 1998. It states on its face that it is "Application for Payment No. 3 (to 18/12/98)" and sought payment of the Contract Price of £63,550.00 and for Variation Orders as listed in an attached list totalling £7,899.00. The application conceded that retention of 5% should be withheld. Since the subcontract provided that 5% retention would be withheld until Practical Completion and 2 1/2 % thereafter, the Application was clearly one which was, on its face, referable to the state of work immediately prior to Practical Completion. At that time, Mackenzie had been deducting sums for contra charges. These were listed and submitted to the adjudicator in 2 lists on 15 and 18 March 1999. These contra charges and Mackenzie's entitlement to deduct part or all of each of these contra charges from monies otherwise due to Sherwood was, therefore, also referred to the first adjudicator.

14. The adjudicator was not asked for reasons and did not give any. His decision, dated 29 March 1999, identified the dispute he was deciding as:

"... the value of application No. 3 for interim payment and in particular as to the value of variations to the works including additions and omissions and as to [Mackenzie's] contra-charges. Furthermore there is a dispute as to whether the contract is "design and build".

The decision was that the subcontract was not a design and build contract and that the payment due to Sherwood was to be calculated as follows:

Contract sum:	£63,550.00
Less nett saving on variations as Sherwood's submission of £2,497.84 =	£61,052.16
Add back drawing costs of £400.00 =	£61,452.16

The adjudicator then decided that 7 of the contra charges claimed, in reduced amounts as decided upon by him, were allowable in the total sum of £1,844.00. This left, following the deduction of 2 1/2% retention and 2 1/2% discount, a net payment due to Sherwood of £6,631.30.

15. It followed that Sherwood had claimed £14,057.23, if the 2 Applications were merged, but had only recovered £1,844.00. The reason was two-fold: (1) against a claim for variations totalling £8,899.00 the adjudicator had provided a net negative sum, or saving, to Mackenzie, of £2,497.84; and (2) contra charges of £1,844.00 had been allowed.

16. The second adjudication notice followed a Final Account submission by Sherwood to Mackenzie dated 30 June 1999. This included a Variation Account dated 26 May 1999. The account listed the same 16 variations as had been listed with the previous submission attached to Application no 3 with one further variation. However, several of the sums claimed were different and a considerably greater amount of supporting documentation for each variation was provided. A new claim was included in the Final Account for the first time. This was a claim for loss and expense arising out of the prolonged period of working on site. This totalled £5,830.40. The Final Account also contained a detailed refutation of each contra charge that had originally been advised by Mackenzie to the first adjudicator.

17. The Final Account was followed by a second referral notice sent by Sherwood to Mackenzie which identified the dispute as follows:

"(1) Sherwood's Final Account payment be made as the statement of account."

There were also claims for interest, a declaration of the date by which payment should be made with a penalty for late payment and for costs.

18. Mackenzie submitted a detailed response to Sherwood's case. That response included this statement:

"3) That you find after reading the appendices that any variations on the contract actually result in a decrease in the contract value not an increase.

4) That you should find that due to Sherwood's negligence as costs shown on appendices 11-28 [to the response] that Mackenzie incurred costs due to this negligence."

The appendices provided details of the same contra charges as had been submitted to the first adjudicator and which had also been dealt with in Sherwood's refutation contained in the Final Account document.

19. Mackenzie's principal objection, which it took as soon as the second notice to adjudicate was served on it and which it maintained throughout the adjudication and now maintains as its grounds for opposing the summary judgment application, was that Sherwood's claim based on the Final Account was substantially the same as its claim based on Application no 3. The variations, save for one, were the same albeit that some of the valuations differed marginally; the contra charges were the same; the Contract Sum was the same and the net saving on the Contract Sum resulting from the variations was, on Mackenzie's case, the same as previously contended for by Mackenzie and as found by the first adjudicator.

20. This objection was developed in 3 stages. Initially, Mackenzie maintained in its submissions to the adjudicator that the previous decision was binding and could not be reopened by the second adjudicator. On this version of the objection, it was being contended that the first decision created a temporary finality which precluded a second dispute arising that could be adjudicated upon by a second adjudicator. Mackenzie reformulated its objection and, before the adjudicator, submitted that he should resign because, although there was a loss and expense claim which was new, overall the second dispute was substantially the same as the first dispute. Finally, in submissions made during the hearing of the summary judgment application, Mackenzie submitted that the second adjudication comprised three separate disputes: as to variations; as to contra charges; and as to loss and expense. It was only in respect of the first two of these disputes that the adjudicator had to resign. He was entitled to remain seised of the third dispute. If that analysis was rejected, Mackenzie maintained its previous objection that, overall, the disputes were substantially the same and that, in consequence, the adjudicator should have resigned and should not have dealt with any part of the reference.

21. The adjudicator's decision, dated 30 September 1999, decided as follows:

"3.02 The dispute referred to me concerns the valuation of the Final Account under the Subcontract and is, therefore, clearly not the same or substantially the same as the dispute previously referred to be Mr Jensen which was concerned with interim payments.

3.03 Mackenzie has pointed out that Sherwood's interim applications in receipt of variations were not marked 'on account' but all such interim payments are on account and there is no requirement that they should be specially so marked.

3.04 Mackenzie has not provided any information as to why the final account valuations of variations as set out in Appendices G and M of the Referral Notice are incorrect. In the absence thereof I accept Appendices G and M.

3.07 The contra charges have been previously adjudicated upon by Mr Jensen and, unlike the interim and final valuation of variations, there is nothing to differentiate them in this dispute from the contra charges adjudicated upon by Mr Jensen. The parties are, therefore, bound by Mr Jensen's adjudication and I use his figure in my calculation."

The adjudicator dismissed the claim for loss and expense in its entirety and, in consequence, decided that £9,324.59 was due by taking a figure for variations of £7, 711. 07. He made no deduction from the Contract Sum for possible savings resulting from the variations. He allowed Mackenzie the same sum for contras, a sum of £1,692.04, as had already been decided upon by the first adjudicator. Finally, two discounts of 2 1/2 % for retention and discount were allowed.

22. Since the issues arising out of the summary judgment application to enforce this decision raise questions of fact which can be determined solely from the documents and questions of law in relation to a relatively small claim, albeit one of considerable importance to the industry given the developing body of case law arising out of adjudication enforcement, I directed at the hearing of the summary judgment application that, pursuant to Part 24.6(b) of the Civil Procedure Rules, the application would be dealt with under Part 8 of the Civil Procedure Rules and that I would determine there and then the questions that arose. The questions that arise are these: (1) whether the court can or should consider whether the adjudicator had jurisdiction to decide the dispute that had been referred to him; (2) if so, whether the adjudicator did have jurisdiction; and (3) if he lacked jurisdiction, what if any relief the claimant is now entitled to. These questions involve the four issues that I have already set out.

5. ***Issue 1 - Should the Court Enquire as to the Adjudicator's Jurisdiction?***

23. The extent to which a court can and should investigate an adjudicator's jurisdiction when considering enforcement proceedings is answered by considering the statutory Scheme and the authorities that, in the short time that the HGCRA has been in force, have already outlined the appropriate approach that a court should take when considering questions of enforcement. The scheme provides, in summary, that:

1. A party to a construction contract has the right to refer a dispute arising under a contract for adjudication (section 108(1));

2. 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 by agreement (section 108(3));

3. If the contract does not comply with the requirements of section 108(1) - (4), the adjudication provisions of the Scheme for Construction Contracts shall apply (section 108(5));

4. The adjudicator must reach a decision within 28 days of referral unless the parties agree to extend that period. Without agreement, the adjudicator may extend the period by up to 14 days with the consent of the referring party (section 108(2)(c) and 108(2) d));

5. The adjudicator shall act impartially and in accordance with any relevant terms of the contract and the applicable law, may take the initiative in ascertaining the facts and the law necessary to determine the dispute, shall obtain and consider such representations and submissions as he requires and shall consider any relevant information submitted to him by any of the parties to the dispute (paragraphs 12, 13 and 17 of the Scheme);

6. The adjudicator shall decide the matters in dispute. He may take into account any other matters under the contract which he considers are necessarily connected with the dispute. In particular he may decide that any of the parties to the dispute is liable to make a payment under the contract (paragraph 20 of the Scheme);

7. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision (paragraph 22 of the Scheme).

24. These provisions, and the well-known background to the enactment of the HGCRA, have led Dyson J. to formulate clear guidance to the approach to the enforcement of adjudicator's decisions which, although persuasive and not binding on me is guidance that I gratefully adopt. The three decisions are: **Macob Civil Engineering Ltd. v Morrison Construction Ltd.** [1999] Building Law Reports 93; **The Project Consultancy Group v The Trustees of The Gray Trust** (unreported) 16 July 1999; and **Bouygues UK Ltd. v Dahl-Jensen UK Ltd.** (unreported) 17 November 1999. I can summarise this guidance 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).

25. In the light of these considerations, the first issue is capable of ready resolution. Unless Mackenzie's challenge to the adjudicator's decision is a jurisdictional challenge, the court should enforce the decision without further ado. If it is a jurisdictional challenge, consistency with the Project Consultancy case would suggest that it must be determined by the court.

26. I am clear that the challenge mounted by Mackenzie is as to the jurisdiction of the adjudicator. The Scheme's wording could not be clearer. It provides that if the two disputes are substantially the same, the adjudicator must resign. That is mandatory language which clearly has the effect that, if the necessary condition exists, the adjudicator is to lose his statutory authority to adjudicate.

27. However, unlike the question of whether or not there is an underlying contract in existence, the adjudicator is given jurisdiction to determine whether or not the two disputes are substantially the same. The jurisdiction is analogous to that given to arbitrators for the first time by the Arbitration Act 1996 to determine their own jurisdiction. This jurisdiction has long held by arbitrators acting under Civil Law systems, a power often characterised in such systems as competenz competenz. It might well be thought that if the adjudicator is given the power to determine the jurisdictional question of substantial overlap, he also has the power to make an error in determining that question which is not open to challenge, save perhaps on grounds of perversity or unreasonableness.

28. However, I do not accept that the adjudicator's powers are not open to challenge. Since the Scheme provides that the adjudicator has an obligation to furnish reasons for his decision, if these are requested, it can readily be ascertained whether any jurisdictional challenge is being mounted on reasonable and bona fide grounds and whether the adjudicator has correctly determined that challenge. It makes no sense, as I see it, to impose on an adjudicator a mandatory requirement to resign if there is a substantial overlap between the dispute referred to him and one already decided by an earlier adjudication decision but then to make such an obligation unenforceable. This would be the effect of making an adjudicator's jurisdiction decision unchallengeable.

29. I draw attention to the fact that my decision on this issue is only, strictly speaking, one affecting Scheme adjudications. Most adjudications are conducted under Institutional Rules and many place no obligation on the adjudicator to resign where the dispute has already been the subject of an earlier adjudication. Indeed, I was provided with information that none of seven particular sets of Institutional Rules reviewed contained a provision similar to paragraph 9(2) of the Scheme [The Institutional rules referred to were: the CIC Procedure, the ORSA Rules (now the TECSA Rules); the ICE Procedure Rules, the CEDR Rules, JCT Amendment 18, GC Works Rules and the New Engineering and Construction Contract Rules.] However, the same jurisdictional question would arise under these Institutional Rules since, if a dispute had already been substantially decided by an adjudicator, there would not remain in existence a "*dispute or difference*" capable of being referred to a second adjudicator in relation to the matters decided in that adjudication. Any second appointment would probably be one without jurisdiction.

6. ***Issue 2 - The Nature of the Court's Enquiry***

30. I do not need to embark on any detailed consideration of the nature of the enquiry that a court should conduct when it is alleged that an adjudicator has erroneously concluded that the two relevant disputes are not substantially similar. On occasion such an enquiry might involve a factual enquiry. However, the enquiry would be conducted for the limited purpose of ascertaining whether or not two separate disputes are substantially the same. The court is not concerned to investigate the merits of the disputes, let alone resolve them. In conducting that enquiry, the court would give considerable weight to the decision of the adjudicator and would only embark on a jurisdictional enquiry in the first place where there were substantial grounds for concluding that the adjudicator had erred in concluding that there was no substantial overlap. Thus, I am not persuaded by Sherwood's argument that the court is potentially undermining the summary and speedy process introduced by the statutory adjudication Scheme. It will be a rare adjudication where the conditions are present which would necessitate such an enquiry.

31. In this case, the enquiry raises a short question of law, namely whether a claim arising from a disputed interim application, albeit the last such application made soon after Practical Completion, raises substantially the same dispute as a disputed Final Account claim where the contents of the Final Account are similar to the interim application in question. The three questions that that issue raises are readily capable of speedy and summary resolution.

7. ***Issue 3 - Was there a Substantial Overlap?***

32. The adjudicator decided that there was no overlap because, as he pithily put it,

"the valuation of the Final Account under the subcontract... is clearly not the same as the dispute previously referred... which was concerned with interim payments."

Mackenzie challenges this finding because, so it was contended, the claims based on the variations was substantially the same in both disputes and the contra charges claimed were identical. Thus, those claims, which were said to raise two separate disputes, were ones from which the adjudicator should have resigned.

33. In order to decide whether these claims raised separate disputes or, if only one dispute, nonetheless a dispute which substantially overlapped the dispute resolved in the first adjudication, it is necessary to consider the valuation and payment provisions of the subcontract. The relevant terms have already been set out. From these, the following conclusions emerge:

1. The subcontract provides for claims to be made for interim payments and a separate claim for final payment based on the Final Account. Clearly, the last interim payment application may occur after Practical Completion and may mirror or be similar to the Final Account application.
2. Each interim application must seek to value all work properly executed up to the date that that application is prepared.
3. The Final Account must be prepared within three months of Practical Completion of the subcontract and must consist of details of each part of the work with all supporting documents. All work will be remeasured and revalued at that stage, even though each interim application is intended to value all work properly executed up to the time each is submitted.

34. Thus, the variations have to be remeasured and revalued during the consideration of the Final Account. In this case, Sherwood submitted considerable additional documentation to support what were admittedly the same variation claims, although some of these were revalued. Sherwood was contending that although the first adjudicator had, in effect, valued the variations in the negative sum of £2,497.84, the remeasurement exercise based on fuller documentation should yield a positive sum in excess of £8,500. Furthermore, a loss and expense claim was put forward for the first time. That entailed a consideration of all the variations since these not only were alleged to have caused most of the delay and disruption but were also alleged, by Mackenzie, to have provided sufficient remuneration for such delay and disruption as had occurred.

35. It was accepted that the loss and expense claim fell outside the ambit of the first dispute. However, the variations claim, although similar in factual content in both disputes, raised separate disputes since, initially it was considered in the context of an interim valuation without loss and expense being

considered whereas, subsequently, it was considered in the context of a Final Account remeasurement with loss and expense also being considered as an integral part of that process.

36. As for the contra charges, although the claims based on these were identical in both disputes, it cannot be said that those claims formed so large a part of the two disputes as a whole as to be a substantial part of both. Furthermore, it is not possible to separate out the contra charges or the variations as separate disputes from the claims for the other parts of the interim application or the Final Account. The factual content of the original work, the variations, the cause of the claimed loss and expense and the contra charges were clearly closely inter-related and an exercise to determine the overall sum due on both the interim application and the Final Account gave rise, in each case, to only one dispute.

37. Thus, the two disputes were clearly different, the adjudicator's decision to that effect was clearly correct and his overall decision was one taken within his jurisdiction.

8. ***Issue 4 - The Consequences***

38. The adjudicator made two findings of fact which were challenged by Mackenzie. These were that Sherwood's variations account was acceptable in full because Mackenzie had provided no information to the contrary; and that the parties were bound by the determination in the first adjudication that the allowable contra charges were as there decided. Mackenzie had put forward detailed information to the second adjudicator to support its full contra charge claims, most of which had not been submitted in the first adjudication. Mackenzie had also challenged, with detail previously submitted in the first adjudication, the variations valuations contended for by Sherwood.

39. There are two answers to Mackenzie's complaints. Firstly, following the approach of Dyson J., any error of approach by the second adjudicator was one of fact within his jurisdiction and cannot and should not be challenged at this enforcement stage. Any challenge can and should be mounted by Mackenzie at a subsequent arbitration. Secondly, some information was provided by Mackenzie and it was open to the fact finder, namely the adjudicator, to determine that it did not shake the correctness of Sherwood's variations claims. Moreover, since the contracharges were not subject to remeasurement under the contractual machinery concerned with the Final Account, it was open to the adjudicator to conclude that the representation of the same contra charges amounted to no new dispute or question and that, therefore, these claims should not be revisited by him.

40. I conclude that the application succeeds and that Sherwood is entitled to judgment for the following sums:

    1. £14,198.26 (made up of £12,586.39 + £1,611.87 as set out in paragraph 1 above).
    2. Interest. The appropriate rate is 6% from 7 October 1999 until 2 December 1999. The court will not ordinarily award compound interest. This award is for simple interest.
    3. Costs.