



THE SHIFTING SANDS

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10 November 2003

8TH ADJUDICATION UPDATE SEMINAR

Orange EBS Ltd v ABB Ltd
HH Judge Frances Kirkham

Background to the dispute

The dispute relates to a contract between ABB and Orange for mechanical services work at the John Redcliffe Hospital in Oxford and the form of the contract was the DOM/1 1980 Edition with ABB's terms and conditions incorporated into it. The contract price was for £98,227.00 and it was envisaged that there would be two weeks of work off site and 12 weeks of work on site. By March 2002 Orange had apparently completed 75% of the work, however by 28 May 2002 Orange had withdrawn from the site and in early June 2002 ABB issued a notice contending that Orange had failed to complete their work and ABB were refusing to grant Orange further access to the site.

For the purpose of the adjudication the dates of correspondence between the parties is of some importance.

ABB wrote a letter to Orange dated 6 July which contained the following statement: -

“Due to the nature and extent of the defects in your work and your abandonment of the site, the employers are unwilling to re-admit you to the site. In the circumstances the sub-contract is terminated.

Please provide us with a final account for work done adjusted to take account of defects and incomplete work. In due course we will let you have full details of the cost of remedial works and details of any other losses suffered by ABB.

For the time being the position is that there are no further sums due to yourself in respect of the contract”.

Orange replied to this letter on 8 July disputing ABB's allegations as to defects and denying that they had abandoned the works. They sent a further letter on 10 July in which they referred to *“the contractual dispute that now exists between our companies”*. There appears to have been no further correspondence between the parties until 2 December

2002, when Orange wrote to ABB alleging that ABB had wrongfully denied Orange access to the site and/or terminated the sub-contract. Orange enclosed their final account seeking a gross valuation of £270,417, which apparently represented damages in respect of ABB's breaches of contract. In their letter Orange also notified ABB that they intended to refer the dispute to adjudication and they enclosed a notice of intention to refer to adjudication with the letter. In that notice Orange sought decision on four matters as follows:

1. ABB had wrongfully terminated the sub-contract.
2. Orange were entitled to an extension of time for completion.
3. ABB should pay Orange the sum of £203,930.04 plus VAT (net sum claimed by Orange in the final account) or such other sums the Adjudicator assessed as being due.
4. Orange were not liable for allegedly defective work.

After receipt of the final account on 2 December, ABB instructed a costs consultancy to investigate and evaluate Orange's final account.

On 12 December ABB's solicitors wrote to Orange contending that there was no dispute between the parties at that stage, which was capable of adjudication because ABB had not had an opportunity of considering Orange's final account. ABB said they were looking into Orange's final account but they would not be able to complete the exercise until 20 January 2003, when they would then respond substantively to it. ABB suggested that if Orange were agreeable, then within 7 days of 20 January 2003, if they had not reached an agreement on the final account then an adjudicator should be appointed to determine the dispute. If, however, Orange insisted on issuing a notice of adjudication before ABB had had an opportunity of responding to the final account then ABB would dispute the adjudication on the grounds that there was no dispute between the parties at the present time.

Orange's representatives responded by letter of 13 December saying they were taking their client's instructions and would reply in due course.

The next letter that was received was dated 6 January 2003 from Orange's representatives, in that letter they made reference back to ABB's letter 6 July 2002. Then Orange enclosed with the letter a formal notice of intention to refer to adjudication where it set out the dispute as follows:

"The dispute arose on or about 5 June 2002 [sic] and concerns the sum due to Orange in respect of their final account and/or damages under the sub-contract as a result of wrongful termination of Orange's sub-contract by ABB, including:

- 3.1 *valuation of Orange works;*
- 3.2 *the amount of damages and/or alternatively direct loss and expense incurred by Orange as a result of delay and disruption to the works;*
- 3.3 *the repayment of monies improperly withheld by ABB from those otherwise due to Orange;*

3.4 *dismissal of monies claimed by ABB against monies otherwise due to Orange.*

3.5 *Interest..."*

Orange sought decisions to the effect that:

1. ABB had wrongfully terminated the sub-contract;
2. Orange were entitled to an extension of time for completion;
3. ABB pay Orange £203,930.04 plus VAT (i.e. the net sum claimed in Orange's final account) or such other sum as the Adjudicator assessed as being due; and
4. Orange were not liable for the alleged defected work.

ABB's solicitors responded on 6 January repeating their position that they had not had an opportunity to consider the final account and if the adjudication proceeded they would dispute the Adjudicator's jurisdiction on the ground that no dispute existed. They invited Orange's representatives to refrain from seeking the appointment of an adjudicator until Orange had responded to their suggested procedure as set out in their letter of 12 December 2002.

On 9 January 2003 Mr Hough was appointed as Adjudicator and by agreement gave two decisions. The first decision on liability was published on 14 February 2003. Mr Hough decided that ABB's conduct in refusing Orange access to the site and proposing to terminate the sub-contract on 5 July 2002 amounted to a repudiatory breach which Orange had accepted. The sub-contract had been brought to an end and both parties were therefore discharged from further performance of their obligations under the sub-contract and Orange were entitled to accrued rights under the sub-contract and the damages for breach of contract. Chris Hough gave his second decision on 4 March 2003 and decided that:

1. the variation account totalled £18,881.42;
2. Orange were entitled to an extension of time for completion from 29 March to 5 June 2002;
3. that Orange had been disrupted in their work;
4. that Orange was entitled to recover loss of profit.

Chris Hough concluded the total value of those claims was £155,011.22.

5. He decided Orange was not in breach of their contract and it was not defective.

Taking into account payments that had previously been made to Orange, Mr Hough awarded Orange the total sum of £90,283.77 plus VAT plus ongoing interest and decided that ABB should be responsible for his fees.

The applications before Court

Orange sought to enforce the Adjudicator's decisions together with the fees it had paid to the Adjudicator, by way of summary judgment pursuant to CPR Part 24.

ABB accepted that the Adjudicator had jurisdiction to determine whether ABB were in repudiatory breach of the sub-contract, therefore Mr Hough's first decision was valid. He also had jurisdiction to decide that Orange were entitled to damages as a result of the wrongful termination. Mr Hough had decided that those damages amounted to £194.78 out of the total sums awarded to Orange.

The Adjudicator did not have jurisdiction however to decide how much ABB should pay Orange pursuant to Orange's final account claim, because there was no dispute between the parties within the meaning of the HGCRA in respect of these issues at the time Orange commenced the adjudication. The final account claim made up the vast majority of the sums awarded to Orange pursuant to Mr Hough's second decision.

The only relevant question for H H Judge Frances Kirkham to decide was whether a dispute had arisen for the purposes of the HGCRA or not. She referred to a number of cases including *Halki Shipping Corporation -v- Sopex Oils Ltd*, *Sindall -v- Solland* and *Edmund Nuttall -v- R G Carter*.

In addition her attention was drawn to a decision by Forbes J in *Beck Peppiatt Ltd -v- Norwest Holst Construction Ltd*.

She concluded from review of the case law that rather than following the decision in *Edward Nuttall -v- R G Carter* she was going to follow the decision in *Halki*, which had been followed by His Honour Judge Lloyd Q.C. in *Sindall -v- Solland* and also by Forbes J in *Beck Peppiatt* case. She concluded that she was bound by the decision in *Halki* and that the meaning for dispute as adopted by *Halki* was "*there is a dispute once money is claimed unless and until the Defendant submits the sum is due and payable*". She also felt she should give careful attention to the guidance provided by Forbes J in *Beck -v- Peppiatt*, and in particular she referred to the decision of H H Judge Lloyd Q.C. in the case of *Sindall -v- Solland* which had been quoted with approval by Forbes J, namely that: -

"For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided".

Having applied that case law to the correspondence between the parties prior to the adjudication, she concluded that a dispute arose as to whether Orange were entitled to pay for damages for ABB's breach of contract in terminating early, at the latest on receipt of ABB's letter of 6 July, however there was no suggestion that ABB would be willing to pay Orange any damages for breach of contract as ABB were denying they were in breach of the sub-contract at that stage. By the time Orange wrote their letter of 8 July the issue was live and to be decided. However, at that stage Orange had not provided any information to ABB as to the sums that they claimed as damages for ABB's breach. It was not until 2 December that Orange submitted its final account which they allege quantified the damages they were claiming for ABB's breach of the sub-contract. Orange had accepted

that the final account sum was well over twice their previous applications and it was over three times the March 2002 application. Orange also accepted that ABB had not seen figures of this magnitude until 2 December 2002 and, in fact, some of the items claimed were entirely new, as a consequence H H Judge Frances Kirkham considered that ABB could not be said to have failed to refuse to pay those sums. She concluded therefore that there was no dispute as at 6 July 2002 as to the amount payable to Orange as damages for ABB's breach of contract or as sums due under the sub-contract.

She proceeded to consider whether and when such a dispute as to the sums that were due under the sub-contract for damages did arise.

“If I apply the simple test in Halki, I must decide whether ABB had refused to admit or failed to pay Orange’s final account by the time Orange issued its notice to adjudicate on 6 January 2003. Orange made their claim on 2 December 2003, by 6 January 2003 ABB had not admitted the claim nor had they paid it. The dispute had arisen.

In view of Forbes J’s approval of the test in Sindall -v- Solland, it is right that I consider whether, as at 6 January 2003 when Orange served its notice to adjudicate, the process of discussion or negotiation had ended and whether there was something which needed to be decided...

I have found this aspect of the application difficult. On balance, I conclude that, by 6 January 2003, sufficient time had elapsed for a valuation, then any discussion or negotiation or Orange’s claim... I conclude (if that be right to apply the approach in Sindall -v- Solland), that by 6 January 2003, the process of negotiation and discussion of Orange’s claim had come to end so the dispute then arose... In the circumstances Mr Hough had jurisdiction to decide as he did in both decisions and Orange are entitled to judgment.

Dean and Dyball Construction Limited v Kenneth Grubb Associates Limited

HH. Judge Seymour QC

28 October 2003 - TCC

Background to the dispute

The dispute related to a contract formed on an exchange of letters between Dean and Dyball (D&D) and Kenneth Grubb Associates (KGA).

KGA sent a letter dated the 24 May 2000 to D&D (the Proposal) in which KGA offered to design a tidal gate in a 40 week period and oversee the commissioning of the tidal gate across the entrance of a marina at Watchet in Somerset. KGA suggested that the ACE conditions of engagement B(2) should form the terms and conditions of the contract. The offer was open for acceptance for 30 days from the 24 May.

D&D acknowledged receipt of the Proposal but nothing further was heard from them until the 23 August 2000 when D&D sent a facsimile to KGA as follows:

“We confirm acceptance of your fee proposal for the above works, in the form of your letter addressed to our Mr. P.J Cross and dated 24 May 2000. We will be appointing you to carry out the full scope of services described under section 3 of your proposal.

Our official appointment letter will follow in due course, however in the time we would be grateful if you would continue to work to the programme of 36 weeks to commissioning of impounding gate -this period to have commenced 31 July 2000.”

No “official appointment letter” was ever sent to KGA.

The tidal gate once installed did not function as expected and as a result KGA designed various remedial works, which were carried out by D&D.

The tidal gate still failed to operate correctly and consequently D&D wrote to KGA on the 30 August 2002 as follows:

“We would advise that the Gate, which was due to impound the Marina in July 2001, has never been properly commissioned and fully handed over to our Employer, and has never operated to the reasonable satisfaction of the Marina operator.....

This situation is wholly unacceptable, and has arisen from your failure to comply with your professional obligation to design a Tidal Lock Gate for Watchet Marina Harbour suitable for the purpose.

As a result of the failure of the Gate to operate satisfactorily, we are making a claim against you for the additional costs we have incurred in ensuring the safety of the Marina...”

The sum at the time was quantified at £369,938.90.

On the 17 June 2003 D&D’s by their solicitors wrote a further letter, the material terms of which were as follows:

“Further to our previous correspondence on this matter we now enclose with this letter an updated summary of the costs that our clients [D&D] have incurred as a result of your negligence and breach of contract.”

The costs were then put at a total of £470,073.60.

D&D’s solicitors gave a Notice of Adjudication on 22 July 2003, which included:

“Following its detailed design by KGA, the gate was fabricated and installed by Taylor and Sons Ltd in the period up to June 2001. Under the terms of the Offer Letter [that is the Proposal Letter] KGA had a responsibility to oversee the commissioning of the gate and this process commenced during 2001...

...it did not function in the manner and with the consistent reliability which was a fundamental requirement of a gate to impound tidal waters in a marina.

...KGA designed an additional mechanical solutionwhich was intended to ensure the rise and fall of the gate in the manner that had originally been envisaged.

....the gate still failed to operate in accordance with specifications. In particular ...it proved impossible to guarantee “fail safe” operation. This had always been a fundamental element of the design, because if the gate were to fail and allow water to drain out of the marina, there would be potentially very high cost caused by any damage to yachts in the marina at the time.

There were also a number of other problems around the workings of the gate including the with the of the net clearance provided by the gate, the “slamming” of the gate during operation, problems of the stop logs and frame modifications. These, and other problems encountered, will be dealt with fully in the Referral Notice.”

“KGA were formally notified of a claim against them on the 30 August 2002 and that letter (and the claim document enclosed with it)will be included with the Referral Notice.

A further letter from Dean and Dyball Construction which stated that ongoing problems were still being incurred was posted to KGA on the 3 February 2003.

In an attempt to discover what were the causes of the problems with the gate, Ove Arup and Partners were instructed to produce a report on the gate design. A copy of this report was posted to KGA on 21 May 2003, and one will be appended to the Referral Notice.

As a result of the design failures of the gate, Dean and Dyball Construction consider that KGA are in breach of their contract with Dean and Dyball Construction.”

D&D’s case as set out in the Referral Notice dated 29 July 2003 was formulated as follows:

“The dispute concerns Dean & Dyball Construction’s entitlement to damages and interest as a result of a breach of contract by KGA.

It will be established later in this Referral Notice that KGA were appointed by Dean & Dyball Construction under the Association of Consulting Engineers Conditions of Engagement 1995 agreement B2 (ACE Agreement) to provide certain consultancy services (the consultancy services) to Dean & Dyball Construction.

The ACE Agreement includes the provision (at Clause B2.2.3) that:

“The Consulting Engineer shall exercise reasonable skill, care and diligence in the performance of the Services”

KGA on learning that an adjudicator had been appointed wrote to him by letter of the 11 August 2003 the material part of which was :

“Thank you for your letters in respect of the above matter. We are in a difficult position since in the absence of a formant ACE agreement with Dean & Dyball we are advised that the question of an adjudication clause is in doubt.

To date we have received a copy of a report by their [D&D] technical advisors Arup, to which we responded fully and suggested a meeting. In our view there is no proven reason for the problems at Watchet and considerable reason to believe that the problem is caused by factors for which Dean and Dyball hold responsibility rather than us. Dean & Dyball’s lawyers Clarke Willmott had neither taken up our offer of a meeting or responded to our letter, but instead proceeded with an application for adjudication, which appears to be premature and doubtful in law.”

With regard to the alleged sum expended by D&D of £531,260.00, we have not had the opportunity to date of reviewing this or the component elements. It will be necessary for us to review all invoices, plant records and labour costs.”

The adjudicator having considered the Arup report decided that KGA had failed to take account of the frictional resistance of the system used to raise and lower the gates and this was the cause of the gates failing to function correctly.

Applications before the Court

D&D sought Summary Judgement to enforce the Adjudicator’s decision.

KGA sought to oppose D&D’s application for summary judgement on a number of grounds including: -

- (a) There was no dispute extant between the parties at the time of the Notice to Adjudicate; and
- (b) The contract was not one to which the provisions of Part 2 of the HGCRA applied because it did not fall within S107; and
- (c) The Adjudicator in arriving at his decision had adopted a procedure, which was unfair, namely conduct separate interviews with the parties and their respective experts.

There was no dispute extant between the parties at the time of the Notice of Adjudication

The Judge considered that the objections raised by KGA focused not on whether there was an actual dispute at the date of the Notice but on the whether the Notice was formally defective in failing to: -

- (a) state precisely when and how RGA had rejected the claim made by D&D:
- (b) identify a cause of action in law which could support the allegation that KGA were liable to D&D and formulate concisely an “issue” or “issues” to be considered by the adjudicator.

In relation to (a) the Judge said:

“In my judgement whether, at the point of giving a notice of adjudication, there is a crystallised dispute in respect of the matter sought to be referred when the quantum of the sum claimed and the alleged composition of that sum has altered from a sum previously claimed is a question of fact and degree the answer to which depends upon what, on the facts, the dispute between the parties was actually about. If liability in respect of a claim is not, at the point of giving notice of adjudication, in dispute, so that the only dispute is about quantum, it is likely to be difficult to say that there is a dispute about a formulation of quantum which is new at that stage and which the responding party has not had an opportunity to consider.....

...the situation is different if liability itself is in dispute and the party alleged to be liable has not accepted that it is bound to pay to the other party any sum whatever. In such a case there is a crystallised dispute as to liability - it is denied- and a crystallised dispute as to the obligation of the party alleged to be liable to make a payment to the other party -the responding party’s position is that it will pay nothing. Those crystallised disputes do not cease to be crystallised simply because the quantum of the claim is altered.”

In relation to (b) the Judge said:

“What precisely must be set out in a notice of adjudication for it to be effective as such depends upon what is required by the relevant rules agreed by the parties as a matter of contract, or by the Scheme, as the case may be....While the formulation of the Notice.....seems to me to be lacking in focus and unduly discursive, in my judgement it was tolerably clear on a fair reading of the Notice as a whole.....KGA was in law responsible to it[D&D]for the deficiencies alleged in the operation of the Gate and, if so, to what sum by way of damages was D&D entitled.

The contract was not one to which the provisions of Part 2 of the HGCR applied because it did not fall within S107.

KGA’s submissions in respect of this point relied in part on the contents of a witness sworn in support of KGA which alleged that some of the terms of KGA’s appointment were agreed orally and there was no written correspondence to confirm the terms or evidence in writing of the oral terms.

In addition and on a slightly different point KGA argued that D&D had not clearly elected to adopt the ACE Conditions into the appointment and consequently without clear acceptance by D&D of the incorporation of the ACE Conditions they were not incorporated.

The Judge decided that the contract was concluded by D&D sending its facsimile of the 23 August 2000, (which was a counter offer, the date for acceptance of RGA’s Proposal having expired) and RGA getting on with the work. Although the facsimile of 23 August 2000 envisaged an “official appointment letter” would be sent and in fact was not, this did not indicate a lack of intention to enter into a contract at that point on the terms contained in the facsimile. The facsimile of the 23 August incorporated by reference not only the

Proposal letter and all its terms, except were they were specifically altered by the facsimile, but also documents and in particularly the ACE Conditions referred to in the Proposal.

In relation to the subsequent oral terms agreed between the parties, while it was not necessary to making a decision on the point as the ACE terms were incorporated into the appointment and consequently adjudication was available upon the express terms of the contract rather than S107, the Judge considered it a *“strange result if a “construction contract” to which S.107 of the 1996 act applies at the time it is made is taken outside the ambit of the section because of some variation, however minor, is subsequently made orally and not evidenced in writing.”*

The Adjudicator in arriving at his decision had adopted a procedure, which was unfair, namely conduct separate interviews with the parties and their respective experts.

The ACE adjudication procedure specifically provided for the Adjudicator to meet with the parties separately.

Natural justice requires that if an adjudicator receives a communication, which is significant to the adjudication from one party alone in the absence of the other, the adjudicator should inform the absent party of the substance of the communication so as to give the absent party an opportunity to deal with it.

In the absence of an express provision allowing the adjudicator to meet with the parties separately, the Judge expressed doubts that it would be appropriate for a an Adjudicator to adopt such a procedure, certainly if the adjudicator failed to provide the other party with the substance of the evidence or discussions that took place and allowing the absent party the opportunity of responding. There was however no suggestion that evidence on behalf of D&D had been given which RGA was unaware of and or that RGA did not have an opportunity to respond. RGA’s objection was simply one of form.

Composite Projects Ltd -v- Andritz AG

HH Judge Frances Kirkham

Date of judgment 30 April 2003

Background to the dispute

The dispute related to a sub-contract between Composite Projects (“Composite”) and Andritz AG (“AAG”) for work relating to a new waste water treatment works and sewage sludge recycling centre at Sandown on the Isle of Wight. AAG had by two sub-contracts, sub-contracted two packages of work to Composite. The first package was for the installation of electrical power, wiring and control wiring, low voltage control wiring and containment to the plant used in the processing of sludge and installation and wiring (including containment) to the control panel for the plant.

The second sub-contract was for the installation of building services to the building in which the sludge processing plant was housed. It included the installation of lighting, emergency lighting, small power distribution, power to roller doors, containment, fire and gas alarm systems, heating and ventilation and building management systems. The

disputes, which were the subject of the application before H H Judge Frances Kirkham, concerned only the second sub-contract.

The Applications before the Court

Composite had made an application pursuant to CPR Part 8 for a declaration in relation to the application of the HGCRA to the second sub-contract. They were seeking a declaration that their work under that sub-contract fell within the definition of “*construction operations*” as defined in sections 105 of the HGCRA and that consequently the second sub-contract constituted a “*construction contract*” as defined in section 104 of the HGCRA.

AAG however is opposing the application on the ground that the court had no jurisdiction to hear the applications and that Part 8 procedure was inappropriate.

Did the sub-contract fall within the definition of “construction contract” and did the work under the second sub-contract fall within the definition of “construction operations”?

The relevant sections of the HGCRA are:

“104 construction contracts

1. *This Part A “construction contract” means an agreement with a person for any of the following -*

... (a) the carrying out of construction operations...”

“105 meaning of “construction operations”

2. *The following operations are not construction operations within the meaning of this part:*

...(b) assembly, installation or demolition of plant or machinery or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is: -

3. *Nuclear processing, power generation, or water or effluent treatment, ...”*

Composite’s case was that the work which was the subject of the second sub-contract did not fall within S105(2) as construction operations which were excluded from the ambit of the Act, as the electrical installation that Composite were carrying out was not connected with the effluent plant but was related to the building within which the plant was contained.

AAG’s case however was that the electrical installation was integral to the effluent plant by reason of evidence from their engineer Herr Undasch who refer to as built drawings which he claimed showed the electrical services which were installed by Composite were fully integrated into the sludge processing plant. AGG also relied on the fact that under Health and Safety Regulations, the sludge processing plant was not allowed to be operated without lighting or fire and gas alarm systems. These systems were the systems that were

being installed by Composite and, as such, they formed an integral part of the overall installation of the waste water treatment plant.

H H Judge Frances Kirkham decided that the services which were the subject of the second sub-contract were physically integral to the building but were not integral to the sludge processing plant and there was no reason to suppose that the sludge processing plant was not capable of being operated without any of the services installed pursuant to the second sub-contract. She accepted for the purposes of the application that AAG were correct in that the plant could not be operated in the absence of lighting and gas and fire alarms because of Health and Safety Regulations but that in her opinion it was insufficient to show that these services were required for the operation of the sludge processing plant. She accepted Composite's submission that buildings in other contexts may not be permitted by virtue of Health and Safety Regulations to operate without adequate lighting or functioning alarm systems and yet could not define those services as required for the operation of the plant.

The distinguishing feature appeared to be whether the actual electrical services installed by Composite were attached or connected to the plant in question or to the building. As such she concluded that the work which was the subject of the building services sub-contract fell within the definition of "construction operations" set out in section 105, did not fall foul of the construction operations which were excluded from section 105 and, as such, the building services sub-contract constituted a construction contract as defined by section 104 of the HGCR.

Does the court have jurisdiction to deal with the Part 8 claim?

AAG applied for the Part 8 claim to be dismissed on the ground the court had no jurisdiction to hear the claim and in particular relied upon clause 20 of the Building Services Sub-Contract:

"20 Settlement of disputes

All disputes arising in interpretation or execution of the present contract, its annexes or in connection with documents issued by both parties to the contract, including additional agreements concerning modifications to the contract will be settled amicably.

If no agreement can be reached or if such agreement is not observed voluntarily by one of the parties, the jurisdiction in the event of a dispute will be in Austria, Graz. Austrian law will be applied..."

AAG also relied upon Article 23 of EC Council Regulation No: 44/2001. Article 23 states:

"If the parties, one or more of whom is domicile in the Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

AAG's case was that all disputes between the parties under the Building Services Sub-Contract must be referred to the court in Graz.

AAG also attempted to adduce evidence showing the intentions of the parties to the Building Services Sub-Contract by reference to any contract between two third parties higher up the contractual chain.

H H Judge Frances Kirkham was not prepared to draw any inferences as to what the intentions of the parties to the Building Services Sub-Contract was on the basis of that evidence, because the wording of clause 20 in the Building Services Sub-Contract was to be construed objectively. The dispute in the proceedings arose from the application of the HGCRA and whether by statutory implication the statutory Scheme for Construction Contracts was applicable. It was not a dispute about the interpretation or execution of the Building Services Sub-Contract or the annexes, nor was it a dispute in connection with documents issued by the parties, nor was it a dispute about additional agreements concerning modifications to the contract. It was thus not a dispute, which the parties had agreed to have settled by the Austrian court for the purposes of Article 23.

While the Austrian court might ultimately be the forum in which substantive disputes between Composite and AAG should be settled, that did not prevent the English court from enforcing the temporary decision of adjudicator properly made. In particular, H H Judge Frances Kirkham referred to the inclusion in Article 23 of the word "settle". She considered that that must refer to the final resolution of a dispute. The decision of adjudicator is not a final resolution in a dispute and neither was the enforcement of such decision by the English court. As a consequence she concluded that the court had jurisdiction to determine the Part 8 claim and make declarations of the nature sought by Composite.

Is the Part 8 procedure appropriate?

H H Judge Frances Kirkham considered it was. She considered the fact there was no further factual expert evidence needed to determine whether or not the work fell within the definition of "*construction operations*" was in the HGCRA, the fact the application was for declarations and not the enforcement of the Adjudicator's decision meant that Part 8 was the appropriate procedure for determining the dispute. The outcome of the application would be helpful to the parties and to any adjudicators to understand whether the latter had jurisdiction is referred to them. She considered that Composite had adopted a sensible and pragmatic approach which was helpful to the parties and saved unnecessary expenditure on costs.

Galliford (UK) Ltd t/a Galliford Northern -v- Markel Capital Ltd

HH Judge John Bherens

12 May 2003

Background to the dispute

The claim arose out of a construction project in Leeds for which Galliford (UK) Ltd ("Galliford") was the main contractor and in respect of which Michael Heal Associates Ltd

("MHA") acted as consultant and structural engineers. Galliford appointed MHA to advise and prepare a detailed design in respect of a conversion of the Wellesley Hotel in Leeds from a hotel into flats. Galliford alleged that MHA failed to advise on the adequacy of its design and crucially Galliford assumed the design was adequate during its negotiations with the employer when it adopted design responsibility of the contract. Part way through the conversion of the hotel the construction of the existing roof slab was found to be inadequate to support the additional floors safely and the design had to be substantially changed, which resulted in a 24 week delay to project and £2,118,332 additional direct and time related costs.

A letter of claim was sent by Galliford to MHA on 2 July 2001.

A further detailed letter was sent in March 2002.

On 31 July 2002 MHA passed a resolution for voluntary winding up and a liquidator was appointed.

On 15 August 2002 Galliford commenced adjudication proceedings under the 1996 Act, these proceedings were fully contested by MHA's insurers. In particular, the insurers disputed the Adjudicator's jurisdiction on the grounds that there was no concluded contract in writing between Galliford and MHA. The Adjudicator rejected this argument by letter dated 6 September and determined that he did have jurisdiction. The Adjudicator then published its decision on 14 October 2002. He decided that MHA was liable to Galliford in respect of the changes to the roof slab design and of changes to the infill steelwork design but not in respect of other matters. He assessed quantum in the sum of £722,586 inclusive of interest and ordered MHA to pay that sum within 14 days. He also directed that MHA should pay his fees.

No part of the sum awarded by the Adjudicator was paid to Galliford and Galliford did not seek to apply to the court to enforce the Adjudicator's decision.

Applications before the Court

Galliford made an application for summary judgment but not as one would normally anticipate for enforcement of the Adjudicator's decision, but instead made an application in relation to a claim under the Third Parties (Rights Against Insurers) Act 1930 which in summary provides that where an injured party establishes that an insured party is liable to it for the injuries that it suffered, and the insured party passes a resolution to wind itself up then the injured party may enforce the contract of insurance against the insurer in order to recover its established losses.

Galliford therefore contended that the adjudication decision itself was insufficient to establish MHA's liabilities and therefore Galliford was bound to succeed under the 1930 Act.

In defence of the application the insurers denied that they were liable to indemnify MHA because of a breach of a condition precedent in the insurance policy which required MHA to notify the insurers of Galliford's claim and/or circumstances which may lead to Galliford's claim immediately upon MHA becoming aware of it and that notification must be in writing. The insurers alleged that MHA was aware of the claim and/or notifiable

circumstances in February 2001 but failed to inform the insurers until July 2001. They claimed the notification clause was a condition precedent to the insurer's liability.

Galliford denied that MHA were aware of the claim and/or notifiable circumstances in February 2001.

The main dispute however, centred around whether the Adjudicator's decision constituted the ascertained relevant liability for the purposes of the 1930 Act so as to transfer and vest MHA's rights under the insurance policy to Galliford. In order to consider this point it is necessary to consider the Act and the insurance policy itself.

Under the terms of the policy, the insurers agreed subject to certain terms and conditions as well as limitations and exclusions to indemnify MHA against "Loss" arising from any Claim or Claims made against MHA during the period of insurance by reason of a wrongful act committed by MHA in or about the conduct of its business.

Loss was defined as "MHA's legal liability for damages awarded against MHA".

By an endorsement on the insurance policy MHA's cover was extended to cover certain payments which might be required from MHA during adjudication procedures.

The relevant terms of the 1930's Act are as follows:

Section 1 of the 1930's Act provides: -

"Where under any contract of insurance a person (hereafter referred to as the insurer) is insured against liabilities to third parties which he may incur, then - ...

(b) in the case of the insured being a company, in the event of ...a resolution for a voluntary winding up being passed, with respect to the company... if either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insured under the contract in respect of the liability shall notwithstanding anything in any Act or rule of law to the contrary, be transferred and vested in the third party to whom the liability was so incurred".

The Act was considered by the Court of Appeal in *Post Office -v- Norwich Union* [1967] 1 All ER 577, and in the House of Lords in *Bradley -v- Eagle Star* [1989] 1All ER 961 in which Lord Brandon expressly approved the reasoning of Lord Denning in the *Post Office* case. He cited with approval of the following passages:

"Under that section the injured person steps into the shoes of the wrongdoer. Thereof transferred to the wrongdoers "rights" against the insured under the contract". What are those rights? When do they arise? So far as the liability of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide; but the "rights" of the insured person against the insurers do not arise at that time. The policy in the present case provides that "the [Defendants] will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or

damage to property". It seems to me that [Potters] acquire only a right to sue for the money when their liability to the injured person has been established so as to give rise to a right of indemnity. The liabilities to the injured person must be ascertained and determined to exist either by judgment of the court or by an award of an arbitrator or by agreement. Until that is done, the right to an indemnity does not arise."

The definition of loss in the insurance policy to which MHA were insured was the same as and indistinguishable from the definition in the Post Office case. It followed therefore that there was no transfer of MHA's rights against the insurers as at the date of the resolution to wind up MHA. As of that date the adjudication procedure had not been commenced and consequently it could not be said that MHA were liable to Galliford as no liability had been established either by judgment, arbitration or otherwise. The crucial question which the Judge had decided on was there was a transfer and vesting of MHA's rights against the insurers to Galliford following the Adjudicator's decision being October 2002.

The Judge concluded that the Adjudicator's decision created a contractual obligation enforceable summarily on the part of MHA to comply with the Adjudicator's decision even though the decision was a necessarily a provisional decision and the Adjudicator's decision was therefore not equivalent to a judgment or an arbitration award; it was no more or no less than a contractual obligation to pay. Although the Adjudicator's decision was enforceable summarily, there was a defence to an application to enforce an adjudicator's decision where the Adjudicator has exceeded his jurisdiction. At the time of the Post Office decision the adjudication procedure did not exist. It was the Adjudicator's decision which was a contractual obligation, this did not amount to a legal liability for a debt or damages which was established by legal action, arbitration or agreement, therefore there was no loss under the insurance policy for which MHA could have sued the insurers. As a consequence, when MHA passed the resolution to be wound up, there was no equivalent right which could be passed to Galliford which they could then pursue against the insurers. The Adjudicator's decision was a contractual obligation but not an absolute obligation and it did not become an absolute obligation until the Adjudicator's decision was enforced by judgment of the court or agreed. In the circumstances, Galliford had issued the proceedings prematurely and as a consequence they were dismissed.

The Judge gave permission to appeal and he accepted that the point in dispute was one where there was no direct authority and was of some general importance.

Simons Construction Limited -v- Aardvark Developments Limited
HH Judge Seymour Q.C.
29 October 2003

Background to the Dispute

Two disputes were referred to Mr. Barker the Adjudicator. The first by Simons Construction Limited (Simons), the second and later dispute, by Aardvark Developments Limited (Aardvark).

In relation to the first reference Mr Barker considered that it was premature as there was no crystallised dispute between the parties. Simons by their solicitors then purported to

notify Mr Barker that his services were no longer required. Mr Barker charged £200 plus VAT in respect of the first reference.

By the time of the second reference a dispute had crystallised between the parties. Mr Barker proceeded to determine the dispute but required the 28 day period in which to make a decision to be extended on two occasions. The final extension being to the 17 June 2002. Mr Barker on the 17 June published what he described as a “*Adjudicator’s Draft Decision for the parties comment*” comments were required within 7 days. Neither party commented on it and on the 25 June 2002 the decision was published again as a “*Final Decision*” without any changes to the substantive text. Mr Barker charged £2,880 plus VAT in respect of the second reference.

Applications before the Court

Mr Barker applied against both Simons and Aardvark for his outstanding fees.

Simons’ case by way of defence to the claim was: -

- (a) in relation to the first reference, the reference was a valid and effective reference, Mr Barker had made it clear that he was not prepared to reach a decision within 28 Days and in those circumstances Simons were entitled to determine his appointment and not pay his fees; and
- (b) in relation to the second reference, the “*Draft Decision*” issued for comment was not a decision but an invitation to debate the conclusions within it, while the “*Final Decision*” was not binding as it had been published latter than the rules governing the second reference allowed Aardvark’s case in relation to the second reference was that as there was no material difference between the “*Draft decision*” and “*Final Decision*” then the “*Draft Decision*” was in fact Mr Barker’s decision and this had been given in time.

The Judge did not accept Aardvarks submissions, and made the following comments:-

“It seems to me that it is clear that the “Draft Decision” was not, as such, a decision in respect of the matters the subject of the Second Reference. The Draft Decision was not signed or dated. It was marked on the title page as “For the Parties Comment”. That is indicative, in my judgement, of a Draft Decision not being intended as necessarily final. Rather each party was afforded on opportunity to make any observations on the Draft Decision which it wished.”

In relation to Simons arguments the Judge made the following comments: -

“...Whether the failure to produce a final decision by no later than 17 June 2002 meant, as was contended on behalf of Simons, that the Final Decision, when produced, was not binding on Simons and Aardvark. That could only be so, in my judgement, if the failure of an adjudicator to produce a decision within the timescale prescribed by the contract by which he was appointed adjudicator, as varied by the agreement of the parties, deprive him of jurisdiction to produce a binding decision thereafter.”

The Judge then proceeded to consider what the JCT contract between the parties in fact provided for in these circumstances and concluded that it was silent as to the consequences of an adjudicator failing to make a decision within the relevant time period.

He also considered the JCT Adjudication Agreement and in particular clauses 5.1 and 5.2. those two clauses enabled the adjudication agreement to be terminated only if both parties agreed and the adjudicator could then be deprived of his fees.

If the adjudicator failed to reach his decision within the relevant period either party could serve a fresh referral notice and a new adjudicator appointed. It was implicit from this that the first adjudicator ceased to have jurisdiction in relation to the dispute. Up until the giving of a fresh referral notice, the first adjudicator retained jurisdiction and the parties were required to comply with the first adjudicator's decision if published prior to either party giving a fresh notice of adjudication.

10 November 2003
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