Neutral Citation Number: [2009] EWHC 319 (TCC)

Case No: 8QZ06856

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2009

Before :

The Hon Mr Justice Ramsey

- -

Between :

Christopher Michael Linnett	**Claimant**
- and -	
Halliwells LLP	**Defendant**

- -
- -

Miss Emily Monastiriotis (of Mayer Brown International LLP) appeared for the **Claimant**
Mr David Fearon (of Halliwells LLP) appeared for the **Defendant**

Hearing dates: 17th December 2008

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Judgment

The Hon. Mr Justice Ramsey :

Introduction

1. The claimant, Christopher Linnett ("the Adjudicator"), was appointed in an adjudication between ISG InteriorExterior Plc ("ISG") and the defendant, Halliwells LLP ("Halliwells"), arising out of a contract to carry out the fit out works at Halliwells' new offices in Manchester. ISG were the referring party in the adjudication and Halliwells were the responding party

2. In these proceedings the Adjudicator claims his fees and expenses against Halliwells, who raised jurisdictional challenges during the course of the adjudication. Halliwells contend that they are not liable directly to the Adjudicator for his fees and expenses, having taken an objection to the Adjudicator's jurisdiction, which they still maintain. They say that the only route for the Adjudicator to obtain payment of fees and expenses is from the referring party, ISG, who can then seek to claim them from Halliwells in enforcement proceedings which would be challenged by Halliwells on jurisdictional grounds.

3. Although the fees claimed are modest, this case raises a question of general importance concerning the ability of an adjudicator to recover his fees from the responding party to the adjudication when that party raises questions of jurisdiction.

Background

4. On 7 December 2007 ISG and Halliwells entered into an agreement under the 1998 JCT Standard Form of Building Contract, with various amendments and supplements ("the Building Contract").

5. By Article 5 and Clause 41A of the Building Contract it was agreed that either party could refer any dispute or difference arising under the Building Contract to adjudication in accordance with Clauses 41A.2 to 41A.8 (as amended), with any dispute then being finally determined by legal proceedings.

6. Disputes arose under the Building Contract and ISG served a Notice of Adjudication dated 22 May 2008 on Halliwells, pursuant to Clause 41A.4.1 of the Building Contract. ISG applied to the RICS on 23 May 2008 for nomination of an adjudicator, as provided for in Clause 41A.2.

7. On 28 May 2008 the Adjudicator was nominated by the RICS. On the same date he sent a letter to ISG and Halliwells enclosing, amongst other things, his Terms of Engagement. ISG served the Referral by fax on the Adjudicator and Halliwells on Thursday 29 May 2008. On the same day ISG posted the attachments to the Referral to the Adjudicator and Halliwells. Halliwells received the attachments on Friday 30 May 2008. The copy sent to the Adjudicator did not reach him on that date. On Monday 2 June 2008 the Adjudicator telephoned Pinsent Masons, ISG's Solicitors, and Pinsent Masons offered to forward a further copy by courier. The Adjudicator suggested that they should wait and see if it arrived in the post on 3 June 2008. He wrote to Pinsent Masons on 3 June 2008 to say that he had not received the posted copy. A further copy was sent by courier and arrived with the Adjudicator on 4 June 2008.

8. From those facts, as Monday 26 May 2008 was the Spring Bank Holiday, it is apparent that the Referral was received by the Adjudicator and the Referral and attachments were received by Halliwells within 7 days of the Notice of Adjudication. However the Adjudicator did not receive the attachments within that period of 7 days.

9. On 28 May 2008 the Adjudicator wrote to the parties enclosing his Terms of Engagement (in error 2007 terms), together with a document setting out an "Adjudication Policy and Procedure", a "Slip Rule" and an "Adjudicator's Questionnaire".

10. On 3 June 2008 the Adjudicator wrote to the parties with amended Terms of Engagement enclosing 2008 terms in place of the 2007 terms previously sent in error. Both sets of terms provided as follows:

> *"Liability for Payment*
> *The Parties are to be jointly and severally liable for payment of my fees and expenses in any event. …*
>
> *Acceptance*

> *Any objections to this Scale and these Terms by the Parties shall be made in writing to me within 7 days of receipt."*

11. On 5 June 2008 Pinsent Masons, on behalf of ISG, wrote to the Adjudicator, enclosing the "Adjudicator's Questionnaire" duly completed. Paragraph 14 of the Questionnaire stated "*Do you accept my Scale of Charges and Terms of Engagement?*". It was answered "*Yes*". The document evidently accepted the Adjudicator's earlier terms. In the covering letter Pinsent Masons referred to the fact that the Adjudicator's 2008 Terms of Engagement had been sent to ISG but nothing further seems to have been said about these terms.

12. On 5 June 2008 Halliwells wrote a letter to the Adjudicator which contained the following statement: "*This letter is written without prejudice to the responding party's contention that the adjudicator does not have jurisdiction to deal with the matters purportedly referred to him.*"

13. The letter continued in these terms:

> *"A copy of the Notice of Adjudication was served by fax and post on the Responding Party on 22 May 2008. Accordingly, service of the Referral on both the Adjudicator and the responding Party should have occurred on 29 May 2008 at the latest. It is clear from the correspondence referred to above that service of the Referral did not in fact take place until 4 June 2008. The Referral was therefore served out of time.*
>
> *In the circumstances, we invite the Adjudicator to now withdraw from the Adjudication. For the avoidance of doubt, we do not grant the Adjudicator the power to decide upon his jurisdiction.*
>
> *Should the Adjudicator not be prepared to withdraw from the adjudication, we invite the Adjudicator to revise the directions given in his letter dated 5 June 2008 requiring service of the Response by Friday 6 June 2008 to provide for service 7 days from the date of receipt by him of the Referral i.e by 11 June 2008."*

14. On 6 June 2008 Pinsent Masons wrote to the Adjudicator and said that they would "*not object if, in the light of Halliwells' fax and on reflection, you are minded to direct that Halliwells have until 11 June 2008 to serve the Response*".

15. The Adjudicator wrote to the parties on 6 June 2008 referring to that letter and saying that he assumed it was agreed that the adjudication should run from 4 June 2008 to 2 July 2008. In that letter he also said that he did not accept Halliwells' assertion that the Referral was served out of time. In doing so he decided against Halliwells' jurisdictional argument and evidently decided to proceed to consider the merits.

16. Halliwells acknowledged that letter and on 10 June 2008 served a Response, which again raised the same objection as the letter of 5 June 2008 and stated:

> *"This document, together with all future documents generated in this Adjudication is submitted without prejudice to the Responding Party's*

contention that the Adjudicator does not have the Jurisdiction to deal with the matters purportedly referred to him."

17. At paragraph 3 of the Response Halliwells also said that while they did not dispute that there was a construction contract in writing "*there is no longer a construction contract fully evidenced in writing for the purposes of the Housing Grants Construction and Regeneration Act 1996*". They said at paragraph 11 of the Response that the original contract had been "*varied by oral agreement and/or by conduct*". They then continued at paragraphs 18 and 20 as follows:

> *"18. As a result of the fundamental variations to the original Contract, the Adjudicator does not have jurisdiction to deal with the matters purportedly referred to him.*
>
> *...*
>
> *20. The Responding Party invites the Adjudicator to consider his jurisdiction in light of the above and, having done so, invites the Adjudicator to withdraw from this misconceived Adjudication. For the avoidance of doubt, the Responding Party does not grant the Adjudicator the power to decide upon his jurisdiction."*

18. On 11 June 2008 Pinsent Masons raised objections to matters in the Response and, at the direction of the Adjudicator, served a Reply to Response on 16 June 2008.

19. On 13 June 2008 the Adjudicator wrote to the Parties and concluded

> *"Unless I receive a completed questionnaire from the Responding Party I will assume the answers to questions 1 to 9 as given by ISG are agreed and that my terms are also agreed. However without positive affirmation, I cannot make the same assumption about the slip rule referred to at question 13."*

20. On 17 June 2008 Halliwells responded to say this:

> *"You do not have jurisdiction to deal with the issues purportedly referred to you for the following reasons:-*
>
> 1. *If a contract is a construction contract to which the Act applies, the parties must comply with the Act and all the terms must be in writing. In circumstances where the contract is one to which the Act applies, but is not Act compliant in that not all the terms are in writing, then the Adjudicator does not have jurisdiction. This is the position here. The Adjudicator is referred to Treasure & Son Ltd v. Dawes [2007] EWHC 2420 (TCC), which follows and clarifies the position in RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd [2002] BLR 217.*
>
> 2. *Any decision in the Adjudication would be a nullity as the Referral and its accompanying documentation were not served on the Adjudicator on 30 May 2008 but rather on 4 June 2008. This is contrary to the prescriptive provision of the clause 41 of the original contract, and also contrary to the requirements of the Act, and accordingly the Adjudicator does not have jurisdiction."*

21. They concluded by saying: "*In the light of [Halliwells'] contention that the Adjudicator does not have jurisdiction, we trust you will understand that return of a completed questionnaire has not been deemed necessary.*"

22. On 24 June 2008 the Adjudicator made his Decision. He stated in relation to Halliwells's challenges to jurisdiction as follows:

    (1) In relation to the oral contract his conclusion at paragraph 27 was:

    > "*Given that there was a written contract between the parties and given that there was no evidence to support the submissions that this contract was changed, either fundamentally or at all, it would have been inappropriate for me to resign for want of jurisdiction on the basis on this first challenge."*

    (2) In relation to the late service of the Referral he said at paragraph 34:

    > *"It seems to me the only impact of the first copy of the Referral documents being lost in the post was that Halliwells were given an extra five days to prepare and serve the Response. My late receipt of the supporting documents caused no difficulties whatsoever and it cannot possibly have caused any prejudice to Halliwells."*

23. At paragraphs 63 to 68 of his Decision the Adjudicator dealt with his fees and expenses in a total sum of £2,436.95 including VAT. He said at paragraph 66 that he apportioned his fees and expenses entirely to Halliwells and that an invoice would be sent out in the near future. At paragraph 68 of the Decision he added:

    > "*The apportionment of my fees and expenses above does not alter the fact that, by virtue of clause 41A.6.2 of the adjudication provisions and paragraph 6 of my Terms of Engagement, the parties are jointly and severally liable for my fees and expenses. In the event of default by Halliwells I reserve the right to invoice the entire amount to ISG.*"

24. The Adjudicator sent an invoice to Halliwells on 27 June 2008. On 22 August 2008 Halliwells wrote to the Adjudicator to say: "*You will recall that throughout the Adjudication our position was that you did not have jurisdiction. That remains our position. Accordingly, we will not be making any payment in respect of your invoice.*"

25. After further correspondence, Halliwells wrote on 2 September 2008 to say this:

    > "*The adjudication was commenced by ISG. The appointment was made at ISG's request. At no time during the adjudication did we agree to your appointment, and we most certainly did not agree to be liable to pay you for anything you did in the adjudication.*
    >
    > *Any appointment as adjudicator (as you recognise in your terms and conditions) is contractual and we never had a contract with you. Again, we can only suggest that you request payment from ISG.*"

26. On 23 September 2008 the Adjudicator issued a Money Claim Online against Halliwells at Northampton County Court seeking to recover his fees, including time spent and invoiced since the date of his Decision in communicating with Halliwells concerning the non-payment of his invoices.

27. On 17 October 2008 Halliwells served a Defence. The Adjudicator then sought a transfer to the TCC at the High Court in London on the grounds that the issues raised by the claim were of general interest to those involved in construction adjudication. Following correspondence between the court and the parties, I transferred the proceedings to the TCC at the High Court in London. In response to my suggestion that there should be a "costs capping" order because the case involved a comparatively small sum in dispute and the transfer to the High Court could lead to disproportionate costs being incurred, the parties agreed that each party should bear their own costs. There is an issue as to the cost of the Adjudicator's time which I may have to deal with in due course.

28. I also gave directions for the exchange of written submissions and proposed to deal with the matter in writing unless either party sought a hearing.

29. Following the adjudication between ISG and Halliwells in which the Adjudicator was appointed, another adjudication ("the Second Adjudication") was commenced by ISG against Halliwells in which another adjudicator, Mr Juniper, was appointed. In that adjudication, Halliwells also raised questions of jurisdiction including the question of whether "*there is no longer a construction contract fully evidenced in writing for the purposes of the Act.*" ISG subsequently commenced proceedings in the TCC at the High Court in London to enforce the decision dated 28 October 2008 in the Second Adjudication ("the Second Decision"). I gave directions in those proceedings which included the hearing of the Part 24 application for summary judgment.

30. The Adjudicator in the current proceedings also sought a hearing and I listed that hearing at the same time of the Part 24 application in respect of the Decision in the Second Adjudication. Subsequently ISG and Halliwells agreed the terms of a Tomlin Order in respect of that Part 24 application.

31. Accordingly at the hearing I was concerned only with the proceedings between the Adjudicator and Halliwells although submissions were made concerning the effect of certain matters raised in the Second Decision.

The liability of a responding party for the fees of an adjudicator

Background

32. It is to be noted that, although adjudication is said to be "statutory adjudication" it is, on analysis, contractual. The adjudication process consists of two agreements. One agreement, the Adjudication Agreement, is that made between the parties to a construction contract either expressly or impliedly by the Scheme under s.108 of the 1996 Act. The second agreement, the Adjudicator's Agreement, is an agreement which may be made between the Adjudicator and one or both of the parties.

33. The adjudication provisions in s.108 of the 1996 Act are concerned only with the Adjudication Agreement. They require the parties to agree upon certain terms in their

contract. These terms include provisions requiring the adjudicator to reach his decision within 28 days or such longer period as may be agreed (s.108(2)(c)); imposing a duty on the adjudicator to act impartially (s.108(2)(e)) and providing that the adjudicator is not liable to the parties unless there is bad faith (s.108(4)). Those provisions are essentially obligations or rights of the adjudicator which would be expected to be contained in the Adjudicator's Agreement or, like similar provisions in s.29(1) and 33 of the Arbitration Act 1996 in relation to the immunity and duties of an arbitrator, to be imposed upon the parties and the adjudicator as a matter of statute. In the absence of any other route, the necessary terms of the Adjudicator's Agreement would have to be implied into that agreement.

34. Similarly, in adjudication, the ability of an adjudicator to obtain fees depends on there being a contractual right to payment under the Adjudicator's Agreement with one or both of the parties. There is nothing in s.108 of the 1996 Act which gives the adjudicator a right to payment. It is to be noted that, in this case, under Clause 41A.2 of the Building Contract it was envisaged that the parties and the adjudicator would all execute the JCT Adjudication Agreement which would, amongst other things, provide the adjudicator with a direct route to payment of his fees from both the referring and the responding party. Although that provision was included in the JCT Standard Form, in this case no such adjudication agreement was entered into between both parties and the adjudicator.

35. The adjudicator's contractual right to payment does not arise under and is not affected by the terms of the decision by which the adjudicator decides which party is to pay his fees and expenses. That decision determines who, as between the parties, is to bear those sums but it does not affect any contractual right to payment which the adjudicator may have or provide a right to payment if he has no contractual right. It may, in practice, lead to the relevant party making payment direct to the adjudicator but it gives the adjudicator no enforceable rights to payment.

36. The process of adjudication requires a rapid appointment of an adjudicator. Under the provisions of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), s.108(2)(b) states that the construction contract shall "*provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice*". In this case appointment of an adjudicator is dealt with under Clause 41A.2 which provides that the Adjudicator shall either be agreed or be nominated by the President of the Royal Institution of Chartered Surveyors. Clause 41A.2.2 provides that any agreement must be reached or any application to the nominator must be made "*with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer.*"

37. The fact that the appointment of the adjudicator is intended to be rapid means that referring party is likely to be the one who seeks the appointment and who is keen for the objective of early appointment to be met. The referring party is therefore likely to be the party which responds positively to the adjudicator's terms and conditions and may do so unilaterally if the responding party is slow to react or raises an objection to the adjudication on jurisdictional or other grounds.

38. In such circumstances it is not uncommon for the Adjudicator's Agreement to be entered into only with the referring party and not with the responding party. This raises questions as to the liability of the responding party for the fees and expenses of the adjudicator.

39. With that introduction, I now turn to consider the facts of this case.

The contractual position between ISG and the Adjudicator

40. In the present case, as the facts set out above show, the adjudicator wrote to the parties and enclosed his Terms of Engagement and other documents. The referring party returned the questionnaire duly completed and by doing so expressly accepted the adjudicator's Scale of Charges and Terms of Engagement, albeit by reference to the 2007 rates. The covering letter from Pinsent Masons mentioned that the 2008 rates had been sent to ISG but I do not know whether anything further was said as to the 2008 rates and whether those rates were agreed.

41. On these facts there was, in my judgment, an agreement between ISG, as the referring party and the Adjudicator covering the Terms of Engagement and his 2007 rates. ISG are therefore liable to pay the Adjudicator his fees and expenses on the agreed terms.

The contractual position between Halliwells and the Adjudicator

42. Halliwells did not sign the questionnaire and did not respond to the adjudicator's invitation in his letter of 28 May 2008 to agree his Terms of Engagement and return the questionnaire. Nor did they respond to his reminder by letter dated 11 June 2008. When the Adjudicator wrote on 13 June 2008 saying that, unless he received a completed questionnaire from Halliwells, he would assume that his terms were agreed, Halliwells did respond in their letter of 17 June 2008 in which they raised jurisdictional objections. They said that in the light of the "*contention that the Adjudicator does not have jurisdiction, we trust you will understand that return of a completed questionnaire has not been deemed necessary.*"

43. Mr Fearon submitted on behalf of Halliwells that there was no contract between Halliwells and the Adjudicator because the terms were not accepted. He further submitted that the Adjudicator could not rely on Halliwells' silence to establish that the terms were accepted and a contract was formed. He referred to the well-known decision in Felthouse v. Brindley (1862) 11 CB (NS) 869 in which a contract was not made where a person said "*If I hear no more about him. I consider the horse mine*".

44. Ms Monastiriotis, on behalf of the Adjudicator, pointed to the fact that Halliwells did not raise objections on the Terms of Engagement within 7 days of receipt as required by paragraph 10 of the Terms. In any event, she submitted that Halliwells are liable for the adjudicator's fees and expenses because, by their actions, they engaged the adjudicator's services and were fully involved in the adjudication process throughout.

45. So far as the contractual position between the adjudicator and Halliwells is concerned, first, I accept that Halliwells' silence following the adjudicator's letter of 28 May 2008 did not amount to acceptance. The general principle derived from Felthouse v. Brindley and applied by the Court of Appeal in Allied Marine Transport Ltd v. Vale de Rio Doce Navegacao SA ("The Leonidas D") [1985] 1 WLR 925 at 927, 937 and the House of Lords in Vitol SA v. Norelf Ltd [1996] AC 800 at 812 is that acceptance

of an offer cannot be inferred from silence, except in exceptional circumstances. In my judgment, there was nothing exceptional in the circumstances here and there was nothing that gave rise to any express or implied obligation on the part of Halliwells to speak.

46. Secondly, on my analysis, the response by Halliwells in their letter of 17 June 2008 made it clear that they were objecting to jurisdiction and would not agree those terms. This, I consider, was a rejection of the terms at a time when there had been no prior acceptance.

47. In those circumstances, given Halliwells' initial silence followed by their response of 17 June 2008 there was no contract formed between Halliwells and the Adjudicator on the Adjudicator's Terms of Engagement.

48. This raises the question of whether an adjudicator in this position has no right to payment from Halliwells and whether the existence or absence of jurisdiction makes any difference.

49. Mr Fearon submits that where, as here, a responding party raises jurisdictional challenges and does not agree the adjudicator's terms, the adjudicator's only method of obtaining payment, if the party found liable in his decision for his fees and expenses fails to pay him, is for him to recover those fees and expenses from the other party, in this case ISG, who would then be left to recover from Halliwells on the basis of the decision, if the Adjudicator had jurisdiction.

50. On the other hand, Ms Monastiriotis submits that whether or not the Adjudicator had jurisdiction, he is still entitled to his fees because Halliwells still continued to take part in the adjudication, albeit with an express reservation in relation to jurisdiction. Alternatively, she submits that if there is no contractual basis, then the adjudicator can recover payment on a *quantum meruit* basis.

51. In order to consider whether the Adjudicator has a right to payment it is necessary to review the relationship between an adjudicator and the parties to the adjudication, particularly on the facts of this case.

The relationship between an adjudicator and the parties

52. There is little material on this topic. However, similar questions have arisen in the context of arbitrator's fees and expenses. Whilst there are important statutory differences between arbitration and adjudication, the general principles are likely to be similar where either an arbitrator or an adjudicator is appointed by the parties to a dispute.

53. In Mustill & Boyd on Commercial Arbitration (2nd Edition) dealing with the position prior to the Arbitration Act 1996, the authors suggested at page 220 that there were "*three ways in which the relationship between the parties and the arbitrator can be explained: in terms of restitutory or quasi-contractual rights; as a matter of status; or a matter of contract*." In relation to the first way they state:

> "*All that is required to found such a remedy is a request by one party that the other party shall perform a service, in circumstances where it is contemplated*

that the service will be rewarded. The request here is present in fact, in the express terms of the appointment so that there is no need for a request to be implied; and the right to remuneration is taken for granted, and indeed is not infrequently quantified by agreement before any services are performed."

54. Later at 233 they consider the entitlement of an arbitrator to payment for a completed reference and say: "*Even when the parties have not made any specific provision for the arbitrator to be paid, an arbitrator appointed to decide a commercial dispute has a right to be paid a reasonable fee.*" In relation to payment where the reference is a nullity because, for instance, there is no binding agreement to arbitrate they say at 245: "*There may, however, be circumstances in which the arbitrator has a restitutory claim, based on the fact that the useless work was carried out at the request of the parties or one of them, where the arbitrator was appointed by one party.*"

55. In relation to the arbitrator's ability to enforce the right to remuneration they say at 235: "*The parties are jointly liable for the fees of the arbitrator and where the tribunal consists of more than one arbitrator, each party is liable for the fees of the whole tribunal, and not merely those of the arbitrator whom he has himself appointed.*" The authors cite Crampton and Holt v. Ridley & Co (1887) 20 QBD 48 at 54 and Brown v Llandovery Terra Cotta (1909) 25 TLR 625 in support of the first proposition. They add as a footnote "*We suggest that the liability is not only joint, but joint and several.*" This view was reflected in the DAC Report on Arbitration Law at paragraph 120 where it stated that it was generally accepted that the parties are jointly and severally liable for the fees of the arbitrator.

56. In the 2001 Companion to Mustill & Boyd at 168 the authors also cite K/S Norjarl AS v. Hyundai Heavy Industries Co Ltd [1991] 1 Lloyd's Rep 524. In that case arbitrators accepted appointments without agreeing fees and tried to negotiate particular fees after the appointment. The nature of the relationship was expressed by Leggatt LJ as follows at 532: "*By accepting appointment in this case the arbitrators by implication undertook to conduct the arbitration with due diligence and at a reasonable fee.*" Sir Nicolas Browne-Wilkinson V-C said this at 537 "*By accepting appointment without any express agreement as to their fees, the arbitrators assumed the status of arbitrator and became entitled to reasonable remuneration for work done…*".

57. On the basis of those observations I consider that the general position in relation to an arbitrator is this:

(1) Where a person acts as an arbitrator then by accepting the appointment, that person is entitled to reasonable remuneration from the parties for work done;

(2) Where a person acts as an arbitrator then the parties are jointly and severally liable for that person's fees and expenses;

(3) Where a person acts as arbitrator but does not have jurisdiction then that person may have a claim based on the fact that the useless work was carried out at the request of the parties or one of them.

58. I see no reason why those general principles should not apply to a person who is appointed as an adjudicator under express or implied contractual provisions for adjudication.

The position where there is no jurisdictional challenge

59. Where one party agrees the adjudicator's terms but the other does not then, except for such terms as might require the agreement of the other party in order to become binding, the Adjudicator can enforce those terms against the party with whom he has a contract. There is nothing objectionable in an adjudicator being appointed unilaterally and, indeed, it is not uncommon for this to happen in arbitrations with three arbitrators.

60. In general terms, absent any jurisdictional objections, I consider that if an adjudicator is appointed and neither party makes a contract with the adjudicator, the parties by participating in the adjudication and thereby requesting the adjudicator to act, enter into a contract with the adjudicator who acts in that capacity as a result of that request. Such a contract would be formed by conduct. There would, I consider be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator and would be jointly and severally liable with the other party to do so. There would also, I consider be an implied term that the adjudicator would act in accordance with the terms of the Adjudication Agreement between those parties.

61. In principle, I can see no reason why the position should not be similar where only one party makes a contract with the adjudicator but the other one does not. In those circumstances, the party who does not make a contract but participates in the adjudication thereby requests the adjudicator to act and there is a contract made by conduct with the adjudicator who acts in that capacity as a result of that request. There would, similarly be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator, that the party would be jointly and severally liable with the other party to make payment and that the adjudicator would act in accordance with the terms of the Adjudication Agreement between those parties.

62. The question of joint and several liability might give rise to some difficulties in the case where one party agrees the rates of remuneration with the adjudicator but the other party does not and has to pay a reasonable remuneration. In Merkin on Arbitration Law at paragraph 10.61 a similar issue is raised in relation to the statutory provision in s.28(1) of the Arbitration Act 1996 that the parties are jointly and severally liable to pay to the arbitrators' reasonable fees and expenses. How does this apply where there is an agreed sum. In Merkin it is suggested that it might be possible to argue that joint and several liability only applies to the amount regarded as reasonable. That seems to be the view of the DAC at paragraph 123. In my view if one party agreed fees and the other party was liable for a reasonable fee then generally joint and several liability would apply only to the reasonable fee which could, in principle, be lower or higher than the agreed fee. However, in practice, the agreed fee is likely to be the same as or accepted to be a reasonable fee.

The position where there is a jurisdictional challenge

63. Whilst the position as set out above would apply where there is no jurisdictional issue, as I have stated above, such issues are frequently taken and some succeed. What then

is the position? It seems to me that where a party wishes to raise a jurisdictional argument, as has now become common in adjudications, it has one of two options.

64. First, it can make an assertion of lack of jurisdiction and withdraw, taking no further part in the adjudication proceedings and leaving the adjudicator and the other party to proceed at their risk. It might then seek an urgent declaration as to jurisdiction from the court or seek to challenge any decision on the grounds that the adjudicator had no jurisdiction. In such circumstances in the absence of any agreement with the adjudicator, there would be no request for the adjudicator to do anything and it would, in my judgment, be difficult to make that party liable for the fees and expenses of the adjudicator.

65. Secondly, it can make an assertion of lack of jurisdiction but continue to participate in the proceedings, without prejudice to that contention. It might seek to persuade the adjudicator to make an early non-binding decision on jurisdiction. If this is in favour of the party, the adjudicator would be obliged to withdraw and the adjudication would come to an end. If the adjudicator finds that he has jurisdiction that party might continue to participate in the adjudication, again without prejudice to its right to challenge any award on the basis of a lack of jurisdiction. By participating in this way, it seems to me that whilst the party is not giving the adjudicator jurisdiction to make a binding decision, it is requesting the adjudicator to carry out work and make a decision.

66. If the adjudicator makes a decision on jurisdiction or on the merits then the party would have a potential benefit. If the adjudicator decides that he does not have jurisdiction then that party has the benefit of the decision because the adjudication comes to an end. If the adjudicator decides he does have jurisdiction and then proceeds to make a decision on the merits, the party is seeking a favourable decision on the defences raised. Whether that party maintains the jurisdictional arguments may depend on how it fares in its defence on the merits. If, for instance, the adjudicator were to dismiss the claim, the party would doubtless abandon the jurisdictional argument and assert the temporarily binding nature of the adjudicator's decision.

67. In many cases it is clear that parties raise jurisdictional arguments so that they cannot be said to have waived any such arguments but then fight the case on the merits and attempt to use the jurisdiction arguments to negotiate a favourable outcome or oppose enforcement. It is currently a regrettable feature of adjudication that, in many cases, the parties spend a great deal of time and money considering and arguing about jurisdictional matters with the effect that the adjudicator, either at an early stage or in his decision, also spends much time dealing with the jurisdictional points raised.

68. The fact that a party makes a jurisdictional challenge should not, in my judgment, in itself change the position where a party participates in the adjudication proceedings. If the adjudicator makes a decision which he did, in fact, have jurisdiction to make then I can see no reason why the mere fact of the erroneous jurisdictional challenge should change the position.

69. If there is a valid jurisdictional challenge and if a party has not participated in the adjudication then, on the basis of the view I have expressed above, that party can have no liability for the fees and expenses of the adjudicator.

70. If, however, a party has participated in the adjudication process, albeit without prejudice to its contention that the adjudicator did not have jurisdiction, then in principle by participating and thereby requesting the adjudicator to adjudicate on the dispute I consider that the party will generally be liable for the reasonable fees and expenses of the adjudicator on the same basis as set out above.

71. I emphasise that this is a matter of contract as between the adjudicator and the relevant party. If the adjudicator did not have jurisdiction then any decision made by the adjudicator will be null and void. This will preclude one party from recovering from the other party any sums based on the adjudicator's allocation of the fees and expenses contained in the invalid decision.

72. This was the position in Griffin v. Midas Homes Ltd (2000) 78 Con LR 152 where His Honour Judge Humphrey LLoyd QC held that he could not enforce the adjudicator's fees and expenses contained in a decision which he held was partially invalid. He said this at p.159:

> "*3. The scheme apparently implicitly confers on the adjudicator a power to apportion his fees and to decide who should pay the apportionment. The adjudicator has done so on the basis of all the work that he carried out. However in the light of my decision it is clear some of that work was unauthorised as it was beyond his jurisdiction and accordingly the defendant cannot be liable for it. Only the party that sought adjudication is liable for the fees, expenses and costs incurred by asking for a decision which the adjudicator had no authority to make and to which it was not entitled under the contract and which in breach of contract it sought. Section 114(4) of the 1996 Act provides:*
>
> > *'Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.'*
>
> *Thus the scheme took effect as implied terms of the sub-contract. The claimants were only entitled to exercise their right to call for adjudication if they first complied with para 1(3) of the scheme. They did not do so in part and were thus in breach of contract.*"

73. Equally, as indicated in this passage, the party challenging the adjudicator's decision will not be liable, as between the parties, for the fees under the terms of any Adjudication Agreement which those parties may have entered into between themselves. That does not, however, deal with the question of the individual liability of the parties to the adjudicator.

The position as between the Adjudicator and Halliwells

74. When the Adjudicator wrote his first letter to the parties on 28 May 2008 he proffered himself for appointment as adjudicator having been nominated by the RICS. Pinsent Masons, on behalf of ISG, evidently accepted him as adjudicator in their letter in reply of 29 May 2008 by which they sent him the Referral and agreed his terms.

75. Halliwells in their letter of 5 June 2008 raised questions of jurisdiction contending that the Referral was served out of time. In that letter they invited the adjudicator to withdraw and made it clear that they did not grant the adjudicator the power to decide upon his jurisdiction. They then continued by saying that, if the adjudicator was not prepared to withdraw: "*we invite the Adjudicator to revise the directions given in his letter of 5 June 2008…*". On my analysis, Halliwells were thereby requesting the adjudicator to make a non-binding decision as to jurisdiction. If he found he did not have jurisdiction then they invited him to withdraw. If he found he had jurisdiction then they invited him to proceed with the adjudication and revise the directions for the date for service of the Response so that they could defend the claim on the merits.

76. In this case it is evident that Halliwells took the second route which I have identified above. They asked the adjudicator to withdraw but, in the alternative asked him to adjudicate the merits, albeit reserving the position on jurisdiction. In doing so, I consider that they asked the adjudicator to proceed and carry out work and, in my judgment, whatever the correct position on jurisdiction, there was an acceptance by Halliwells that, if the Adjudicator rejected the jurisdictional argument, he would carry out work in dealing with the merits which would involve considering the arguments of both sides. The Adjudicator then rejected the jurisdictional argument and proceeded to consider the merits, including Halliwells' arguments.

77. In such circumstances, the Adjudicator proceeded both in compliance with the request of Halliwells and pursuant to the agreement with ISG. In relation to Halliwells the adjudicator proceeded at their request and did so without any express agreement as to fees. I consider that, as submitted by Ms Monastiriotis, the request from Halliwells and the fact that the Adjudicator proceeded with the adjudication gave rise to a contract formed by conduct with an obligation by Halliwells to pay the Adjudicator's reasonable fees and expenses.

78. If that be wrong or if, in a particular case, the matter could not be characterised in terms of a contract, I consider that Ms Monastiriotis would be correct in her submissions that the principles identified by Lord Steyn in Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 AC 221 at 227 apply. First, a responding party such as Halliwells has benefited or been enriched by having a decision on the merits which it can seek to rely on if it wishes. Secondly, that enrichment was at the expense of the adjudicator who spent time and incurred cost in dealing with Halliwells' submissions and the arguments raised. Thirdly, that enrichment was unjust where a party accepts the benefit of the adjudicator's services without payment. Fourthly, there are no specific defences to the payment of the fees in this case.

79. In my judgment, therefore, whether of not the Adjudicator had jurisdiction Halliwells are liable to pay the Adjudicator his reasonable fees and expenses of conducting the adjudication and are jointly and severally liable to the Adjudicator for the payment of such reasonable fees and expenses with ISG, whose liability is limited to the fees and expenses agreed with the Adjudicator, as set out above.

The 1996 Act, the Adjudication Agreement and the Adjudicator

80. I consider that the analysis above also overcomes a number of potential difficulties which arise if both parties do not enter into an agreement with the adjudicator. If the referring party enters into an agreement with the adjudicator but the responding party

does not and has no liability for the fees and expenses of the adjudicator then this can lead to problems. If the responding party takes an active part in the adjudication then the fees and expenses are increased. In such circumstances, an outcome which makes only one party liable for the fees incurred in the adjudication process and puts the adjudicator at risk if the referring party is unable to pay his fees and expenses is unlikely to be the objective businesslike intention of the parties .

81. Mr Fearon accepted, in effect, that if the Adjudicator were to be found by the court to have jurisdiction then Halliwells would be liable to pay his fees. It is difficult to envisage an arrangement where a party's liability to an adjudicator would depend on whether or not he had jurisdiction to decide a dispute, absent an express provision to that effect. It would be likely to give rise to unfortunate conflict consequences and the adjudicator would have to carry out the same work if he considered that he had jurisdiction, whether or not he did have jurisdiction.

82. It is to be noted that, although adjudication is said to be "statutory adjudication" it is, in fact, contractual. The contractual right to adjudication is either express or, in appropriate circumstances if there is no express provision, the provisions of the Scheme are implied by ss.108(5) and 114(4) of the 1996 Act.

83. The express terms of the construction contract or the implied terms of the Scheme can only bind the parties to the construction contract unless the Contracts (Rights of Third Parties) Act 1999 applies. The adjudicator cannot therefore enforce rights under the construction contract such as the express term, in this case at Clause 41A.6.2, by which the parties agreed to be jointly and severally liable for the fees and expenses of the adjudicator or, when applicable, paragraph 25 of Part I of the Scheme which contains a similar provision. This is in contrast to s.28(1) of the Arbitration Act 1996 which, as a matter of statute, makes the parties jointly and severally liable to pay the arbitrator's such reasonable fees and expenses.

84. During the course of the hearing, the question arose as to whether in this case the adjudicator might be able to enforce the provisions of the Contract under s.1(1)(b) of the Contracts (Rights of Third Parties) Act 1999 on the basis that there is a term of the Contract which "purports to confer a benefit on him". In particular, Clause 41A.6.2 provides that the Parties shall be jointly and severally liable to the Adjudicator for his fee and for all expenses reasonably incurred.

85. In David Cartwright v. Lydia Fay District Judge Rutherford in Bath County Court (unreported, 9 February 2005) held that a provision in the adjudication rules that the adjudicator could take proceedings against the party responsible for paying his fee if that party did not pay, was a term which purported to confer a benefit on the adjudicator and was enforceable by the adjudicator. In this case, subsequent to the hearing I was provided with Clause 1.12 of the Contract which is the standard provision stating that nothing in the Contract confers or purports to confer any right to enforce any of its terms on any person who is not party to it. As a result, this route under the 1999 Act is not available in this case.

Did the adjudicator have jurisdiction?

86. In the event, I have found in this case that Halliwells are obliged to pay the adjudicator his reasonable fees and expenses, whether or not he had jurisdiction. It

may not therefore be strictly necessary for me to decide whether the adjudicator had jurisdiction. However, having heard argument and in the light of the position adopted by Halliwells, effectively that they would pay the adjudicator if he had jurisdiction, I consider that I should deal with the arguments.

87. There are two jurisdictional points raised. First, that the Referral was served out of time and, secondly, that there was no contract fully evidenced in writing as the Contract had been varied orally.

Late service of the Referral

88. The chronology in this case is as follows:
    (1) The Notice of Adjudication was served on Halliwells on 22 May 2008;
    (2) ISG served a copy of the Referral by fax (without the accompanying documents which were sent by post) on 29 May 2008 on both the Adjudicator and Halliwells;
    (3) Halliwells received a copy of the accompanying documents on 30 May 2008;
    (4) The Adjudicator did not receive the original Referral and accompanying documents which seemingly were lost in the post but received a duplicate copy on 4 June 2008.

89. On this basis, the Adjudicator received the Referral but not the accompanying documents outside the 7 day period provided for by Clause 41A.4 which states:

> "*If an Adjudicator is agreed or appointed within 7 days of the notice then the Party giving the notice shall refer the dispute or difference to the Adjudicator (the "referral") within 7 days of the notice…. The said Party shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party.*"

90. The notice of adjudication was served on 22 May 2008. In the absence of any other contractual provision which might affect the calculation of the period of seven days, I consider that the appropriate calculation is that contained within s.116 of the 1996 Act. There was a bank holiday on 26 May 2008 which is excluded by s.116(3) of the 1996 Act and s.1 and Sch. 1 to the Banking and Financial Dealings Act 1971. The seven day period began to run on 23 May 2008 (s.116(2)) and there being no exclusion of Saturdays and Sundays under the 1971 Act it ended on 30 May 2008.

91. The copy of the Referral sent by fax on 29 May 2008 included all the relevant matters except for "any material" which ISG wished the adjudicator to consider. That documentation was received by Halliwells on 30 May 2008, within the seven day period. There was, therefore, a failure by ISG to send the accompanying documentation to the adjudicator within the seven day period. That was a breach of Clause 41A.4. Did it have the effect of depriving the Adjudicator of jurisdiction to determine the dispute? In my judgment, whilst a failure to serve the accompanying documents on the adjudicator within the seven day period was a breach of Clause 41A.4, it was not a sufficient breach to mean that the Referral was invalid or to make the adjudication or the decision a nullity, for the reasons set out below.

92. There are a number of decisions on the effect of a failure to comply with the provisions of Clause 41A or, where appropriate, the equivalent provisions of the Scheme. Decisions have also considered the provision at Clause 41A.5.6 which deals with a failure to comply with the provisions or requirements of Clause 41A. There is no such provision in the Scheme. In general a failure to comply with an express or implied term of a contract may deprive a party of rights or give rise to a liability.

93. In the context of Clause 41A of the 1998 JCT Standard Form or the equivalent clause in other JCT Standard Forms, the most relevant decision on the service of the referral notice within seven days of the notice of adjudication is that of His Honour Judge Coulson QC, as he then was, in Cubitt Building Interiors Ltd v. Fleetglade Ltd (2007) 110 Con LR 36. In that case Judge Coulson had to consider whether the provisions of Clause 41A.4.1 of a 1998 JCT Standard Form were mandatory and he held that they were, in the sense that the steps must be taken within the specified time period.

94. He referred to his earlier decision in Hart Investments Ltd v. Fidler (2006) 109 Con LR 67 where he reached the conclusion that the provision in paragraph 7 of Part I of the Scheme that "*the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the "referral notice") to the adjudicator*" was mandatory.

95. At [49] he said: "*My initial reaction to this point was to consider that, in the overall scheme of things, it might be difficult to say that the delay of one day in the provision of the referral notice should be accorded great significance, and that it would be harsh to rule that the whole adjudication was a nullity because of that one day's delay. But, on a more detailed analysis, I do not consider this reaction to be so easy to justify.*" He then went on to consider at [50] the policy of speed in adjudication and said "*If the timetable can be extended without consent either, as here, at the beginning of the process or, as in Simons, at the end of the 28 days, there is a great danger of uncertainty and of a watering-down of the critical importance of the tight timetable on which the entire adjudication process is based. In other words, if, as I consider it to be, Ritchie is a correct statement of the position at the conclusion of the 28 days, it seems to me that the same principle must also apply to the event which signals the commencement of the same 28 day period, namely the provision of the referral notice within seven days of the intention to refer.*"

96. In Cubitt at [41] Judge Coulson said that he had held that the words in Clause 41A.4.1 were mandatory but posed this question: "*Does that finding mean that the referral notice was not served in accordance with its provisions and is therefore a nullity?*" His answer was "no" and he said that "*Clause 41A has to be operated in a sensible and commercial way.*" Later he found that as a matter of an implied term or, on the particular facts of the case, service on Day 8 did not mean that there had been a failure to comply with Clause 41A. He said that "*although Clause 41A sets out a mandatory timetable, it is a timetable that needs to be operated in a sensible and businesslike way.*" I respectfully agree. Where the parties have agreed, either expressly or by the terms implied by the Scheme, that the dispute shall be referred to the adjudicator within seven days then the courts should uphold that agreement. Generally, apart from exceptional cases such as Cubitt, this will mean that the court will treat the service of the referral within that period as being mandatory so that the failure by the referring party to serve it in that period will be regarded as making the referral a nullity as not

being what the parties intended. In such cases the adjudicator will have no jurisdiction derived from that referral.

97. On the other hand, operating Clause 41A and its mandatory timetable in a sensible and businesslike way means that where there has been a failure to comply with the detailed procedural aspects of Clause 41A, the courts should be slow to find that this renders the relevant part of the process a nullity so as to deprive the adjudicator of jurisdiction. Objectively that cannot have been the intention of the parties or of the provisions of the Scheme. This is consistent with the position that I held applied under the Scheme in OSC Building Services Ltd v. Interior Dimensions Contracts Ltd [2009] EWHC 248 (TCC).

98. In this case the referral was served on Halliwells and the Adjudicator within time but there was a failure to deliver the accompanying documents to the Adjudicator, but not to the responding party, within seven days. This was because of a failure in the delivery system. This then led to the sensible suggestion that a further copy should be provided if the first copy did not arrive on the next working day and, when it did not, a further copy was sent immediately and received the next day. Objectively, I do not see that it can have been the intention of the parties that this should render the referral a nullity so as to deprive the adjudicator of jurisdiction. This is particularly so where everything was served on time on Halliwells.

99. Further in this case, I consider that the provision of Clause 41A.5.6 would overcome the fact that the accompanying documents were served late upon the adjudicator. That clause provides that "*Any failure by either Party to enter into the JCT Adjudication Agreement or to comply with any requirement of the Adjudicator under clause 41A.5.5 or with any other provision in or requirement under clause 41A shall not invalidate the decision of the Adjudicator*."

100. This or a similar provision has been the subject of three decisions.

101. In Tracy Bennett v. FMK Construction Ltd His Honour Judge Havery had to consider a case where a referring party had applied to the contractual adjudicator nominating body on the seventh day and Clause 41A.2.2 of the 1998 JCT Standard Form provided that "*any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer*." The question was whether that clause had been complied with.

102. Counsel submitted that the provisions of Clause 41A.2.2 were merely directory and that it could not have been intended to be mandatory given the impossibility of determining the object in the mind of the person applying to the nominator. Moreover, it was submitted that any adjudication which proceeded to a decision was validated by Clause 41A.5.6 notwithstanding any failure to comply with any provision or requirement under Clause 41A. Thus, it was submitted that Clause 41A.2.2 must be directory in all cases. Judge Havery accepted those submissions.

103. In Palmac Contracting Ltd v. Park Lane Estates Ltd [2005] EWHC 919 (TCC) Her Honour Judge Kirkham had to consider the adjudication provisions at Clause 39A of the 1998 JCT Standard Form of Building Contract with Contractor's Design. One of

the challenges to the enforcement of the adjudicator's decision was on the grounds that the referring party had failed to comply with the provisions in Clause 39A.2 because they had applied for the appointment of an adjudicator before they had served a notice of adjudication. The judge found that the provision did not stipulate for any application for nomination to be made after the notice of adjudication had been served. However she went on to deal, obiter, with an argument that Clause 39A.5.6 would, in any event, have validated any invalid appointment of an adjudicator. Judge Kirkham held that Clause 39A.5.6 would not validate the appointment of an adjudicator invalidly appointed and that its scope was limited to procedural steps within a validly constituted adjudication.

104. In Cubitt Judge Coulson also considered, obiter, whether Clause 41A.5.6 could have overcome a late referral. He referred to Palmac and said this at [50]:

> "*In my view, cl 41A.5.6 is concerned with procedural relief. It cannot confer jurisdiction on an adjudicator who does not have any jurisdiction in the first place. An adjudicator, in order to have the power to make directions, must be in receipt of a valid referral notice. If that has not happened, then cl 41A.5.6 cannot rescue the situation. Take as an example an adjudicator who is appointed in a situation where there is then no referral notice for three months. In such circumstances the responding party is entitled to say, if and when the belated referral notice turns up, that the adjudicator has no power to make any directions at all. Under cl 41A the referral notice would be a nullity. It would make a nonsense of the whole adjudication process if the referring party could then rely on cl 41A.5.6 to argue that the much delayed referral notice had not invalidated the decision of the adjudicator.*"

105. The purpose of Clause 41A.5.6 is evidently to avoid arguments that non-compliance with the provisions or requirements of clause 41A invalidates the decision of the Adjudicator. On its face it is a broad provision but it must have limitations. It would not, in my judgment, overcome a fundamental non-compliance in the appointment of an adjudicator. For instance if the parties agreed one adjudicator and the referring party obtained the appointment of another then I cannot see that it has any application. I respectively agree with Judge Kirkham that it applies to procedural non-compliance and is limited to procedural steps within a validly constituted adjudication. In my judgment, it would be apt to cover the failure to serve the accompanying documents on the Adjudicator within seven days, as occurred in this case.

106. I therefore find that the late service on the adjudicator of the documents accompanying the Referral did not, on the facts of this case, invalidate the Referral and thereby deprive the Adjudicator of jurisdiction.

Contract in writing

107. Halliwells also contended, albeit that it was not pursued with any force, that there was no contract fully evidenced in writing because the terms of the Contract had been varied orally. This argument was based on s.107 of the 1996 Act and the decision of the Court of Appeal in RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd [2002] BLR 217.

108. In the present case, I do not consider that s.107 of the 1996 Act has any impact on the enforceability of the Adjudicator's decision. Where the parties have provided for

adjudication in their contract by the provisions of Clause 41A then there is an express provision which contains an enforceable adjudication provision. On that basis it does not matter, in my judgment, whether that agreement is made in writing, orally or partly orally and in writing. Unlike the provisions of s.5 of the Arbitration Act 1996, there is no provision in the 1996 Act requiring an agreement to adjudicate to be in writing.

109. What s.108 of the 1996 Act does is to provide that, in cases where there is a construction contract in writing which does not have an express adjudication provision complying with s.108, the adjudication provisions of the Scheme are implied into that contract. Where a contract is in writing, it must contain an express adjudication provision complying with s.108 or otherwise the Scheme applies. Where a contract is not made or evidenced wholly in writing the provisions of s.108 do not apply. If, for instance, the contract is made orally, in whole or in part then, as in RJT Consulting Engineers, the contract is not made or evidenced wholly in writing and if it does not contain an adjudication provision, then s.108 of the 1996 Act does not apply so as to give rise to an implied right to adjudicate under the Scheme.

110. In this case there was an express adjudication provision which complied with s.108 of the 1996 Act. The Scheme did not apply. If there was an oral variation then that did not affect the existing express adjudication provision. This was also the conclusion reached by Akenhead J in Treasure & Sons Ltd v. Dawes [2007] EWHC 2420 (TCC) where the said at [31]:

> "*In my judgment, where there is a contractual agreement to adjudicate, as here, that adjudication process is not undermined, jurisdictionally or otherwise, by the fact (if it be the case) that the terms of the original contract (containing the adjudication clause) were orally varied. There could only be such undermining if it was an express term of the contract itself to the effect that oral variations of the terms were not to be considered valid unless recorded or evidenced in writing. Essentially the parties will have agreed in a binding contract that disputes will be referable to adjudication. If there is some oral variation to the terms of that contract, that does not itself undermine the contractual enforceability of the adjudication process. If the original agreement is binding and whether or not the oral variation is binding, there still remains a binding adjudication agreement of which either or both parties may make use from time to time.*"

111. I therefore do not consider that any oral variation of the Building Contract would affect the jurisdiction of the Adjudicator under Clause 41A. In any event, I do not have any evidence of the alleged oral variation nor did the Adjudicator: see paragraph 27 of the Decision. In the circumstances there is no basis upon which Halliwells can resist enforcement of the Adjudicator's decision by relying on an oral variation.

Conduct in the subsequent adjudication

112. In relation to jurisdiction Ms Monastiriotis also relied on the terms of the Second Decision as showing that Halliwells have relied on the Adjudicator's Decision in the first adjudication. As a result she submitted that Halliwells cannot both assert that the Adjudicator's Decision is one that was made without jurisdiction and at the same time

rely on that decision. Mr Fearon did not accept that this was the effect of the Second Decision.

113. In this case, as appears from the Second Decision, ISG was claiming relief in the Second Adjudication which included the following: "*1. A decision from the Adjudicator that Halliwells shall pay to ISG the sum of…£450,179.51…"*

114. In relation to this claim for payment of a further sum, paragraphs 3.6 and 3.7 of the Second Decision states that:

> "*3.6 Part of the sum claimed by ISG is £12,830.58 which ISG asserts is unpaid from the principal amount awarded by the previous adjudicator. Halliwells submit that the amount is not due because of an agreement reached with ISG whereby ISG would not seek to enforce the Adjudicator's decision if payment of £450,000.00 plus VAT was made*
> *3.7 In any event, Halliwells submit that the previous Adjudicator's decision could only be enforced by the Court.*"

115. At paragraph 4.7 of the Second Decision the adjudicator stated:

> "*I accept and agree with Halliwells' assertion that I cannot order payment of the £12,830.58. It has already been decided by Adjudication that this amount (and £450,000.00 already paid) was to be paid by Halliwells to ISG. As Halliwells say, an Adjudicator's decision can only be enforced by the Court.*"

116. On that basis it is evident that Halliwells were defending a claim made by ISG in the Second Adjudication on the basis that the Adjudicator's Decision in the previous adjudication was binding. In my judgment, the doctrine of election prevents a party from "approbating and reprobating" or "blowing hot and cold" in relation to the validity of an adjudicator's decision. The law on election is set out in Codrington v. Codrington [1875] LR 7 HL 854 at 866 per Lord Chelmsford; Banque des Marchands v. Kindersley [1951] 1 Ch 112 and Lissenden v. CAV Bosch Limited [1940] AC 413 per Lord Atkin. It was applied by Dyson J, as he then was, in the context of adjudication decisions in Macob v. Morrison [1999] BLR 93 at 99 where he said: "*what the defendant could not do was to assert that the decision was a decision for the purposes of being the subject of a reference to arbitration but was not a decision for the purposes of being binding and enforceable pending any revision by the arbitrator. In so holding, I am doing no more than applying the doctrine of approbation and reprobation or election. A person cannot blow hot and cold - see Lissenden v. CAV Bosch Limited [1940] AC 412, and Halsbury's Laws, Fourth Edition, Volume 16, paragraphs 957 and 958. Once the defendant elected to treat the decision as one capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable unless revised by the arbitrator.*" I have also applied this principle recently in PT Building Services Limited v. ROK Build Limited [2008] EWHC 3434 (TCC).

117. If I had not found that the Adjudicator had jurisdiction, as set out above, I consider that Halliwells would, in any event, have been prevented from approbating and reprobating the Decision of the Adjudicator. Having relied on it for the purpose of the Second Adjudication and having obtained the benefit of that decision in the Second

Decision, I do not consider that Halliwells could now assert that the Adjudicator did not have jurisdiction to make the Decision.

Summary

118. I therefore find that, in the circumstances of this case, Halliwells are liable to pay the reasonable fees and expenses of the Adjudicator, even if he did not have jurisdiction. In fact, as I have held the Adjudicator did have jurisdiction.

119. The parties are invited to agree the terms of the order and to submit written submissions on any ancillary matters that arise from this judgment.