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## LEGAL BRIEFING

### *Humes Building Contractors Limited v Charlotte Homes (Surrey) Limited*

HHJ Gilliland QC [2007] TCC Salford

#### ***The Facts***

Humes Building Contractors Limited sought to enforce by way of summary judgment an adjudicator's decision for £158,486.26 plus VAT. The building contract was based upon a JCT Intermediate Form of Building Contract with Contractors Design 2005 Edition. Relations between the parties deteriorated and the defendant purported to terminate the contract under clause 8.4. The claimant brought a claim for measured work and wrongful determination. The defendant counterclaimed for defects and liquidated damages. The adjudicator valued the contractor's claim but in his decision refused to consider the counterclaim on the basis that the defendant did not serve a withholding notice.

#### ***The Issues***

The defendant refused to pay the amount of the decision on the basis that the adjudicator had exceeded his jurisdiction in deciding that the termination had been wrongful. The defendant also claimed that the adjudicator had decided a different question to the one asked and had made an error by failing to consider the counterclaim merely because a withholding notice had not been issued. Finally, the defendant argued that the decision should not be enforced because the adjudicator had failed to consider the merits of the defendant's case in respect of a deduction for liquidated damages and defects.

#### ***The Decision***

HHJ Gilliland QC considered that the adjudicator had answered the questions put to him, although he may have decided some of the points incorrectly. Nonetheless an error of fact or law would not be enough to refuse enforcement of the decision. Refusing to consider the defects claim and liquidated damages claim was in the Judge's view wrong, regardless of the fact that a withholding notice had not been issued. However, this was an error within the adjudicator's jurisdiction. The defendant argued that it was unfair to enforce the decision because it had not been given the opportunity to address the adjudicator in respect of the adjudicator's incorrect legal reasoning. The Judge therefore considered whether the actions of the adjudicator were so unfair that the court should refuse enforcement in a summary manner. At paragraph 25 he held:-

"In my judgment what the adjudicator has done was manifestly and seriously unfair to the defendant. The defendant's claim that the claimant's work was defective was an important part of its defence. The defendant claimed the defects amounted to £135,916.48 and if that was correct the amount of any award in favour of the claimant would have been very significantly reduced. The adjudicator however rejected this claim (and any balance of the claim for liquidated damages) without considering it upon its merits as in my judgment he should have done. The defendant has been deprived of any opportunity of persuading the adjudicator that his view of the law was incorrect and the

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consequence is that the adjudicator has excluded a very substantial part of the defence without consideration of its merits for reasons which are wrong in law. There is nothing to suggest that the defendant should have realised that the adjudicator might be of the view that a withholding notice was necessary before he could consider these claims. In my judgment the failure of the adjudicator to raise the point with the parties and to invite their comments before issuing his decision was so unfair to the defendant that the court should not enforce the decision summarily.”

The application for summary judgment was therefore dismissed.

***Comment***

The adjudicator’s decision was not enforced. This was because the defence had not been considered on its merits. A withholding notice had not been issued, and the adjudicator decided that in the absence of that notice, the defendant should pay. Adjudicators are entitled to make errors of law, but on this occasion the Judge further decided that the defendant had not had the opportunity to address the adjudicator on the issue before the adjudicator made the decision. This was unfair, and so the decision was not enforced.

This is a rare judgment, because most adjudicators’ decisions are enforced. It also demonstrates that adjudicators still do not fully understand that they are supposed to consider what the valuation should really have been regardless of the situation in respect of the notices. There are occasions, of course, when the notices will prevail but those are rare and those cases turn upon the precise wording used in the contract.

***Nicholas Gould***  
***March 2008***