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## CONSTRUCTION LAW BULLETIN

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### ADJUDICATION: DISPUTES OVER VALIDITY OF A CONTRACT TERMINATION

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#### INTRODUCTION

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In a recent adjudication where the adjudicator was a very senior retired judge, the question arose as to whether a dispute relating to the termination of a JBCC contract was susceptible to adjudication and whether the adjudicator had the power to make a binding order on that issue.

These questions arose for consideration in the adjudication in the context of the following features of adjudication and the facts of the case:

- An adjudicator's determination is binding on the parties and remains in force until varied or overturned by an arbitration award and must be immediately complied with.
- Adjudication is an intervening provisional stage in the dispute resolution process.
- Adjudication is there to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis.
- A declaration in an adjudication that a contract has been validly terminated with an allied declaration that performance guarantees provided under the contract are therefore deemed to have expired and must be returned to the contractor cannot be provisional in nature and susceptible to being reversed in subsequent arbitration proceedings.
- Whether an adjudicator has jurisdiction to rule on a contract termination if, on his decision being overturned in arbitration, the parties cannot be restored to their respective positions pre-termination.

## BACKGROUND FACTS

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The Contractor in the case had terminated its contract with the Employer for want of the Principal Agent having issued a payment certificate despite due notice to do so.

The applicable JBCC contract (Edition 6.1 – March 2014) provided that the Contractor could give notice of intention to terminate the contract if the Principal Agent failed to issue a payment certificate by the contractual due date subject to giving the Employer and/or the Principal Agent 10 working days' notice of such intention. Absent the default being remedied within the 10 working days concerned, the Contractor accrues a right to and may terminate the contract on account of such default.

One day before expiry of the Contractor's 10 day default notice, the Principal Agent asked the Professional Quantity Surveyor (PQS) employed on the job to issue the outstanding payment certificate to the Contractor, which the PQS duly did, just in time.

The Contractor disputed that the certificate was a valid certificate on the grounds that the Principal Agent had no authority to delegate his contractual obligation to issue payment certificates to a third party, even another Employer's agent on the job. Hence the Contractor's termination of the contract for want of having received a valid payment certificate timeously.

The JBCC contract stipulates that, upon termination by the Contractor on account of the Employer's default:

- the latent defects liability period terminates; and
- the performance security furnished expires and the original guarantee must be returned to the Contractor.

## ANALYSIS

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The first port of call in considering the jurisdictional question in issue is the dispute resolution clause in the contract, being clause 30.

This clause stipulates that, where **any disagreement** arises between the parties, a party may give notice of such disagreement, whereupon the parties shall attempt to resolve such disagreement.

Where the disagreement is not resolved within 10 working days, the disagreement is deemed to be a dispute.

The party who issued the notice of disagreement may elect, by way of a notice of adjudication given within 10 working days thereafter, to have the dispute determined by adjudication and, failing such notice, the dispute must be determined by arbitration.

In the case in question, the termination of the contract by the Contractor clearly gave rise to a disagreement between it and the Employer.

The adjudicator noted that clause 30, which deals with how "any disagreement" between the parties is to be decided, does not expressly place any limitation on the meaning of those words.

If any limitation were to be placed on the meaning of the words "any disagreement", that would have to be by way of placing a restrictive interpretation on the words.

The adjudicator concluded in all the circumstances that, despite:

- adjudication being an interim dispute resolution mechanism, designed to enable continued performance under the contract on the basis that any error by an adjudicator can be corrected in a later arbitration; and
- in the case in question an erroneous decision in favour of the Contractor would not be readily reversible,

these were not considerations that could justify reading in a restrictive meaning to the words “any disagreement”. Difficulties in unravelling the consequences of an adjudicator’s decision should not be taken to limit an adjudicator’s jurisdiction.

In the result, the adjudicator found that clause 30 of the JBCC contract was sufficiently wide to include disputes relating to whether or not the contract had been correctly and validly terminated and as adjudicator he was clothed with authority to rule on that dispute.

The adjudicator was fortified in his conclusion by:

- the statement in Finsen’s *The Building Contract – A Commentary on the JBCC Agreements*, Third Edition, where the author states, in relation to clause 30:  
  
“... a dispute as to whether a party who has cancelled the contract was entitled to do so, would come within the scope of this clause”;
- the decision in the case of Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd, where the court upheld an adjudicator’s ruling that the Employer must provide material certificates to the Contractor, which clearly could not be reversed by a later decision in an arbitration;
- the comment in the case of Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd, where the court quoted with approval statements made in the case of Bouygues (UK) Ltd v Dahl-Jensen UK Ltd to the effect that adjudicators will make mistakes and such mistakes might have disastrous consequences for a losing party;
- the decision in the case of Mitsubishi Hitachi Power Systems Africa (Pty) Ltd and Another v Murray & Roberts Power & Energy, where the court had no difficulty in countenancing an adjudicator directing a party to produce an allegedly confidential agreement which, once given, could clearly not be taken back;
- the decision in the case of Framatome v Eskom Holdings SOC Ltd, where the court upheld an adjudicator’s decision directing the Project Manager to complete an assessment of a compensation event in the contract which would on the face of it not be amenable to later reversal in an arbitration.

## **DECISION**

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The adjudicator on the facts of the case upheld the Contractor’s cancellation and agreed that the Principal Agent was not entitled to have delegated the issue of the payment certificate to the PQS, ergo that payment certificate was invalid.

## CONCLUSION

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An adjudicator is empowered to determine a dispute relating to the validity of a termination of a contract unless the dispute resolution clause in the contract clearly dictates otherwise.

Principal Agents should think twice before delegating the responsibility to issue payment certificates to others and make sure that the contract permits that.

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