JUDGENT : MR JUSTICE AKENHEAD: TCC. 23rd October 2007

Introduction

1. These claims relate to the decision of an adjudicator, Mr Don Smith ("the Adjudicator") given on 14th July 2007. The Adjudicator was appointed pursuant to the terms of a construction contract between Vauxhall Motors Limited ("Vauxhall") and Ringway Infrastructure Services Limited ("Ringway"), whereby Vauxhall employed Ringway to construct a new vehicle distribution centre to carry out various associated works at Vauxhall's premises at North Road, Ellesmere Port, Cheshire. In that decision, the Adjudicator ordered Vauxhall to pay Ringway £1,303,704.95 plus VAT and interest together with the Adjudicator's fees and expenses.

2. This judgment relates to the application for summary judgment brought by Ringway to seek to enforce that decision. Vauxhall had instituted proceedings (HT–07–296) effectively seeking declarations that the Adjudicator's decision was void or unenforceable on the grounds that the Adjudicator had no jurisdiction to determine that which he determined. Those proceedings, commenced on 18th September 2007, were met by Ringway's own proceedings against Vauxhall (HT–07–305) by which it sought a judgment enforcing the Adjudicator's decision. There is an application under Section 9 of the Arbitration Act 1996 whereby Ringway seeks to have all or part of Vauxhall's claims stayed to arbitration. It has however been agreed that, if there are any issues relating to that application following the publication of this judgment, the parties will have leave to address me further.

Contract

3. To understand the facts and issues in this case it is necessary to refer to a number of the terms of the contract. The contract between the parties was or incorporated the Joint Contracts Tribunal standard form of Building Contract With Contractor's Design 1998 edition, incorporating Amendments 1 to 5. Certain of the standard terms were amended by agreement between the parties. References hereafter to the clauses will be to the amended clauses.

4. By Article 5 and Clause 39A of the Contract Conditions, provision was made by the parties for adjudication in respect of disputes or differences which had arisen between the parties. These provisions broadly reflected the statutory requirements in Section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") which provides mandatorily for adjudication in construction contracts. It is unnecessary to set out the provisions relating to adjudication because it is accepted that the contract between the parties was a construction contract to which the provisions of the HGCRA applied and that there is nothing in the adjudication provisions which offends the Act.

5. The contract between the parties, although apparently not signed, was entered into in 2004. The contract documents suggest (although I make no findings in this regard) that the Works were to be carried out and completed between August and December 2004. Provision was made for liquidated damages to be payable by Ringway in the event of culpably late completion at the rate of £0.80 per car parking space per day. Much of the work (if not all) related to the provision of a large car park to accommodate new cars being built by Vauxhall together with various other parking bays and spaces.

6. The payment provisions are of some importance in this case:

   (a) Clause 30.1 made provision for "*Interim Payments*" to be made by the Employer to the Contractor. This was to be on the basis of Alternative B which involved payment from time to time for the *"total value of work properly executed including any design work"* as referred to in Clause 30.2B. The Appendix to the Contract identified that interim payments were to be made by reference to the following dates:

   "The first date is to be agreed and thereafter on the same date in each month adjusted to the nearest working day in that month."

   (b) Clause 30.3.1.2 provided that the Contractor should make Applications for Interim Payment as follows:

   "Where Alternative B applies, Applications for Interim Payment shall be made on the dates provided for in Alternative B in Appendix 2 and which date shall continue up to the day named in the Employer's statement of Practical Completion or to within one month thereafter. Thereafter Application for Interim Payment shall be made as and when further amounts are due to the Contractor and after the expiration of the Defects Liability Period named in Appendix 1 or on the issue of the Notice or Completion of Making Good Defects (whichever is the later) provided that the Employer will not be required to make any Interim Payment within one calendar month of having made a previous Interim Payment."

   There is no contractual definition of the expression "Applications for Interim Payment".

   (c) There then follow these material provisions:

   "30.3.3 *Not later than 7 days after the receipt of an Application for Payment the Employer shall give a written notice to the Contractor specifying the amount of payment proposed to be made in respect of that Application, the basis on which such amount is calculated and to what the amount relates and, subject to clause 30.3.4, shall pay the amount proposed no later than the final date for payment.*

   30.3.4 Not later than 5 days before the final date for payment of an amount due pursuant to clause 30.3.3 the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such a withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.

   30.3.5 Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or clause 30.3.4 the Employer shall pay the Contractor the amount stated in the Application for Interim Payment.

30.3.6.1 Following the receipt of the Employer's written notice to the Contractor specifying the amount of payment to be made to the Contractor, the final date for payment of an amount due in an Interim Payment shall be the second day of the second month after the month of invoice."

(d) Clause 30.5 made provision for the submission of the "Final Account and the Final Statement" within three months of Practical Completion of the Work. Provision was made for the Employer to submit its own Final Account if the Contractor did not submit the Final Account and Final Statement within the 3 months period specified.

The facts

7. The Employer's Agent was Walfords LLP, Quantity Surveyors. Mr Peat was primarily involved on their behalf on this particular project.

8. The works commenced in or about August 2004 and apparently that work proceeded at least until the middle of 2005. There is an issue between the parties which I need not to resolve as to when works were practically complete. Between September 2004 and June 2005 Ringway made 10 Applications for Payment. Each of these 10 applications was in similar form. A total value of the work carried out to date was identified. A retention of 3% was deducted. The amount identified as "previously certified" was deducted leaving a balance, "*Application total*", at the bottom of the page. Each of these 10 applications was responded to in documents entitled *"Employer's Valuation"*. These followed the same format as the applications in terms of value of work executed with a deduction of retention and previous payments leaving a net sum payable.

9. By its letter dated 27th March 2006, Ringway wrote to Walfords enclosing what it called a "*draft final account*". It is (properly) accepted by both parties that this was not a Final Account or Final Statement for the purposes of Clause 30.5. The draft final account document identified a total contract valuation of £4,020,759 compared with an original contract value of £3,100,000. The text of the letter makes it clear that claims and assertions were being made by Ringway that substantial delays in completion were attributable to factors for which they were not responsible and which, on their assertion, entitled them to additional costs. Approximately half of the extra costs claimed are attributable to delay and disruption whilst the other half is attributable to what are said to be extra work.

10. Mr Peat responded to that letter in his letter dated 12th May 2006. He accepted that certain of the extras would or could attract additional payment whilst rejecting a number of other claims. There was a particular issue raised by him relating to delay which on his analysis was not the fault or responsibility of Vauxhall. This was responded to by Ringway in its letter dated 22nd May 2006 which promised a detailed response at some stage in the future. However this response took time to come. This was because the person who had been dealing with accounting matters at Ringway had left.

11. Ringway wrote to Vauxhall on 20th March 2007 indicating that a Mr Rigby, Ringway's Commercial Company Director, had taken over responsibility for the resolution of the final account. To that end, Ringway had instructed Alan W Wood Associates Ltd to complete the final account and act on Ringway's behalf. It identified a sum due at that stage of at least £209,946.81; this included the release of retention monies. Mr Rigby asked that this sum should be certified and paid immediately. Mr Wood was a chartered civil engineer, who also had a number of other qualifications.

12. Mr Peat responded in general terms to that letter in his letter of 2nd April 2007. Mr Rigby wrote back on 12th April 2007 to Mr Peat saying that Alan W Wood Associates would be contacting him shortly regarding account resolution issues. He pointed out that there was a sum of over £200,000.00 outstanding from the Interim Application 10. He looked forward to payment as a matter of urgency. There was no response to the claim that £209,946.81 was outstanding, at least until the end of June 2007.

13. In his letter dated 13th April 2007 to Mr Peat, Mr Wood wrote that his firm acted for Ringway "in *respect of the resolution of the account for its work"*. He said:

"We confirm we are preparing an account on Ringway's behalf and we will forward this for your consideration when it is completed. It is the case however that Ringway completed the Works … in 2005. We understand it is not in issue that the total amended Purchase Order value is £3,190,686.00 and against this sum Walfords have certified and/or Vauxhall … have paid the total sum of £2,980,739.19, giving a shortfall (and sum due) of £209,946.81, excluding interest and VAT. We trust it is agreed that no retention should be withheld from any sum due at this date.

We further understand that Walfords have informed Sue Cormack (Ringway's Divisional Credit Controller) that no further certificate will be issued until the 'claim' is dealt with. Clearly such decision is not based upon a contractual provision and we would ask whether Vauxhall … have sanctioned such action/inaction on Walfords part, as certifiers under the Contract. For the avoidance of doubt Ringway will claim interest on any sum due, but not paid by Vauxhall … and we request you consider this matter further and issue a certificate, as a matter of urgency, to reduce any unnecessary items being presented."

The reference to the "claim" clearly means in context the claim for delay and disruption related costs and losses. The reference to Walford being certifiers and to the issue of a certificate is technically incorrect. The contract calls for applications for interim payments to be responded to by a statement from Vauxhall (or its Agent) identifying what amount Vauxhall considered was due in relation to the particular Application.

14. That letter was not responded to. Consequently, Mr Wood wrote a letter to Walfords on 26th April 2007 in these terms: *"We … would be grateful if you could inform us within 7 days as to whether or not a certificate will be*

issued/payment made in respect of the sum due of £209,946.81 (or other sums due), plus VAT. Please note that our client will claim interest on any unpaid/overdue sum(s). Please also note that if Ringway do not receive payment of the sum due in the next 7 days they will consider that a dispute has arisen and we are instructed to seek recovery of the said sum in adjudication proceedings, if necessary. …"

15. Walfords did respond to the two letters of 13th and 26th April 2007 in Mr Peat's letter of 2nd May. He apologised for the delay in responding because he said "after such a long period of inactivity on the project it has taken a little time to get back up to speed." He wrote, materially, as follows:

"We are pleased to see that there is now the opportunity to finally resolve the issue of this account … one would imagine your task of preparing an account for consideration may be a difficult one.

In this letter I do not wish to go into the problems that were encountered, the delays incurred and who's fault that may be, if necessary this can logged and further discussions take place, what I would say however is that we were trying to engage in a dialogue with Ringway into reaching an amicable settlement to the whole account. Meetings were held with Mr Tony Stevens and other Ringway Management staff and the 'claim' put forward by Ringway. This in the main has been rejected or further information requested. No further correspondence was ever received from Ringway. If this "open dialogue" is no longer to be the case our Client would have to review their previously very considerate actions in not invoking any Liquidated … Damages due under the contract from the late completion by the Contractor …

In my brief telephone conversation with Sue Cormack I did not mean to imply that no further Certificate would be issued but presumed a final account/settlement could be reached relatively quickly and any balance of payment made accordingly. If you feel that this is not the case then we will value the works in accordance with the Contract and certify accordingly …"

16. Mr Wood responded the following day:

"We note the statements in your letter regarding past "dialogue" that took place in respect of the resolution of Ringway's account and state Mr Wood rang your office yesterday (after receipt of your letter) to re–enter (afresh) the dialogue with you with a view to understanding your client's current position concerning the account and any sum accepted as due, together with the likelihood of an amicable and speedy settlement. Please contact Mr Wood on … to discuss the matter at any time."

It appears to be the case that there was little if any discussion of a settlement nature between the parties over the next few months.

17. Mr Wood in a further letter dated 4th May 2007 to Mr Peat raised a number of queries in respect of various comments on variation claims which had been adumbrated by Mr Peat in his letter dated 12th May 2006.

18. Mr Wood in his letter dated 16th May 2007 to Mr Peat sent Ringway's "Interim Application No 11" for its works for Vauxhall at Ellesmere Port. The letter is headed "Interim Application No 11". The document submitted was a very substantial document running to almost 350 pages (contained in Exhibit JEP 4 to Mr Peat's Witness Statement of 12th September 2007). Over its first 45 pages is a prose explanation supporting the interim account. The Summary identified the original contract price of £3,100,000 together with a Variation Account value of £1,154,443.86 producing a gross total of £4,254,443.86. To that is added a claim of £30,000.28 in respect of interest. Deducting the amount previously paid, there is a net sum said to be due of £1,303,704.95.

19. In this Interim Application documentation, Ringway gave relatively detailed explanations as to why and on what basis they were entitled to the sums over and above the original contract price. Ringway, for instance, claimed it was entitled to an extension of time for the Works in respect of alleged additional works. They claimed interest on sums which were said to be wrongly retained as retention by Vauxhall. They sought payment for the measured works in the agreed sum of £3,100,000. They examined in detail their "Variation Account" in the sum of £1,154,443.86. In respect of each of what was said to be 21 Variation Orders, they sought to explain why and upon what basis they were entitled to individual sums against each of such Variations. In this part of the Interim Application, language is used such as Ringway stating that it was entitled to recovery of various net or total sums. Detailed back–up documentation is provided to support Ringway's claims under each individual variation.

20. Interim Application No 11 evoked no written response of any sort until 27th June 2007. It seems clear (and indeed it is not disputed on the evidence) that there was some telephone contact between Mr Peat and Mr Wood. In Mr Peat's witness statement of 12th September 2007 he refers to seeking unsuccessfully to make contact with Mr Wood in the third or fourth week in May; Mr Wood was on holiday. He refers to the fact that when he did receive a call from Mr Wood in the week commencing 4th June 2007 they discussed the size of Interim Application No 11. Mr Peat told Mr Wood that he had read the narrative to the interim application but had not had sufficient opportunity to consider in detail all of the build up of the variation costs. Mr Wood requested Mr Peat to forward a response to him as soon as possible. There was a discussion of a possibility of a meeting with Vauxhall. Mr Peat spoke to Mr Wood again during the week commencing 18th June 2007. Mr Wood told Mr Peat that he had submitted all the available information about the account to Mr Peat and he would in all probability not have any more information. Although he was not being put under any pressure by Ringway it was necessary for him to report back to them shortly. He told Mr Peat that he had been given a month by Ringway before he would be required to pursue Mr Peat about the application. Mr Peat said that he would try and respond by 22nd June 2007. Mr Wood accepted that.

21. On 25th June 2007, Mr Peat spoke again with Mr Wood who reminded him that he had not received any response to the interim application and he said that he must receive a response from Mr Peat by 26th June 2007. Nothing else of importance was said.

22. On 27th June 2007, Mr Wood wrote to Mr Peat in these terms:

"We refer to the recent telephone conversations ... and (notwithstanding your recent assurances) we note that as of 11.15 am today we have not received any response to the Interim Account No. 11, sent to you on 17 May 2007. If it is your intention to send a valuation to us today, we would be grateful if it could be sent by facsimile to the above address and also sent to the offices of A L Lamb Associates Ltd ...

"Please note our client is concerned at the on–going delay to the valuation and the extended period for payment of the substantial sum due. On the basis of the previously started Order Value (£3.19M) and the sum paid to date of £2.97m and on the basis that there will be a substantial increase in the Order Value in the light of our detailed application, we would be grateful if you could inform us when payment will be made by VM. Please note that our client reserves its position in respect of the interest on overdue payments.

You also state that Ringway wish to seek an overall settlement of this account on a speedy/amicable basis, without the need to revert to adjudication proceedings and we would welcome the opportunity to meet with VM before such a position is reached. Please advise whether this is possible in the short term."

23. Some six hours later, Mr Peat sent back to Mr Wood his response to Interim Application No. 11. He wrote:

"We have reviewed the information submitted, some of which has assisted us in being able to agree elements within the accounts. It will become self–evident upon your review of where we failed to agree your contractual understanding or valuation of the works.

We also enclose our Employer's Valuation No. 11. You will note that the Valuation is higher than the current order value and the Employer is currently checking the extent of orders raised. Will you please arrange for Ringway to submit their invoice to the Accounts Payable department in Barcelona?

As we have previously discussed VM will obviously be keen to avoid adjudication if the account can be settled. Perhaps we should discuss this again once you have had a chance to review our response."

Attached to that letter were two documents. The first (4 pages) identified where there was agreement and disagreement to the 21 Variation Orders identified in Interim Application 11. The second was a document signed by Walfords headed "EMPLOYER'S VALUATION No. 11". It had there identified a value of "Works Executed" of £3,206,790.69 and a figure for "Previous Payments", leaving a "Net Valuation" of £226,051.50. The following day, Walfords sent to Mr Wood a revised Valuation No. 11 which revised the net valuation figure down to £218,901.50. Also on that day, Mr Wood telephoned Mr Peat. They discussed a particular variation which was in issue. Mr Peat told Mr Wood that he had made arrangements to meet with Vauxhall senior management on 5th July. Mr Wood asked that there should be a meeting with him immediately following that meeting to be attended by senior Ringway management. Mr Peat did not agree expressly but said he would speak to Vauxhall concerning his request. There was no other matter of importance discussed.

24. By letter dated 2nd July 2007 to Vauxhall, Mr Wood referred to telephone conversations he had had with Vauxhall's Mr Burrows in the previous week concerning their Interim Application No. 11, referring to "the differences between the Parties" and saying that he would welcome the opportunity to meet and discuss the settlement of this account at the earliest opportunity. He was instructed to request Vauxhall to identify their "final position" by close of business on 5th July "so that a decision can be made as to whether adjudication proceedings will be necessary and/or commenced." Mr Wood sent a similar letter to Vauxhall on 3rd July 2007 asking Vauxhall to inform him as soon as possible whether it wished to meet and discuss the settlement of this account on 5th July 2007.

25. There was little or no response to those letters from Vauxhall. On 9th July 2007, Mr Wood on behalf of Ringway wrote as follows:

"We refer to our previous discussions and confirm Ringway wish to settle the matter of the proper amount remaining due to it on an amicable basis and as soon as possible. In so far as we have not heard from you following your meeting on Thursday 5 July 2007, Ringway suggests that the dispute is now decided by a neutral third party and append the names of three eminent civil engineers, with extensive experience in the adjudication of such matters.

We would be grateful if you would concur in the name of one of the three named persons to act as adjudicator, to allow the resolution of this matter to be concluded, or otherwise inform us of any persons you suggest are suitable. We would be grateful for your reply to this request at your earliest convenience and by close of business on Wednesday 11 July 2007."

This letter from Mr Wood was like all his letters since 16th May 2007 headed "Interim Application No. 11".

26. Vauxhall replied by fax on 9th July 2007 indicating that a Mr Benjamin of Vauxhall's legal department would now be handling this issue. There then followed an exchange of e–mails in which Mr Benjamin rejected the three names put forward by Mr Wood as adjudicators and put forward two names including that of Mr Don Smith. There was some e–mail discussion about whether there should be a settlement meeting. There was in fact no settlement meeting over the next few weeks. By 12th July 2007 Mr Benjamin and Mr Wood had agreed upon the appointment of Mr Smith as adjudicator and they both agreed upon a draft letter which was eventually sent by Mr Wood to Mr Smith. That letter, dated 13th July 2007, stated as follows:

"Re: Adjudication between Ringway Highway Services Limited and Vauxhall Motors Limited in respect of a dispute arising out of works in the Vehicle Distribution Centre at Ellesmere Port and Ringway's Interim Application No. 11

A dispute has arisen between the parties as to the proper sum due to Ringway Highway Services Limited, arising out of Interim Application No. 11, sent to Vauxhall Motors Limited's representatives on 16th May 2007. We confirm the Parties are in agreement as to your appointment as adjudicator in this matter.

The matter confirms the construction of a large (surface) vehicle distribution car parking and HGV area, together with an ancillary office building and the demolition of 3 No. buildings elsewhere on the Ellesmere Port site. The Contract Price was £3.1M and the amount sought by Ringway is some £4.25M. The amount in dispute is now approximately £1M. The dispute contains, inter alia, quantum and legal matters.

We would be grateful if you would formally confirm you are willing and able to accept this appointment and provide the Parties/their representatives with a copy of your terms and conditions. We will forward the Notice of Adjudication and Referral Notice to you thereafter."

27. Mr Smith replied to Mr Wood and Vauxhall on 14th July 2007 indicating that he was willing to accept the appointment and enclosing a copy of his Terms and Conditions.

28. On 18th July 2007, Mr Wood served on Vauxhall (and the Adjudicator) Ringway's Notice of Adjudication. By 19th July 2007, Vauxhall had appointed solicitors, Moran & Co who confirmed their retainer by letter dated 19th July 2007 to Mr Wood. By letter dated 19th July 2007 Mr Wood served on the Adjudicator and Vauxhall Ringway's Referral Notice.

29. By letter dated 20th July 2007 to the Adjudicator, Moran & Co addressed the Adjudicator on procedure and timetable and formally reserved their "clients' position so far as your jurisdiction is concerned". By letter dated 25th July 2007 to the Adjudicator, Moran & Co indicated that they had met with leading counsel and received comprehensive advice from him.

30. On 1st July 2007, Ringway had served on Vauxhall an invoice for the net sum of £218,901.50 plus VAT to reflect the revised valuation received from Walfords on 28th June 2007.

31. Under cover of their letter dated 31st July 2007, Moran & Co served on behalf of Vauxhall their Response to the Referral Notice, together with a witness statement. They also served a Withholding Notice. This latter notice was in the form of a letter from Vauxhall to Ringway which identified an intention to withhold payment of £1,047,253.17 against the amount claimed in Interim Application No. 11. There was a detailed analysis of the Variation Order claims in Interim Application No. 11 and also an expression of an intent to withhold and/or deduct liquidated damages of £362,512.00. It is unnecessary to decide whether these two sums are to be added together to identify the total withholding intended by Vauxhall.

32. As the Response from Vauxhall indicated that there was a challenge to the jurisdiction, Mr Smith invited Mr Wood's comments in his letter to the parties dated 1st August 2007. Mr Wood responded in some detail in his letter to the Adjudicator of 2nd August 2007 arguing that the Adjudicator did have jurisdiction to resolve the disputes and claims as adumbrated in the Notice of Adjudication and Ringway's Referral document. Mr Smith by way of response on 2nd August 2007 to the parties indicated that he had formed the view that he had jurisdiction and he would provide written reasons if either party wished him to provide them.

33. Although there was a further exchange of correspondence between the parties and the Adjudicator, Ringway did not serve any reply to the Reponse. There was without any demur from the parties, no hearing before the Adjudicator who felt able to resolve the issues before him on the basis of the written material. By letter dated 14th August 2007, Mr Smith sent to the parties his Decision.

The adjudication and the Adjudicator's decision

34. In their Notice of Adjudication, Ringway essentially sought to put the claim as arising out of or in connection with Vauxhall's failure to give any written notice to Ringway, pursuant to Clauses 30.3.3 and/or 30.3.4 following receipt of Interim Application No. 11 dated 14th May 2007. Ringway referred to the failure within five days after receipt of this application on the part of the Employer to give written notice to the Contractor specifying the amount of payment proposed to be made; the five-day period should by reference to Clause 30.3.3 have been seven days. They relied upon the absence of a withholding notice under Clause 30.3.4 and sought recovery of the net sum said to be due from Interim Application No. 11, namely £1,303,704.95, plus VAT, plus interest together with payment of the Adjudicator's fees and expenses.

35. In their (more detailed) Referral Notice, Ringway went into more detail about the Contract and identified Clauses 30.3.3 to 30.3.7 as the clauses relied upon. Again there was reliance on Interim Application No. 11 and the failure by Vauxhall to give any written notices either under Clauses 30.3.3 and/or 30.3.4. There was no attempt in the Referral Notice to seek to argue the valuation merits of Interim Application No. 11. The same relief claimed in the Notice of Adjudication was claimed.

36. In its Response document, Vauxhall expressly took the point that the Adjudicator had no jurisdiction to resolve the dispute as adumbrated in the Notice of Adjudication and the Referral document; the referred dispute did not concern Vauxhall's alleged failure to give written notices under Clause 30.3.3 and/or 30.3.4. Vauxhall argued that Ringway had not issued Vauxhall with an invoice in respect of Interim Application No. 11 in accordance with Clause 30.3.6.1 (set out above); accordingly Vauxhall argued that the final date for payment had not yet arisen and Vauxhall had now served a valid written notice of withholding pursuant to Clause 30.3.4 in respect of Interim

Application No. 11. Vauxhall made a number of further points, the more important of which were as follows. It argued that, although by about 28th June there may have been a dispute between the parties about the valuation of the items covered by Interim Application No. 11, there was no dispute relating to any immediate right of payment of the sum said to be due under the Application. It was said that there was some agreement to be inferred as a result of the correspondence and telephone conversations between Mr Peat and Mr Wood whereby the parties agreed that they would proceed by way of negotiation rather than to opt to use the contractual mechanisms. Vauxhall summarised their position at Paragraph 38:

"(1) The document sent on 16th May 2007 was not an interim application within the meaning of the Contract.

(2) The parties agreed that they would not adopt the contractual procedure and would instead seek to negotiate. Accordingly, by their agreement, Ringway disentitled itself from seeking to rely upon the operation of Clause 30.3.

(3) By its conduct in discussing the account with Vauxhall, as particularised above, Ringway waived its entitlement to rely upon the provision of Clause 30.3.

(4) By reason of the matters set out above, a common assumption arose between the parties that they would seek to negotiate the ultimate entitlement and would not resort to the procedures within Clause 30.3. In the circumstances it would be unjust to allow Ringway to resile from that common assumption."

This summary appears under a chapter in the Response which is headed "Jurisdictional issues: the status of the application and the crystallisation of the dispute".

37. Thereafter in the Response over some 70 paragraphs, Vauxhall sought to argue that the true valuation of the variation account was substantially less than that put forward by Ringway.

38. In correspondence following the Response, Mr Wood on behalf of Ringway responded to several of the arguments, in particular that relating to the present or absence of an invoice.

39. The Adjudicator's decision did specifically at Paragraphs 9 to 28 address the jurisdictional challenge. The Adjudicator clearly regarded Interim Application No. 11 as an Application for Interim Payment under the Contract. He found that Vauxhall was at the latest in possession of that Application on 17th May 2007 and in accordance with Clause 30.3.3 Vauxhall should have issued a payment notice no later than 24th May 2007. Because the Employer's Valuation No. 11 (Revised) was dated 27th June 2007, it was not an effective Clause 30.3.3 notice. He found that there was no effective Clause 30.3.4 withholding notice. He found that the invoice dated 1st July 2007 was nothing more than a reaction to the Employer's revised valuation No. 11 and was of no contractual significance.

40. At Paragraph 19 of the Decision, the Adjudicator expressed the view that, because he was appointed to act as Adjudicator by agreement, that precluded any subsequent challenge to his jurisdiction. He found that Vauxhall was in breach of Clause 30.3.3; therefore the payment mechanism had broken down and it was not open to Vauxhall to benefit from its own breach of the payment mechanism to challenge his jurisdiction. He found that Clause 30.3.6.1 which requires the submission of an invoice by the contractor was "clearly inoperable under circumstances where Vauxhall is in breach of Clause 30.3.3, as in the absence of notification of the amount of payment proposed to be made, by Vauxhall, Ringway [was] unable to send an invoice in the certified amount." He was not persuaded that any agreement was reached whereby the contractual procedure for settlement of the account or for Interim Application was not to be adopted; he did not consider that Vauxhall had provided any proper evidence in support of its assertion in this regard. He was not satisfied that there had been any waiver of rights by Ringway in relation to Clause 30.3 or that there was any common assumption as to not resorting to the Clause 30.3 procedures.

41. Having found as he did, namely that Interim Application No. 11 was a valid Application under Clause 30.3.1 and that there were no Clause 30.3.3 or 30.3.4 notices, he found that by operation of Clause 30.3.5 Vauxhall was obliged to pay Ringway the amount stated in the Application for Interim Payment. In his decision he made the following orders:

(a) Vauxhall was no later than 21st August 2007 to pay Ringway £1,303,704.95 plus any VAT properly chargeable on that sum;

(b) Vauxhall was no later than 21st August 2007 to pay to Ringway interest of £15,751.61 up to 14th August 2007 and thereafter at a daily of £375.04 until the sum due under the Decision was paid;

(c) Vauxhall were to pay his fee and expenses in the sum of £6,399.05 inclusive of VAT.

The issues in these proceedings

42. The issues have to some extent been refined from the pleadings as a result of the written and oral arguments submitted by the parties' Counsel. The essential overall issue is whether or not the Adjudicator had jurisdiction to decide (as he did) that given the absence of any timely Clause 30.3.3 and/or 30.3.4 notices Ringway was entitled pursuant to Clause 30.3.5 to the net sum claimed in its Interim Application No. 11.

43. In its Particulars of Claim (Claim No. HT 07 296), Vauxhall identified four Jurisdictional Challenges in the following order:

(1) It was said that the letter which sought to refer the dispute to adjudication was Mr Wood's letter of 9th July 2007. It is pleaded that this was a reference not of the amount due under Application No. 11 but of the amount of the Defendant's ultimate entitlement on a Final Account. The only dispute over which the Adjudicator

had jurisdiction was a dispute as to the substantive and ultimate entitlement; he did not have jurisdiction to resolve a dispute about entitlement under Application No. 11.

(2) It was said that no dispute had crystallised prior to the reference to adjudication in relation to Application No. 11 because no demand had been made for payment of the amount claimed in Application No. 11 prior to or even in the letter of 9th July 2007.

(3) Because Ringway had not, prior to the reference, referred to or relied upon the provisions of Clause 30.3, no dispute existed or could exist in relation to the claim made in respect of Application No. 11 based on Clause 30.3.5 of the Contract Conditions.

(4) The sum claimed by the Defendant was not due as at the date of the Notice of Adjudication; alternatively the mechanism contained in Clause 30.3.5 had not been activated by the time of the Notice of Adjudication. This was the argument previously made that, because there had been no invoice pursuant to Clause 30.3.6.1, there was no final date for payment.

44. In addition to the Jurisdictional Challenges, Vauxhall sought to raise six "*Substantive Defences*". These substantive defences to a large extent overlapped with the jurisdictional defences. For instance, the first and fifth Substantive Defences relate to the absence of an invoice for the sum said to be due under Interim Application No. 11; because there was an invoice for the sum said to be due by reason of the Employer's Valuation No. 11 (revised), Ringway was estopped from contending that Walfords' letters of 27th or 28th June 2007 did not constitute a valid notice pursuant to Clause 30.3.3; an alternative plea of a waiver is made as well. The third and fourth defences set out pleas of waiver and estoppel by convention whereby in effect it is argued that Ringway either waived its entitlement to rely on Clause 30.3 or that there was a conventional estoppel whereby the parties agreed that the Clause 30.3 procedure would not be relied upon. The sixth Substantive Defence sets out the plea that ultimately there was a valid withholding notice pursuant to Clause 30.3.4 (its letter dated 31st July 2007) in respect of Interim Application No. 11.

45. The second Substantive Defence refers to the agreement which is alleged by Vauxhall to have been made that the parties would not adopt the contractual procedure in the May/June 2007 period but would instead seek to negotiate. However, in Vauxhall's Leading Counsel's oral arguments at the hearing before me, this alleged agreement was prayed in aid as having relevance to the jurisdictional issues. Mr Paul Darling QC for Vauxhall made it clear that, for the purposes of this application only, I could and in appropriate circumstances should make appropriate findings on the available information about this alleged agreement. Mr Stephen Dennison QC on behalf of Ringway suggested that I could not (or at least should not) make any findings about this agreement. Neither party applied for either of the key factual witnesses to be called physically to give evidence.

46. On any analysis of the jurisdictional challenges to the Adjudicator's decision made by Vauxhall, it seems to me that I have to decide whether or not the dispute, which had crystallised prior to the Notice of Adjudication and which was thereafter referred to adjudication, covered Ringway's entitlement (if any) to be paid money by Vauxhall in respect of the sum said to be outstanding under Interim Application No. 11. Thus it will be necessary to consider Interim Application No. 11, as to whether in practice and as a matter of contract it was an Interim Application for Payment within the meaning of Clauses 30.3.1, 30.3.2, 30.3.3 and 30.3.5 and whether or not an Application for Interim Payment is in effect a claim for payment.

47. Formulated in this way, it will therefore be necessary to consider whether in the circumstances which have happened (and indeed about which there is no factual dispute) the absence of a requisite invoice under Clause 30.3.6.1 raises, in practice, a jurisdictional bar in the circumstances of this case.

The Law

48. In a raft of cases since the decision in this court of Dyson J (as he then was) in ***Macob Civil Engineering Ltd v Morrison Construction Ltd*** [1999] BLR 93, it has been recognised and established that the decisions of adjudicators, properly reached, are to be enforced. This applies even if the adjudicator is wrong in fact or in law (see for instance the Court of Appeal decision in ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** [2000] BLR 522). More recently, Jackson J in the TCC said in ***Carillion Construction v Devonport Royal Dockyard*** [2005] BLR 310 at Paragraph 80:

"In my view it is helpful to state or restate four basic principles:

1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish)

*2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see **Bouygues**, **C&B Scene** and **Levolux**.*

*3. Where an adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see **Discain**, **Balfour Beatty** and **Pegram Shopfitters**.*

*4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see **Pegram Shopfitters** and **Amec**."*

49. These four principles were endorsed as correct in the Court of Appeal decision on the ***Carillion*** case: see [2006] BLR at Paragraph 52. Chadwick LJ, who gave the judgment of the court, said at Paragraph 85: *"The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision*

unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator."

50. I do not read these decisions as saying that a party seeking to avoid enforcement of an adjudicator's decision starts with one hand tied behind its back or that there is some evidential or legal presumption against allowing the challenge which it is seeking to make. However, because most such challenges have failed to date and given the policy of the 1996 Act, judges should examine the evidence and argument particularly carefully before allowing the challenge. If a properly arguable case is advanced on a jurisdictional challenge, it must be properly and fully considered by the Court (see for instance ***Thomas Frederic's (Construction) Ltd v Keith Wilson*** [2004] BLR 30 at Paragraph 32). A less arguable case may attract a more rigorous costs or interest sanction than would otherwise be the case. As appears below, I consider that Vauxhall's case is at least properly arguable.

51. As I am not concerned here with any complaint about the fairness of the Adjudicator's conduct of the adjudication, the issue is one of jurisdiction. Complaints about jurisdiction can vary from case to case. The issues here revolve around what if anything was the dispute between the parties and, if there was a referable dispute, whether the dispute resolved by the Adjudicator was that which was referred to him.

52. The law relating to how and when a dispute arises has been considered in this Court and the Court of Appeal in ***Amec Civil Engineering Ltd v Secretary of State for Transport***. At first instance [2004] EWHC 2339 (TCC), Jackson J derived seven propositions from the authorities on this topic:

"1. The word 'dispute' which occurs in many arbitration clauses and also in Section 108 of the Housing … Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard–edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') for the claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge so that a claim is not admitted are Protean. For example, there may be an expressed rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reason for its imposing may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill–defined that the respondent cannot sensibly respond to it, neither silenced by the respondent nor even an expressed non–admission, it is likely to give rise to a dispute for the purposes of arbitration or adjudication."

53. Before the ***Amec*** case was heard in the Court of Appeal, that Court considered issues relating to disputes in ***Collins Ltd v Baltic Quay Management (1994) Ltd*** [2005] BLR 63. In that case Clark LJ (as he then was) accepted the seven propositions of Jackson J in the ***Amec*** case as "*broadly correct*". He added at Paragraph 63:

"I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred to that the claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion has been concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so."

He went on to say at Paragraph 64: *"It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of dispute. It also appears to me that court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J."*

54. Some three months later, the ***Amec*** case reached the Court of Appeal – [2005] BLR 227. The appeal was dismissed. May LJ was "*broadly"* content to accept Jackson J's seven propositions as correctly stating the law. He added two further observations:

"1. Clause 66 refers, not only to a 'dispute', but also to a 'difference'. 'Dispute or difference' seems to me to be less hard–edged than 'dispute'. This accords with the view of Danckwerts LJ in ***F&G Sykes v Fine Fare*** *[1967] Lloyd's Rep 53, at 60 where he contrasted a difference being a failure to agree, with a dispute.*

2. In many instances, it will be quite clear that there is a dispute. In many of these, it may be sensible to suppose that the parties may not expect to challenge the engineer's decision in subsequent arbitration proceedings. But major claims by either party are likely to be contested an arbitration may well be probable and necessary. Commercial good sense does not suggest that the clause should be construed with legalistic rigidity so as to impede the parties in starting timely arbitration proceedings. The whole clause should be read in this light. This leads me to lean in favour of an inclusive interpretation of what amounts to a dispute of difference."

It should be noted that the **Amec** case was not concerned with a dispute or difference referable to adjudication but to arbitration. However, there is no good reason in principle to differentiate in law or in fact as to a dispute or difference in adjudication as opposed to in arbitration. Both involve dispute resolution processes which are triggered by the existence of a dispute (and sometimes a difference) which is referable to that process. In the current case, a "dispute or difference" is referable both to adjudication and to arbitration (see Articles 5 and 6A of the Contract.)

55. I draw the following conclusions from these authorities, at least in the context of the current case:

(1) The existence of a dispute or difference may be inferred from what is said or not said by the party in receipt of what may be termed "a claim".

(2) There does not have to be an express rejection of a "claim" by the recipient. In so far as the case of ***Monmouthshire County Council v Costelloe and Kemple Ltd*** (1965) 5 BLR 83 suggests otherwise, the more recent cases of ***Amec*** and ***Collins*** suggest otherwise.

(3) A "claim" for the purpose of giving rise to a dispute or difference may not be a claim for money or for the payment of money. The variety, extent and scope of disputes are infinite. It may involve simply an assertion of a right by one party.

(4) One needs to determine whether there is "claim" and whether or not that claim is disputed from the surrounding facts, circumstances and evidence pertaining up to the moment that the dispute, subsequently referred to adjudication (or arbitration), has crystallised.

56. I derive some support for the above propositions from the judgment of HHJ Thornton QC in ***Fastrack Contractors Ltd v Morrison Construction Ltd*** [2000] BLR 168 (at Paragraph 19): *"An adjudicator derives his jurisdiction from his appointment. That appointment is governed by the statutory provisions of HGCRA which … require there to be a dispute that has already arisen between the parties to the construction contract. It follows that the appointing procedure must also relate to such a dispute. Thus, the notice of adjudication, the selection of a person to act as an adjudicator by an adjudicator nominating body; the indication from the selected adjudicator of his willingness to act; and the referral notice must all relate to the same pre–existing dispute. Any selection, acceptance of appointment or subsequent adjudication and decision which are not confined to that pre–existing dispute would be undertaken without jurisdiction."*

57. HHJ Toulmin QC in ***AWG Construction Services Ltd v Rockingham Motor Speedway Ltd*** [2004] EWHC 88 (TCC): *"The test in each case is first what dispute did the parties agree to refer to the adjudicator? And, secondly, on what basis? If the basis which is argued in the adjudication is wholly different to that which a defendant has had an opportunity to respond in advance to the adjudication, this may constitute a different dispute not referred to the adjudicator or, put another way, insofar as the adjudicator reaches a decision on the new issues it is not responsive to the issues referred to him."*

The decision in this case

58. The first step which must be taken is to determine in effect and in practice whether Interim Application No. 11 was a claim by Ringway for the payment of money.

59. There is no issue between the parties that the "*draft final account*" sent by Ringway to Mr Peat on 27th March 2006 was not either an Application for Interim Payment or the Final Account and/or Final Statement referred to in Clause 30.5.1 of the Contract Conditions. Indeed, given that it is Vauxhall's position that the Works were not practically complete until October 2006, it will be difficult to contend that the draft final account was or represented the final accounting documentation called for within the three months period after Practical Completion by Clause 30.5.1.

60. It is however material background that the draft final account which claimed for a substantial number of variations was clearly disputed by May 2006. Mr Peat's letter of 12th May 2006 makes it clear that substantial elements of the draft final account which, in gross, totalled over £4m were in issue.

61. It is also material that the previous Applications for Payment were numbered 1 to 10 and that each of them (possibly excluding Application No. 1) were valued by Walfords within the seven–day period after their receipt. For instance, Ringway's Application for Payment No.10 was dated 26th June 2005 and Walfords' corresponding Valuation No. 10 was dated 30th June, that is within seven days of the date of the Application.

62. There is nothing in the correspondence or witness evidence for the period in March to May 2007 leading up to the submission of Application for Payment No. 11 which suggests that any application for payment to be made was to be treated in any way other than a contractual one. For instance, Mr Wood's letter to Mr Peat of 13th April

2007 simply says that he was "preparing an account on Ringway's behalf" and would forward it for Walfords' consideration.

63. Mr Wood's letter dated 4th May 2007 to Walfords confirms that at least in respect of seven Variations there clearly is a dispute as to whether payment should be made to Ringway and if so how much.

64. When Mr Wood sent Interim Application No. 11, there is nothing on the face of that Application or the covering letter which suggests that it is anything other than an Interim Application for Payment under the Contract. The fact that it was numbered 11 in the continuing sequence of previous Interim Applications suggests very strongly that the application was what it purported to be, namely an application under Clause 30.3.1. The fact that Practical Completion may well have occurred by May 2007 does not mean under the Contract Conditions that Applications for Interim Payment cannot be made. Clause 30.3.1.2 expressly makes it clear that they are to be made "as and when further amounts are due to the Contractor".

65. I must then consider whether or not the Application for Interim Payment No. 11 is on analysis a claim to be paid the net outstanding sum arising therefrom. Although there is no contractual definition, capital letters are used for the term "Application for Interim Payment". Clause 30.3.2 makes it clear that each such Application must be accompanied by such details as may be stated in the Employer's Requirements; there is no suggestion that the apparently extensive detail attached to the prosed part of Interim Application No. 11 was in some way insufficient. I see no reason why the ordinary meaning should not be given to this expression: by making an Application for Interim Payment, a contractor is asking to be paid. Put another way the Contractor is claiming that it is entitled to be paid the sum in respect of which it is applying for payment.

66. The prose part of the Interim Application No. 11, entitled *"Interim Account No. 11",* is, properly understood, a clear explanation of the sums in respect of which Ringway was expressly seeking recovery. For instance, at Paragraph 2.4, "Ringway seek payment for the measured works" in the agreed sum of £3.1m. In respect of interest said to be outstanding, Ringway *"claim interest on the sum wrongly retained as retention by*" Vauxhall. There are numerous other examples of claims for recovery in the document. For instance, in respect of VO Nos. 1 and 2 at paragraph 3.11, Ringway: *"seek to recover the net sum of £6,950.00 paid to their subcontractor plus an uplift of 10%. Ringway claim the total sum of £7,645.00"* (emphasis added).

67. I consider that it is impossible to construe Interim Application No. 11 as anything other than a claim for payment of money. It cannot be construed either on its face or in context as a request for a consideration of the various claims for variations and other matters on some academic or pure valuation basis. This Application was a commercial document by which payment was sought. It was not an academic exercise.

68. Thus, Interim Application No. 11 was a claim in fact and under the Contract for payment. Whether or not Ringway was or became entitled to be paid depended upon what Vauxhall and its agent Walfords did or did not do. If Vauxhall believed that the net sum the subject matter of Interim Application No. 11 was overstated to a greater or lesser degree, the contractual machinery enabled them to give an appropriate notice saying so. That is the written notice under Clause 30.3.3. That provision reflects Section 110 of the HGCRA 1996: a primary purpose of Clause 30.3.3 and Section 110(2) is to enable both contractor and employer to know the basis upon which there is disagreement between them on any given payment application. It provides an agenda either for further discussion or for a subsequent adjudication.

69. Clause 30.3.4 of the Contract Conditions similarly requires the Employer if it is so advised "not later than five days before the final date for payment of an amount due pursuant to Clause 30.3.3 to give a written notice relating to what amount is proposed to be withheld and/or deducted from" the sum identified as due under Clause 30.3.3. The operation of Clause 30.3.4 is contingent upon a Clause 30.3.3 statement. It is important to note that there is a distinction between Clauses 30.3.3 and 30.3.4: under the former, it is a mandatory obligation on the part of the Employer to give the written notice to the Contractor specifying the amount of payment proposed to be made in respect of any given Interim Application for Interim Payment. Clause 30.3.4 is discretionary; that is not surprising because in any given case the Employer may not wish to deduct from a sum otherwise due to the Contractor.

70. The contractual machinery for payment thus requires the Employer to give a Clause 30.3.3 written notice. Failure to do so on the part of the Employer is effectively a breach of contract. This applies even more in the case of this particular contract which, by an amended Clause 30.3.6.1, makes the final date of payment of an Interim Payment contingent upon the submission of an invoice; however upon a proper construction of Clause 30.3.6.1, no invoice can be submitted and no final date for payment established unless and until the Employer has served its written notice under Clause 30.3.3. Thus, a breach by the Employer of Clause 30.3.3 would in theory secure that the final date for payment was extended indefinitely. It cannot have been intended that the Employer should be able to defer an obligation to pay as a result of its own breach in failing to do that which the Contract specifically required it to do.

71. The effect of Clause 30.3.5 is simple: where the Employer has failed to give the requisite written notice under Clause 30.3.3, the Employer must pay the Contractor the amount stated in the requisite Application.

72. Mr Paul Darling QC, for Vauxhall, seeks to argue that in any event, even if there has been a default by the Employer in failing to serve the requisite Clause 30.3.3 notice, an invoice by necessary implication must be served by the Contractor before there is any entitlement to payment. That is wrong because Clause 30.3.5 makes it clear

that the obligation to pay falls due immediately following the seven–day period after receipt of an Application for Payment where the Employer has not given the requisite written notice.

73. Similarly, for the reasons adumbrated above, the Application for Interim Payment is a claim for payment. It is not necessary for the Contractor, having failed to receive from the Employer the Clause 30.3.3 notice, to submit a further claim or request for immediate payment before it is entitled to be paid.

74. In so far as it is necessary for me to make this finding, I am not satisfied that there was any express or implied agreement between the parties that Interim Application No. 11 was in some way to be treated not as an application for payment under the contract but as some invitation to treat or to negotiate. The evidence of Mr Peat and the correspondence does not in my view support any express agreement. It is certainly not necessary or logical from the evidenced history of the period April to June 2007 to imply that there was any such agreement. I must emphasise however that I only make these findings for the purposes of this application. It is not intended to give rise to a form of issue estoppel in other proceedings such as any arbitration between the parties.

75. I now turn to the issue of when the dispute between the parties arose. The correspondence and evidence indicate that although Interim Application No. 11 was issued historically at a time when a number of Ringway's variation claims had already been put in issue about a year earlier, the parties certainly proceeded in a relatively relaxed fashion for a period of about four weeks following the submission of Interim Application No. 11. Clearly Mr Wood was not demanding a response within a few days, albeit it is equally clear that he was not obviously or clearly (on the available evidence) waiving or abandoning any rights which his clients might have under the contract.

76. It is clear (and I find) that no later than 27th June 2007 there was a substantive dispute between the parties arising out of and in respect of Interim Application No. 11. In effect and in substance, Ringway's claim was that they were entitled to the sum claimed within Interim Application No. 11 whilst Vauxhall by their agents, Walfords, were saying that a substantially smaller sum was due. It is not coincidental that the bulk of the matters in issue as raised on or about 27th June by Walfords coincided with the issues taken by them about one year previously. The main area of issue (certainly in money terms) was Ringway's claims for delay and disruption.

77. By the end of June 2007, the dispute was: was Ringway entitled to be paid the gross sum claimed (inclusive of interest) of £4,284,44.14 less an amount previously paid of £2,980,739.19 leaving a net balance of £1,303,704.95 or was the Contractor entitled to a gross sum of £3,206,798.69 less the previous payment?

78. Letters leading up to the appointment of the Adjudicator and the notice of Adjudication all refer to Interim Application No. 11. The dispute on this had crystallised well before 9th July 2007. That is evidenced by the agreed letter which Mr Wood sent to the Adjudicator on 13th July 2007: the dispute was "as to the proper sum due to Ringway ... arising out of Interim Application No. 11." That dispute related to Ringway's claim for payment which it had made in Interim Application No. 11.

79. It is necessary to distinguish between matters which could be raised as legitimate defences to Ringway's claims and jurisdictional objections. The claim as formulated by Ringway in the Adjudication relied in effect exclusively upon Clause 30.3.5 and upon the fact that the Employer had not given its requisite written notice under Clause 30.3.3 within the allotted seven days following receipt of Interim Application No. 11. Such a notice would have had to have been submitted by the Employer no later than about 24th May 2007. There is no issue that such notice was not given on time. It was open to Vauxhall to raise as a defence to that claim an assertion that Application No. 11 was not to be treated as an application for payment under the contract at all either because in some way it was not such an application or because the parties by way of conventional estoppel or by some other conduct had agreed that it was not to be treated as such an application. Those, if valid, would be substantive defences in the Adjudication to the claim based on Interim Application No. 11. Similarly, the absence of an invoice could have been raised as a defence, albeit it I do not consider necessarily that it would have been a good defence. It is very important in considering applications to resist enforcement of adjudicator's awards to differentiate between matters which could and should properly have been raised as substantive defences and those matters which are raised purely as jurisdictional objections.

80. Mr Darling QC invites me to accept his argument that, because Ringway by itself or through Mr Wood did not expressly raise a claim specifically based upon the absence of the Clause 30.3.3 notice before any dispute had crystallised, the dispute which had crystallised and which was then referred to adjudication did not in some way include any right on the part of Ringway to argue its entitlement based on Clause 30.3.3 and Clause 30.3.5. He told the court that this argument (referred to as the "sudden death" submission (which expression reflects the arguably swingeing effect of Clause 30.3.5)) had seriously upset Vauxhall who had been wholly unaware of it until it was raised in the Notice of Adjudication and more particularly following the Referral document. It seems to me however that Ringway's claim for payment under Interim Application No. 11 was a claim for payment in respect of the gross amount therein identified; in the event (or rather in the light of the inactivity) which occurred on the part of the Employer that sum arguably became due on or shortly after 24th May 2007. Given that nothing was paid by Vauxhall following receipt of Interim Application No. 11, there clearly was a dispute by the end of June 2007 as to what if anything Ringway was entitled to be paid. The fact that Ringway chose only in the adjudication to rely on one argument (the operation of Clauses 30.3.3 and 30.3.5) does not mean that that argument was not encompassed by the overall claim which it had made under Interim Application No. 11. Since

the Interim Application had been made under Clause 30.3, it was open to Ringway to rely upon all the various provisions within that sub–clause to justify its entitlement for payment.

81. Thus it was part of the referred dispute as to whether or not the contention based on Clauses 30.3.3 and 30.2.5 was a valid one. Essentially the question referred to the Adjudicator was: was Ringway entitled to the gross sum claimed under Interim Application No. 11 less sums previously paid?

82. The Adjudicator answered that question in favour of Ringway. He did so on a basis which it was open to Ringway to put forward because it was essentially covered by the claim which it had made and the dispute which had arisen.

83. Whilst jurisdictional objections are often technical (and not necessarily bad because they are), the Court must be careful to ensure from a commercially sensible analysis of what is or is not encompassed by any given dispute.

84. Although I have in effect addressed the four jurisdictional objections raised on Vauxhall above, for the sake of precision I address them specifically below:

(a) Jurisdictional Challenge No. 1

I am satisfied that the dispute which had crystallised and was referred to adjudication was the dispute as to whether or not Ringway was entitled to payment in respect of the sum or sums claimed under its Interim Application No. 11. Interim Application No. 11 was not an academic valuation exercise which Ringway was seeking to embark upon. It was a claim to be paid the sums which are the subject matter of that application.

(b) Second Jurisdictional Challenge

I am satisfied that a dispute had crystallised before the Adjudicator was appointed in relation to Interim Application No. 11. The fact that no new demand had been made for payment following the non–notification by the Employer under Clause 30.3.3 is and was immaterial. There was a claim for payment clearly made within Interim Application No. 11 itself. The absence of the Clause 30.3.3. statement simply secured that there was no defence to that claim.

(c) Third Jurisdictional Challenge

The fact that there was no express or specific reliance on Clauses 30.3.3 and 30.3.5 does not alter the fact that there was a clear claim for payment by Interim Application No. 11. In the events which happened (no notice from the Employer within time under Clause 30.3.3), the operation of Clause 30.3.5 meant that the sum claimed within Interim Application No. 11) was undoubtedly payable.

(d) Fourth Jurisdictional Challenge

This relates to the absence of an invoice from Ringway. For reasons indicated above, no invoice can have been required in circumstances where the Employer was itself in breach of Clause 30.3.3. The Clause 30.3.3 notice is the trigger for the operation of Clause 30.3.6.1. It cannot be open to an employer in those circumstances by reason of its own breach to defer its obligation to pay indefinitely. Everything, of course, would, or at least could, have been different if the Employer had submitted its notice under Clause 30.3.3. In any event the presence or absence of an invoice was a defence (arguably) in the adjudication. It was arguably therefore part of the dispute referred and it was open to Vauxhall to raise the issue as a substantive defence. It was raised by Vauxhall in the adjudication and the Adjudicator addressed (and rejected) the point.

85. It has been accepted that it is not necessary for me otherwise to address the six "substantive" defences raised by Vauxhall in its Particulars of Claim. This is because if the Adjudicator had jurisdiction to decide as he did, then it is not appropriate or justifiable for substantive defences to be raised against an application or claim to enforce a validly reached adjudicator's decision.

Conclusion

86. I am therefore satisfied that the Adjudicator had jurisdiction to decide as he did and that his Decision dated 14th August 2007 is enforceable and should be enforced. It therefore follows that Ringway's application under CRP Part 24 succeeds. There will be judgment in favour of Ringway in Claim No. HT 07 305 and Vauxhall's claim HT 07 296 should be dismissed.

MR STEPHEN DENNISON QC (instructed by CMS Cameron McKenna) and MR RUPERT CHOAT (Solicitor Advocate) appeared for the Claimant
MR PAUL DARLING QC and MR MATTHEW HOLT (instructed by Moran & Co.) appeared for the Defendant