

JUDGMENT : His Honour Judge Richard Thornton QC : 2nd November 2002. TCC.

1. Introduction

1. Bovis Lend Lease Ltd ("Bovis") entered into a management contract with Triangle Development Ltd ("Triangle") to refurbish and fit out three existing Victorian school houses into 43 luxury residential apartments and associated works at Silverthorne Triangle, Thackeray Road, London, SW8 3TW. The contract incorporated the JCT Standard Form of Management Contract, 1998 Edition and provided for the work to be completed in four phases between 16 October 2000 and 16 July 2001.
2. Disputes arose as to the contents of the valuations of two interim certificates. The architect, Paul Brookes Architects Limited, had reduced the value of certain works packages from the corresponding sums contained in earlier interim certificates so that each of these two certificates certified a negative value as being due to Bovis, namely a sum less than the sum previously certified. These negative certificates were made the subject of an adjudication by Mr Hough and his decision was to the effect that the two certificates should be amended to reinstate the sums deducted from earlier certificates and that the resulting uplift in the two interim certificates, totalling £158,020.71, plus interest calculated from the last date for payment of each of the original certificates. That sum was directed by the adjudicator to be paid within seven days of the decision which was dated 12 September 2002.
3. Triangle disputed, and still disputes, its suggested obligation to pay this sum on a number of grounds and has made no payment towards it. In consequence, Bovis has taken proceedings to enforce payment. For reasons that were not explained at the hearing, the chosen procedure was by way of a claim form issued under CPR Part 8 rather than under CPR Part 24 which is the usual Part used for adjudication enforcement proceedings. Since Triangle's registered office is located in St Helier, Jersey, permission to serve the proceedings in Jersey was obtained from the Technology and Construction Court on 20 September 2002. It was only at the hearing on 25 October 2002 that the parties' respective cases in favour of and against enforcement emerged.

2. Relevant Factual Background

4. As is usual in management contracts, the work was divided up into work packages. Three work packages are relevant. In each case, the architect, on the advice of the quantity surveyor, decided that Bovis, as management contractor, had been in default in the manner in which it had checked the relevant applications for payment of these three work package contractors and, in consequence, disallowed the entire sum being claimed for each of them. This removed substantial sums from the sums previously certified and led to the two negative valuations I have referred to.
5. The chronology leading up to the adjudicator's decision is highly material. This starts with the issue of interim certificates nos 23 and 27 that were the subject of the relevant deductions. These were issued on 9 April 2002 and 21 June 2002 with the final date for payment being fourteen days later, respectively, 23 April 2002 and 5 July 2002. In consequence, as provided for in paragraph 10 of the applicable Scheme for Construction Contracts Regulations, the final date for the giving of a valid notice to withhold payment against the sums certified in those certificates would have been 16 April 2002 and 28 June 2002, being seven days before the respective final dates for payment.
6. These negative certificates were the subject of much discussion between Bovis, Triangle and the architect leading to an arrangement or agreement whose terms are in dispute. On Triangle's side, it is contended that it was agreed that a sum of £100,038.07 retention would be released before the date provided for in the contract for its release in return for which the parties would immediately mediate the dispute as to the negative interim certificates and the deductions that had been made. This release, as Triangle saw the matter, amounted to an on-account payment towards the sums deducted from the interim certificates pending that mediation. However, Triangle contended that Bovis then declined to participate in a mediation despite the issuing of an additional interim certificate on 28 June 2002 certifying as due for payment a sum of £100,038.07 with a final date for payment of 29 July 2002. Triangle has paid this sum. Bovis does not accept Triangle's characterisation of this sum as an on-account payment towards the sums deducted from the earlier interim certificates.
7. On 23 July 2002, Bovis gave to Triangle an adjudication notice of the dispute as to whether or not the architect was entitled to deduct from interim certificates sums that had been previously certified. On

25 July 2002, the architect served on Bovis a notice under clause 7.2 of the contract to the effect that Bovis were failing to proceed regularly and diligently with the carrying out of its obligations. In a letter dated 30 July 2002, the architect explained that this suggested failure involved such matters as a severe reduction in labour levels and failures to both replace defective work and administer and manage the works. In a letter to the architect dated 26 July 2002, Bovis responded that the default notice did not comply with the procedural requirements of the contract and that the underlying factual basis for its issue did not exist. Thus, Bovis has always contended that the default notice was invalid and erroneously given and that the determination of its employment was invalid.

8. On 31 July 2002, Triangle issued a notice under clause 2.10.1 of the contract informing Bovis of its intention to withhold or deduct liquidated damages following certificates of non-completion of two blocks or sections of the works that the architect had issued on 24 June 2002. This notice was followed, on 2 August 2002, with the second notice that clauses 4.3.4 and 4.12.4 of the contract provide for and which has to be served before liquidated damages may be deducted from sums otherwise payable under interim certificates. The first notice referred to a sum of £87,000 as being due.
9. Bovis responded with a notice served on Triangle on 7 August 2002 to the effect that Triangle had repudiated the contract by engaging new contractors and that, therefore, Bovis was accepting that repudiation and was treating the contract as being at an end. This amounted to the exercise by Bovis of its common law rights, preserved by clause 7.12 of the contract, to accept what it regarded to be Triangle's repudiatory breach of contract. Triangle, through its solicitors, immediately responded in a letter dated 8 August 2002 to the effect that the contract had not been repudiated by Triangle and that it expected Bovis to improve its performance on site. On the same day, the architect wrote to Bovis and asked that a programme detailing the steps that Bovis propose to take to complete the work be delivered within seven days. However, on the following day, 9 August 2002, Triangle sent Bovis a notice under clause 7.2 of the contract as a follow-up to the earlier default notice dated 25 July 2002 that determined Bovis' employment under the contract on the grounds that the originally specified default had continued for more than fourteen days from 25 July 2002.
10. Meanwhile, three adjudications were being progressed. The first, being the adjudication following Bovis' adjudication notice already referred to, was subject to a referral notice dated 31 July 2002 after Mr Hough had accepted nomination as the adjudicator and Bovis then agreed to extend the time within which the adjudicator's decision was to be made by fourteen days. A second adjudication was started by Triangle, Mr Hough was again nominated and the referral notice was sent by Triangle on 16 August 2002. This dispute concerned Triangle's claim that Bovis was in default of contractual provisions relating to the provision of documents for the valuation of work package contractors' work. A third adjudication was started by Triangle and, for the third time, Mr Hough was nominated following the adjudication notice which was sent on 19 August 2002. The referral notice was sent by Triangle 27 August 2002. The subject matter of this adjudication was the dispute as to whether Triangle had evinced an intention to abandon and refuse to perform the management contract.
11. The first adjudication decision concerning the two interim certificates with negative values was issued on 12 September. This decided that the two interim certificates should be amended by including the omitted valuations and that Triangle should pay Bovis £158,020,71 and interest from the respective dates of final payment of the interim certificates. In response to this decision, Triangle served on Bovis on 13 September 2002 a composite notice which: (1) gave notice under clause 4.3.3 of the contract as to the amount of the adjudicator's decision, being nil, which it was proposed to pay; (2) gave notice that the adjudicator's decision should be corrected due to a suggested discrepancy in it; (3) identified the withholding it proposed to make being: (a) its entitlement to withhold payment as a result of clause 7.6.4.1 of the contract on account of the determination of Bovis' employment; (b) the early payment of £100,038.73 of the retention which was to be credited to the sum directed to be paid; and (c) a further £15,084.59 in liquidated damages retained pursuant to clause 2.10 of the contract.
12. This notice was followed by the decision in the second adjudication on the 13 August 2002 in which the adjudicator decided that Bovis was in breach of its contractual obligations by not providing certain

of the documents required by Triangle. The adjudicator was unable to reach a decision in respect of other documents.

13. The decision in the third adjudication was given on 26 September 2002 and was to the effect that Triangle had not prior to 9 August 2002 evinced an intention no longer to be bound by the management contract and that the management contract had not been brought to an end on 7 August 2002 by Bovis' acceptance of Triangle's allegedly repudiatory breach.
14. Finally, Triangle requested the adjudicator to correct his first decision to take account of Triangle's alleged entitlement to claw back £100,038.73 of the sum it had been directed to pay on the grounds that the decision contained a discrepancy. The suggested discrepancy was that the decision, in directing that a sum of £158,020.71 should be paid, had overlooked the contents of the most recent interim certificate which had provided for the early release of retention in accordance with the agreement reached in late June 2002. As a result, there had already been a payment of £100,038.71 towards the overall sum that Triangle had been directed to pay.
15. The adjudicator, in a letter dated 16 September 2002, declined to correct his first decision on the grounds that: *"My decision was made with due regard to the submissions of both parties in relation to the sum of £100,038.73 paid as partial release of retentions. I regard the payment of such monies as a separate issue unrelated to Triangle's obligations to make payment of monies that I have decided should have been included in relation to Works Contractors. There is therefore no error in my decision to be corrected."*

3. Terms of the Contract

16. The principal question for my decision is whether the adjudicator's decision that Triangle must pay Bovis £158,020.78 is enforceable or whether, instead, it is superseded by contractual provisions allowing Triangle to withhold payment as a result either of the determination of Bovis' employment or as a result of Bovis' alleged repudiation of the contract or as a result of the service of the withholding notice dated 13 September 2002. These questions involve a consideration of the closely inter-woven contractual provisions concerning payment, the service of withholding notices, termination of the contractor's employment and adjudication.
17. The particularly relevant contractual terms are as follows:
 - (1) **Payment Provisions**
 1. *"The architect ... shall issue Interim Certificates [monthly] stating the amount due to [Bovis] from [Triangle] specifying to what the amount relates and the basis on which the amount was calculated ..."* (clause 4.2).
 2. *"The final date for payment by Triangle to Bovis of the amounts stated as due in interim Certificates shall be 14 days from the issue of each interim certificate."* (clause 4.3.1).
 3. *"Not later than five days after the date of issue of an interim certificate [Triangle] shall give a written notice to Bovis which shall specify the amount of the payment proposed to be made in respect of the amount stated as due in that Interim Certificate."* (clause 4.3.3).
 4. *"Not later than five days before the final date for payment of the amount due pursuant to clause 4.3.1 [Triangle] may give a written notice to [Bovis] which shall ... shall specify any amount proposed to be withheld and/or deducted from that due amount, the grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground."* (clause 4.3.4).
 - (2) **Determination**
 1. *"If before the date of Practical Completion, [Bovis] shall make a default in any one or more of the following respects:
 - .1 without reasonable cause he wholly or substantially suspends the carrying out of the project; or
 - .2 he fails to proceed regularly and diligently with the carrying out of his obligations referred to in Article 1 before the completion of the project; ...then the Architect may give [Bovis] a notice specifying the default or defaults."* (clause 7.2)
 2. *"If [Bovis] continues a specified default for 14 days from receipt of the notice under clause 7.2.1 then [Triangle] may on, or within 10 days from the expiry of that 14 days by a further notice to [Bovis] determine the employment of [Bovis] under this Contract. Such determination shall take effect on the date of receipt of this further notice."* (clause 7.2.2).
 3. *"In the event of the determination of [Bovis] under clause 7.2.2, ... and so long as that employment has not been reinstated then: ...
 - .4.1 ... the provisions of this Contract which require any further payment or any release of Retention to [Bovis] shall not apply; provided that [this clause] shall not be construed so as to prevent the enforcement by [Bovis] of any rights under this Contract in respect of amounts properly due to be paid by [Triangle] to [Bovis] which [Triangle] has*

unreasonably not paid and which, ... have accrued 28 days or more before the date of determination of the employment of [Bovis].” (clause 7.6.4.1).

4. *“The provisions of clauses 7.2 to 7.7 are without prejudice to any other rights and remedies which [Triangle] may possess.” (clause 7.8).*

(3) Adjudication

1. *“If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 8A” (Article 8).*

2. *“Effect of Adjudicator’s decision*

9A.7.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

.7.2 The Parties shall, without prejudice to their own rights under the Contract, comply with the decisions of the Adjudicator; and [Triangle] and [Bovis] shall ensure that the decisions of the Adjudicator are given effect.

.7.3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute pursuant to clause 9A.7.1.” (clause 9A.7).

18. It is also necessary to have in mind the relevant provisions of the Housing Grants, Construction, Regeneration Act 1996 (“HGCRA”) and the statutory Scheme for Construction Contracts which were both applicable to this contract:

1. *“A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under [the Scheme for Construction Contracts]. ...*

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.” (HGCRA, section 108(1)).

2. *“(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. ...*

(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than-

(a) seven days from the date of the decision, or

(b) the date which apart from the notice would have been the final date for payment.” (section 111).

3. *“(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.” (Scheme, paragraph 23).*

4. The Issues

19. The issues that arise in this Part 8 claim may be summarised as follows:

1. Whether the sum directed to be paid by the adjudicator is immediately payable and is now enforceable irrespective of the nature of Triangle's asserted set off, deduction, withholding or cross-claim or of the potentially contrary terms of the determination provisions of the contract.
2. Whether Triangle is entitled to withhold payment of the sum directed to be paid by the adjudicator on the particular grounds that the employment of Bovis had been determined or that the contract had been brought to an end as a result of Bovis' continuing repudiation of the contract.
3. Whether Triangle may withhold payment having served a relevant withholding notice not later than five days before the final date for payment of the adjudicator's decision.
4. Whether Triangle can withhold payment of £100,038.71 of the sum in question on the grounds that it has paid, or is to be treated as having paid, that sum already.

5. The Use of CPR Part 8 Proceedings

20. Bovis has started CPR Part 8 proceedings in its attempt to enforce the adjudicator's decision that Triangle should pay £158,020.71 within 7 days of 12 September 2002. Part 8, which is the successor to the originating summons procedure under the old Rules of the Supreme Court, is applicable where a party seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact or where a rule or practice direction requires or permits the use of the Part 8 procedure. Bovis

essentially seeks a judgment and not merely a decision of certain questions although, as it has turned out, the issues or questions that I must decide can be decided in the abstract under Part 8 since they do not involve any substantial dispute of fact.

21. Part 8 proceedings are designed to cater for decisions of law and not for trials and monetary judgments. They are not appropriate unless they do not involve any substantial dispute of fact and the only written evidence that may be used is that filed with the claim form or, for a defendant, that filed with the acknowledgement of service (CPR 8.5(1) and (3) and 8PD paragraph 5.1 and 5.3). The court may at any stage in the proceedings order that the claim is to continue as if the claimant had not used the Part 8 procedure and, if it does so, may give any directions it considers appropriate (CPR 8.1(3)).
22. In this case, Bovis set out in the claim form the background facts and then identified the decision that it wanted the court to make as being whether it was entitled to an order for the payment of the sum that the adjudicator decided should be paid. Since, in reality, Bovis is seeking a judgment for that sum, the procedure adopted would require the court first to determine any question arising which is not dependent on disputes of fact and then transpose the procedure into a Part 7 claim and give directions for the entry of any appropriate judgment or for the summary or full trial of any remaining issues.
23. It is clear that the Part 8 procedure is only appropriate for the determination of the first two issues that have arisen. This can be seen by the fact that significant additional evidence was served and relied on by both parties following the initial service of the evidence served with the claim form and the acknowledgement of service form.
24. The parties recognised this difficulty during the hearing which had been brought on with admirable speed only about five weeks after the last of the adjudicator's decisions. It was agreed that I would decide the first two issues under Part 8 and then hand down my judgment on those issues and consider what procedural directions I should then give issue for the disposal of any remaining issue or claim. These two issues have been formulated by me since the hearing but their wording reflects the arguments that were presented at the hearing.

6. Issue 1 - The Nature of Enforcement Proceedings

25. Strictly speaking, there is no such procedure as "enforcement proceedings" which is a widely used and helpfully descriptive phrase that is used to identify proceedings whose aim is to secure payment of sums directed to be paid by an adjudicator by obtaining a separate judgment of the court that can then be enforced using all available methods of judgment enforcement that are provided for judgments.
26. Ordinarily, a decision of an adjudicator will give rise to a contractual entitlement to immediate payment without deduction, set off, withholding, reliance on a cross-claim, abatement or stay of execution. This is because the sum in question is due by virtue of the statutory and contractually backed provisions requiring compliance and full effect to be given to the decision of an adjudicator in addition to it being due by virtue of the underlying contractual provisions. It is for this reason that courts have repeatedly held that no deduction or withholding will ordinarily be allowed from an adjudicator's decision.
27. The courts have, however, developed exceptions to this general rule. These exceptions include situations where it can be shown that the adjudicator had no jurisdiction to make the whole or some definable part of the decision in question or where the adjudicator has failed to act fairly or in conformity with applicable procedural rules in some significant respect. These exceptions give effect to the court's two-fold duty of ensuring that the draconian powers of the state that are available to ensure that judgments are satisfied are not used where an adjudicator's decision was a nullity or lacked substantial procedural integrity.
28. The courts have also developed two further exceptions to the general rule that an adjudicator's decision is immediately enforceable. These are where the terms of the contract in question or the terms of another applicable adjudication decision clearly override the apparent obligation of a party to comply within seven days with an adjudicator's payment decision. However, clear words will be needed if the contract- or conflicting adjudicator's decision is to be construed so as to give primacy to

a deduction or withholding or to some other basis that is being relied on as a ground for not paying the payment decision in full.

29. The first and earliest decision governing adjudication enforcement is the oft cited decision of Dyson J in **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] LR 93. However, the relevant principles governing set off and withholding from an adjudicator's decision are most helpfully set out in the subsequent decision of Judge Hicks in **VHE Construction PLC v RBSTB Trust Limited** [2000] BLR 187 where, with characteristic clarity, he stated the position to be:

"55. I conclude that enforcement proceedings such as these are proceedings to enforce a contractual obligation, namely the obligation to comply with the decision. The decision does not have the status of a judgment, nor is there any corresponding provision to section 66 of the Arbitration Act 1995, under which, by leave of the court, judgment may be entered in terms of an arbitral award, or the award may be enforced in the same manner as a judgment.

56. There is, however, a question whether the obligation to "comply with" a decision which requires the payment of a sum of money has any greater effect than to make that sum a simple debt, for example by excluding certain defences which could be raised in answer to an action on such a debt. ..."

Judge Hicks then considered whether any of the contractual provisions that had been relied on by the paying party merely gave the adjudicator's decision the status of a simple debt or, instead, made it more substantial and impregnable by excluding defences such as set off. His conclusion was that:

*"... section 111 [of the HGCRA] constitutes a comprehensive code governing the right of set off against payments contractually due. [The paying party] has not complied with it. It would make a nonsense of the overall purpose of Part II of the Act, to which sections 108 and 111 are central and in which they are closely associated, not least by the terms of section 111(4), if payments required to comply with adjudication decisions were more vulnerable to attack in this way than those simply falling due under the ordinary contractual machinery. To return to the question I left unanswered in paragraph 56 above, therefore, I find these compelling reasons for concluding that in clause 39A.7.2 and 39A.7.3. [which were in similar terms to clauses 9A.7.2 and 9A.7.3 in the contract in this case] at least on the facts of this case, "comply" means "comply, without recourse to defences or cross-claims not raised in the adjudication."*¹

1. Amongst cases which have followed and applied Judge Hick's statement of principle, all of which were cited in argument, are: **Northern Developments (Cumbria) Limited v J & J Nichol** (2000) BL 158, Judge Bowsler; **Solland International Limited v Daraydan Holdings Limited** (unreported) 15 February 2002, Judge Seymour and **Levolux A.T. Limited v Ferson Contractors Limited** (2002) BLR 341, Judge Wilcox

30. It was suggested in argument that there is a conflict between this line of authority and three decisions of Judge Lloyd and that I would have to reach my own decision as to whether the relevant principles are as Judge Hicks have stated them to be. In particular, it was suggested that Judge Lloyd had held in these decisions that an adjudicator's decision does not create a separate obligation to pay from the underlying contractual obligation that is protected from set off or withholding. It is clear, however, that when these three decisions are carefully considered, they do not conflict with, but instead helpfully illuminate the general principles summarised by Judge Hicks in the **VHE** case.
31. Judge Lloyd's three judgments are those in **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** (2001) 75 Con LR 71; **Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd** [2001] BLR 207 and **David McLean Housing Contractors Limited v Swansea Housing Association Limited** [2002] BLR 125.
32. In **KNS**, Judge Lloyd was faced with an argument that clause 29.6.3 of the contract in that case, which allowed for the determination of the contractor's employment and was the equivalent of clause 7.3.4.1 that is applicable in this case, had the effect of overriding the requirement that the decision of the adjudicator had to be complied with. Judge Lloyd concluded:
- "28. ... other rights under the contract which were not the subject of the decision remain available to the relevant party. If therefore by the time an adjudicator makes a decision requiring payment by a party to the contract has been lawfully terminated by that party (or that party has real prospects of success in supporting that termination) or some other event has occurred which under the contract entitles a party not to pay then the amount required to be paid by the decision does not have to be paid."*

Clearly therefore, Judge Lloyd was affirming the general principle that immediate effect should be given to an adjudicator's payment decision as well as pointing out that that principle can be excluded by other terms of the contract.

33. I next turn to Judge Lloyd's decision in **Glencot Developments**. In that case, after a detailed consideration of the law relating to the need for an adjudicator to be impartial and to the facts of the case, Judge Lloyd concluded that there was sufficient evidence that the adjudicator was not impartial to preclude his giving summary judgment to enforce the adjudicator's decision since, if that lack of impartiality was made out at the trial of the enforcement claim, the adjudicator's decision would be held to be a nullity. However, although the adjudicator's decision could not be relied on in the summary judgment application being heard by Judge Lloyd, an interim payment of part of the underlying claim was ordered which was based on the evidence of the underlying claim set out in the adjudicator's reasons for his decision. Judge Lloyd concluded that the receiving party had established that it had a real prospect of success in relation to a substantial part of the claim. It was in this context that Judge Lloyd stated:

"33. ... However an adjudicator's decision does not create a cause of action as such; it is merely an expression as to liability and quantum about the dispute that has arisen under the contract. ... Under the Act and the Scheme that decision cannot be challenged if it is within the jurisdiction of the adjudicator as the parties are taken to have agreed to be bound by it and cannot in law question the decision if it is valid. The cause of action (or chose in action) remains the original claim (if upheld) and is not the decision of the adjudicator, but the amount recoverable is the amount the adjudicator decides is due."

34. In essence, Judge Lloyd decided that where an adjudicator's decision is valid, the parties are taken to have agreed to abide by that decision. However, if there is a dispute as to the validity of the decision, the claiming party is still free to rely on its entitlement to judgment or an interim payment based on the underlying cause of action that had been dealt with by the adjudicator since that cause of action survives and does not merge in, and is not superseded by, the disputed adjudicator's decision.

35. Judge Lloyd then returned to this area of law in **David McLean**. The quickest way of summarising the effect of this decision, and in particular paragraphs 14 - 15 of Judge Lloyd's judgment which were said in argument potentially to conflict with Judge Hick's statement of principle in **VHE**, is to quote and adopt the helpful statement of Judge Seymour about those paragraphs that is set out in his judgment in **Solland International Limited v Daraydan Holdings Limited** (unreported, 15 February 2002). Judge Seymour explained that Judge Lloyd was concerned with an adjudicator's decision in an unusual situation where:

"31. ... In the course of the very decision as to how much was due to the contractor the adjudicator had to reach a conclusion as to whether the contractor was entitled to any, and if so what, extension of time. The converse of a decision that the contractor was not entitled to loss and expense over the full period of delay as was excluded from the evaluation of the loss and expense to which the contractor was entitled to. there was thus a decision of an adjudicator as to the period over which the employer was entitled to liquidated and ascertained damages. Subject to the question of the giving of a notice of intention to withhold payment in respect of such liquidated and ascertained damages against the sum which the adjudicator had determined was payable to the contractor, there was no reason why a set off was not appropriate. Judge Lloyd held that an effective notice of intention to withhold payment against the decision of the adjudicator had been given. In those circumstances his decision is wholly in line with and not a departure from the approach which I [and earlier decisions of the TCC and Court of Appeal] consider to be appropriate."

36. I gratefully adopt Judge Seymour's reasoning which clearly shows that **David McLean** was a case where the court was giving effect to and complying with a further decision of the adjudicator as to extensions of time and their corollary, the extent of delayed completion by the receiving party and its entitlement to liquidated damages for delay. It was for that reason that effect was not given to the separate decision in favour of the paying party that a sum of money was due to it.

37. I therefore conclude that:

1. The decision of an adjudicator that money must be paid gives rise to a separate contractual obligation on the paying party to comply with that decision within the stipulated period. This

obligation will usually preclude the paying party from making withholdings, deductions, set offs or cross-claims against that sum.

2. For a withholding to be made against an adjudicator's decision, an effective notice to withhold payment must usually have been given prior to the adjudication notice being given, or possibly the decision being given, and which was ruled upon and made part of the subject-matter of that decision.
3. However, where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail.
4. Equally, where a paying party is given an entitlement to deduct from or cross-claim against the sum directed to be paid as a result of the same, or another, adjudication decision, the first decision will not be enforced or, alternatively, judgment will be stayed.

7. Issue 1 - Clause 7.6.4.1 and the Adjudicator's Repudiation Decision

38. There are two related grounds for non-payment relied on by Triangle. Firstly, it alleges that Bovis irrevocably repudiated the contract by its written notice in its letter dated 7 August 2002 notifying Triangle that it was treating the contract as at an end. There was in consequence no necessity for Triangle to accept that repudiation since it had been presented with a *fait accompli*. This common law repudiation was confirmed by the adjudicator's third decision dated 26 September 2002 when he decided that Bovis had not accepted any repudiation of the contract by Triangle since Triangle had not repudiated the contract. The consequence of that third decision was that Triangle was no longer obliged by its contractual obligation to ensure compliance with and give effect to the first payment decision by paying it forthwith but could, instead set off against it its own cross-claim for damages flowing from Bovis' repudiation of the contract.
39. The second ground relied on by Triangle is that it had successfully determined Bovis' employment under the contract. Unless or until there has been an adjudicator's decision, a trial or an arbitration that has decided that that determination was invalid or was not justified by the prevailing facts on site, Triangle claims an entitlement to rely on clause 7.6.4.1 of the contract which provides that, following a clause 7 determination of Bovis' employment, the provisions of the contract requiring further payments to be made to Bovis are not to apply.

(1) Disputed Determination of Bovis' Employment

40. Bovis disputes the validity of both the substantive determination of its employment and the procedural validity of the notice giving effect to that determination. These disputes cannot be considered in Part 8 proceedings. However, it is not relevant, in enforcement proceedings, to consider the underlying or procedural validity of the determination unless these questions are raised directly by the receiving party in Bovis' position and it can be seen that there are substantial grounds for that challenge. For the purposes of activating clause 7.6.4.1, Triangle merely has to point to an architect's default notice which is valid in appearance and for which there is no evidence that it was given in bad faith and to its own follow-up notice of determination which has the same characteristics. Unless and until there is an adjudicator's decision or an arbitrator's award that decides or declares that the determination was invalid or a nullity, Triangle is entitled to proceed on the basis that the determination has current, albeit potentially temporary, validity and that it is entitled to rely on clause 7.6.4.1 if this is applicable to the enforcement application. It is worth recording that the evidence served by Bovis for the Part 8 proceedings would not as it stands raise any substantial grounds for challenging the validity of Triangle's determination of its employment in summary judgment proceedings.

(2) Clauses 7.6.4.1 and 9A.7.2 of the Management contract

41. Bovis contended that clause 9A.7.2 takes precedence over clause 7.6.4.1 and that, in consequence, Triangle's obligation to discharge the direction of the adjudicator and make a payment of £158,020.71 trumps the provision in the contract that, following a determination of Bovis' employment, contractual obligations requiring payments to be made to Bovis shall no longer apply.

42. Bovis raised a threshold question to this issue. It contended that clause 7.6.4.1 was governed by section 111 of the HGCRA so that it could not be relied on since no withholding notice had been served which notified Bovis of Triangle's intention to rely on that clause prior to Bovis' adjudication notice dated 23 July 2002.
43. It is therefore necessary first to consider whether Triangle must serve a section 111 withholding notice before it can rely on the right to avoid payment provided for by clause 7.4.6.1. Section 111 of the HGCRA applies to any payment: "of a sum due under the contract". That wording is not appropriate to cover clause 7.6.4.1 since that clause has the effect, on the determination of the employment of the contractor, that: "the provisions of this Contract which require further payment shall not apply". It follows that, following a determination of the contractor's employment, but in no other circumstances, further potential contractual payments that the contract would otherwise have required, are no longer to be regarded as accruing due under the contract at all. Thus, any sum which any term of the contract would have required payment of had the contractor's employment not been terminated ceases to be subject to a contractual requirement of payment on a determination. It follows that the service of a section 111 withholding notice is not prerequisite to a paying party's reliance on clause 7.6.4.1 of the contract as a defence to enforcement proceedings.
44. The starting point in any consideration of what contractual terms, if any, can prevail to enable a set off or cross-claim to be relied on in answer to an enforcement claim is the decision of the Court of Appeal in **Parsons Plastics (Research and Development) Limited v Purac Limited** [2002] BLR 334. The principle was expressed by Pill LJ as follows:
"15. ... It is open to the [employer paying party] to set off against the adjudicator's decision any other claim they have against the [contractor receiving party] which had not been determined by the adjudicator. The adjudicator's decision cannot be re-litigated in other proceedings but, on the wording of this sub-contract, can be made the subject of set-off and counterclaim."
- In that case, the adjudication was a purely contractual adjudication without the statutory backing of the HGCRA but that is immaterial when considering the applicability of the principle applied by the Court of Appeal in the **Parsons Plastics case** to the effect that appropriate terms of the contract can defeat the requirement that immediate effect should be given to an adjudicator's payment decision. Of course, it is only clear words that can trump the payment decision. In **Parsons Plastics**, the relevant clause provided that:
"Nothing contained in this Deed whether expressly or by incorporation or by implication shall in any way restrict [Purac's] equitable or common law rights of set off. Without prejudice to the generality of the foregoing, [Purac] shall have the right to set off against any sum due to [Parsons] whether hereunder or otherwise a fair and reasonable sum in respect of or on account of any claim or claims that have been made against [Purac] by the Purchaser the subject matter of which touches or concerns the Sub-Contract Works."
45. This principle was applied by Judge Lloyd in the **KNS case** that I have already considered. In **KNS**, a sub-contractor had given notice that it intended to suspend work on the grounds of non-payment. Having done so, the main contractor terminated the sub-contractor's employment under the sub-contract. The adjudicator decided that the sub-contractor was not entitled to suspend working. The result of that decision was, Judge Lloyd concluded, that the main contractor was entitled to terminate the sub-contractor's employment. One of the questions for decision by Judge Lloyd was whether the sub-contractor was entitled to payment following another of the adjudicator's decisions that a payment should be made by the main contractor. This second decision had been made notwithstanding the determination of the employment of the sub-contractor under a contractual provision which gave the main contractor the right to defer further payment 'until after completion of the Sub-contract works and the making good of defects' following the determination of the subcontractor's employment.
46. In the course of his judgment, Judge Lloyd stated:
"27. ... [Counsel for the sub-contractor] submitted that when an adjudicator decided that an amount had to be paid, it had to be paid notwithstanding, it seemed, any provision in the sub-contract. ...
28. ... In my judgment the answer is clear. Clause 38A7.2 expressly provides that-

'the parties shall, without prejudice to their other rights under the contract, comply with the decisions of the adjudicator ... '.

Therefore other rights under the contract which were not the subject of the decision remain available to the relevant party. If therefore by the time an adjudicator makes a decision requiring payment by a party the contract has been lawfully terminated by that party (or that party has real prospects of success in supporting that termination) or some other event has occurred which under the contract entitles that party not to pay then the amount required to be paid by the decision does not have to be paid."

47. Bovis argued that the wording of clause 7.6.4.1 was not wide enough to trump clause 9A7.2 for two reasons. It contended that clause 9A7.2 required Triangle to be bound by the adjudicator's payment decision and to comply with and give effect to it. These clear-cut obligations fell outside the ambit of clause 7.6.4.1 which only applied to payments which were required to be made by the provisions of the contract. However, since the obligation imposed on Triangle that is relied on to the effect that it is to comply with and give effect to the adjudicator's payment decision is itself a contractual provision requiring further payment, there is no scope for contending that clause 7.6.4.1 is not including clause 9A7.2 in its embrace.
48. This conclusion is reinforced by the qualification to Triangle's obligation to comply with the payment decision that is contained in clause 9A7.2. Triangle's payment obligation is qualified by the phrase: *"without prejudice to their own rights under the contract"*. One of Triangle's over-arching contractual rights that is encompassed by that phrase is the right no longer to be contractually obliged to make further payments to Bovis following a determination of Bovis' employment under clause 7.
49. The proviso to clause 9A7.2 was said by Bovis, however, only to have limited effect and to be inapplicable to this case. In so contending, Bovis placed reliance on this passage in Judge Hicks' judgment in **VHE** that construed the same phrase in a similarly worded clause contained in the contract in question in that case:
"65. ... [Counsel for the paying party] contends, as I understand it, that that entitles [the paying party] to exercise its right under clause 24.2.1 of the contract to "deduct the [liquidated damages claimed] from any sum due ... to [the paying party] under this contract" including the money due under the adjudication decisions. I agree with [counsel for the receiving party] that that involves reading "without prejudice to" as equivalent to "subject to". There may be contexts in which that meaning is required, but the more natural and usual one is "but leaving unaffected"."
50. Bovis contended that if the phrase *"without prejudice to [Triangle's] rights under the Contract"* is read as if it stated *"but leaving unaffected [its] rights under the Contract"* rather than *"subject to [its] rights under the Contract"*, it is clear that the proviso does not extend to the provisions of clause 7.6.4.1. However, it is not entirely clear to me what the difference is between "subject to" and "but leaving unaffected" in the context of this case and in particular in the context of the potential operation of clause 7.6.4.1. As I read the phrase "without prejudice to" in the context of clause 9A.7.2, that proviso is making it clear that the obligation to pay an adjudicator's payment decision is not to be cut back or diminished by any withholding by the paying party which would not have been allowed in relation to the underlying obligation to pay and which had not been subject to a valid section 111 notice to withhold payment. Where, however, there pre-existed some other contractual right to avoid payment which was not governed or affected by section 111 or by the terms of the adjudicator's decision, that contractual right survives an adjudicator's payment decision and, in the words of Judge Hicks, was left unaffected by the contractual obligation to give effect to an adjudicator's decision.
51. If the phrase "without prejudice" has the extended meaning of "subject to", it is probable that any pre-existing entitlement to withhold could be used to defeat payment even if that had not been made the subject of a section 111 notice but, on any view, the phrase is sufficiently wide in its ambit so as to extend the effects of the proviso to clause 7.6.4.1.

(3) Proviso to Clause 7.6.4.1

52. Bovis mounted a further argument to the effect that the sums in question had accrued due 28 days or more before the date on which Triangle could first have given a notice to determine Bovis'

employment and Triangle had unreasonably not paid those sums. If this argument is correct, clause 7.6.4.1 does not apply, given the wording of the proviso that it contains.

53. Bovis' attempted reliance on the proviso to clause 7.6.4.11 suffers from the difficulty that the sum in question did not accrue due before the determination of Bovis' employment but only accrued due after that determination. The constituent parts of the relevant sum did not become due or payable until the adjudicator's decision was made on 12 September 2002 when the interim certificates were amended by that decision.
54. Bovis argued that the consequence of the amendments to the interim certificates that the adjudicator decided should be made was that the interim certificates were to be treated for all purposes as if the only interim certificates that had been issued were the amended interim certificates issued on the date that the original certificates were issued and as if the unamended certificates had never seen the light of day. However, the effect of the adjudicator's decision amending the two interim certificates was not to back date the accrual of the obligation to pay the sums inserted into them by amendment. Although the certificates themselves retained their original dates, the final date for payment of the sums added by the amendment was not the contractual fourteen days after the date of issue but was, by virtue of section 111(4) of the HGCRA, a date not later than seven days after the date of the adjudicator's decision to pay. Thus, the obligation to pay the relevant sum had not accrued more than 28 days before the determination of Bovis' employment but only accrued on, or within 7 days after, a date some days after that determination. It follows that the proviso to clause 7.6.4.1 is not relevant to this case.

(4) Common Law Repudiation

55. Bovis contended that Triangle's common law damages cross-claim arising out of Bovis' repudiation could not be used for the purpose of defending and resisting payment of Bovis' claim based on the adjudicator's payment decision. That would amount to a withholding that was not allowed by the terms of the contract and had not been made the subject of any section 111 notice. Bovis concluded that this aspect of this case was on all fours with Judge Bowsher's decision in **Northern Developments (Cumbria) Limited v J & J Nichol** [2000] BLR 158 where he allegedly declined to give effect to a similar cross-claim.
56. In that case, a sub-contractor started adjudication proceedings against the main contractor and obtained a decision that £205,000 should be paid to it. Before the adjudication notice had been served however, the main contractor had purported to accept a repudiatory breach by the sub-contractor and had appointed an alternative sub-contractor to complete the subcontract works. The main contractor claimed to be entitled to set off its claim for damages against the sum that the adjudicator had decided was due that flow from the sub-contractor's repudiation of the sub-contract. Judge Bowsher held that the main contractor was not entitled to set off or withhold payment on that ground.
57. It is important, however, to examine carefully Judge Bowsher's reasoning. This was that the main contractor was asserting a cross-claim for damages flowing from the repudiation. This cross-claim, advanced as a set off, was nothing less than a withholding that had not been made the subject of any section 111 notice nor had the main contractor referred this cross-claim the adjudicator as a ground for its non-payment of the subcontractor's claim. In those circumstances, Judge Bowsher concluded that the adjudicator was correct in paying no regard to the repudiation and the main contractor could not belatedly pray it in aid as a defence to the claim based on the adjudicator's payment decision.
58. Judge Bowsher also observed that if the validity of the repudiation or the cross-claim advanced by the main contractor for damages flowing from that repudiation had been referred to adjudication, any decision favourable to the main contractor might have been capable of being used as a set off against the adjudicator's payment decision but, in the absence of such a referral, the first payment decision was effective and fully enforceable.
59. It should also be remembered that there was no contractual provision in the contract in the **Northern Developments case** allowing a set off or a cross-claim for damages flowing from a repudiation to defeat the immediate effect of an adjudicator's payment decision. Moreover, there was no adjudicator's decision that the main contractor could rely on in asserting such an entitlement.

60. Bovis also sought to rely on another decision which it contended supported its case that no cross-claim was open to Triangle. That was the decision of Judge Wilcox in **Levolux A.T. Ltd v Ferson Contractors Ltd** [2002] BLR 341. In that case, a subcontractor suspended work following the withholding of part of an application for payment and, in consequence, the main contractor determined the sub-contractor's employment. The subcontractor started adjudication proceedings and obtained a payment decision in its favour. The main contractor resisted the claim to enforce that decision on the ground that the determination clause in the contract contained a provision that all further sums accruing due to the sub-contractor, including an adjudicator's decision, should cease to be due and should no longer be capable of accruing due. Judge Wilcox enforced the decision. He did not have to consider the potential effect of the determination provisions of the contract because he concluded that it was a necessary implication of the adjudication decision that the sub-contractor had been entitled to suspend the works and that, in consequence, the purported determination of its employment had had no effect. Thus, on the facts as determined by the adjudicator, no cross-claim arose at all so that the question as to whether a cross-claim was permitted by the terms of the contract to defeat the immediate effect of an adjudicator's decision did not arise.
61. In conclusion, it can be seen that Judge Wilcox was giving effect to the principle that the effect of an adjudicator's decision can in appropriate circumstances be trumped by, or read in conjunction with, another adjudicator's decision, particularly where that decision formed part of the payment decision and had the effect that the grounds for cross-claiming had not been made out. Thus, Judge Wilcox found that there were no grounds for a set off, given the terms of the adjudicator's decision.
62. I now turn to the non-controversial facts of this case. The third decision of the adjudicator is that Bovis had no entitlement to treat the contract as having been repudiated by Triangle and it therefore had no right to treat the contract as at an end. Thus, Bovis had no contractual entitlement to cease work or to fail to complete the contract. The only possible conclusion, in the light of that decision, is that Bovis repudiated the contract in a way that did not require acceptance since Bovis had acted unilaterally, irretrievably and unequivocally to treat the contract as at an end and had ceased work under the contract without any contractual justification.
63. Thus, this case is on all fours with the reasoning of Judge Bowsher contained in this passage of his judgment in **Northern Developments**:
"36. ... the repudiation issues might have been raised in a later adjudication either by the same or a different adjudicator. Depending on the timing of the decision of those adjudications, it might have turned out that in considering enforcement of the decisions there might be some set-off of the decisions as occurred in VHE, but that would arise merely as a coincidence of timing. ... If there are two conflicting adjudication decisions, it may be appropriate to set one off against the other in enforcement proceedings ..."
64. The first and third adjudication decisions of Mr Hough are in conflict. That situation has arisen because the parties chose to refer their existing disputes piecemeal to adjudication and although the same adjudicator was appointed to decide each of the three disputes, he had to consider each in isolation given the manner in which he had been nominated and in which the parties had presented their respective cases to him in each of the three adjudications. As a result, there are two conflicting decisions, one giving Bovis a right to payment and the other giving Triangle the right to cross-claim unliquidated damages flowing from Bovis' repudiation of the contract. It is not possible, in this Part 8 claim, to determine whether Triangle's cross-claim is sufficient to defeat or merely to reduce Bovis' claim but, given the availability of clause 7.6.4.1 to Triangle as an additional basis for defeating the entire claim based on the adjudicator's first decision, that question is purely academic.

(5) Triangle's Other Grounds of Defence

65. Triangle seeks, if necessary, to rely on its alleged entitlement to withhold payment of a sum of £100,038.07 that it contends that it has already paid Bovis following the purported early release of retention and also to withhold a further sum of £15,084.59 on account of unpaid liquidated damages. However, these withholdings had not been preceded by a timeous withholding notice since, to be effective to avoid payment of the amended interim certificates nos 23 and 27, a withholding notice would have had to have been issued at least five days before those certificates were originally issued

and the only relevant withholding notice was issued long afterwards. Triangle also seeks to show that £100,038.07 of the claim has already been paid as an alternative to its withholding defence in connection with that sum. That defence raises a disputed question of fact which clearly cannot be raised in Part 8 proceedings.

66. However, in the light of my conclusion that Triangle may defend Bovis' claim by relying on clause 7.6.4.1 and on its cross-claim for damages flowing from Bovis' repudiation, these alternative grounds and defence of Triangle do not arise.

8. Conclusion

67. It follows that the answers to the questions that I have answered under Part 8 are:
1. The decision of an adjudicator that money must be paid gives rise to a separate contractual obligation on the paying party to comply with that decision within the stipulated' period. This obligation will usually preclude the paying party from making withholdings, deductions, set offs or cross-claims against that sum.
 2. For a withholding to be made against an adjudicator's decision, an effective notice to withhold payment must usually have been given prior to the adjudication notice being given, or possibly the decision being given, and which was ruled upon and made part of the subject-matter of that decision.
 3. However, where other contractual terms clearly have the effect of superseding, or provide for an entitlement to avoid or deduct from, a payment directed to be paid by an adjudicator's decision, those terms will prevail.
 4. Equally, where a paying party is given an entitlement to deduct from or cross-claim against the sum directed to be paid as a result of the same, or another, adjudication decision, the first decision will not be enforced or, alternatively, judgment will be stayed.
 5. Triangle is entitled to rely on clause 7.6.4.1 of the contract and the adjudicator's third decision to withhold payment of the sum directed to be paid under the adjudicator's first decision.
 6. Bovis' contention that the determination of its employment was invalid or a nullity is not sufficient, in the absence of an adjudicator's decision to that effect, or any sufficient evidence to sustain that contention, to entitle Bovis to defeat Triangle's reliance on clause 7.6.4.1 in these proceedings.
68. In the light of these decisions, there is nothing capable of determination under Part 24 and the Part 8 claim will be decided by the answers set out in paragraph 67.

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