

JUDGMENT : His Honour Judge David Wilcos : 26th June 2002. TCC.

1. The Claimant (LAT) is a sub-contractor under a GC/Works sub-contracts with amendments whereby it was to supply and fit brise soleil and louver panelling as the Defendants' subcontractor.
2. The sub-contract incorporated the conditions of the GC/Works Sub-Contracts with amendments.
3. The amended Clause 38(A) provided that
38.A.2.1 When either party requires a dispute or difference to be referred to adjudication then that party shall give notice of his intention to refer the dispute or difference to adjudication. Notice of intention shall include four particulars of the dispute or difference together with a sum many of the contentions on which he relies, a statement of the relief or remedy which is sought I and any material he wishes the Adjudicator to consider. Within seven days of the giving of such notice the party giving notice of intention shall refer the dispute or difference to the Adjudicator for his decision (the referral) and shall include with that referral a copy of the notice of intention. The referral shall be copied simultaneously to the other party.
4. On 25 March 2002 the Claimant gave notice of intention to refer a dispute to adjudication
 1. *The dispute is your failure to pay LAT's interim application number 2 dated 18 December 2001 ... in respect of which you gave notice by your letter of 23 January 2002 ... pursuant to section 110(2) of the Housing Grants Construction and Regeneration Act 1996... that you intended to pay £48,112.12 plus VAT of £8,401.95 a total of £56,413.07 to LAT on 22 February 2002.*
5. The Claimant in the notice recited that £4,753 only had been paid which sum was inclusive of VAT, and that the Respondent had relied on a Notice of Withholding Payment. The Claimant contended that the Notice was not a valid Withholding Notice within section 111 of the Housing Grants and Regeneration Act 1996.
6. Mr John Redmond was nominated to act as Adjudicator: his award dated 30 April 2002 was supported by brief reasons.
7. He identified the gist of the dispute referred as being whether or not the Withholding Notice, of the 23 January 2002, complied with the requirements of section 111 HGCRA. He concluded that it did not because whilst the Notice clearly particularised the amount proposed to be held (£43,965.46) it did not adequately specify the ground for withholding.
8. The award was that the Claimant was entitled to payment in the sum of £51,659 inclusive of VAT from the 22 February 2002, being the final date of payment under the sub-contract and to 67 days interest at the rate of 8 per cent per annum, together with costs of £3,617 and the Adjudicator's fee in the sum of £1,086.
9. The amended conditions of the GC/Works sub-contract as to adjudication included the following provisions:
38A.11 Neither party shall be precluded from raising any right of set-off, counterclaim or abatement in connection with the enforcement of an Adjudicator's decision.

The present claim

10. The Claimant claims summary judgment for the amount of the award inclusive of costs of VAT and fees.
11. The claim, however, is not under Part 24, it is under Part 8.
12. The Claimant accepts that this procedure is inappropriate in the instant case not least because of the different criteria applicable under Part 8 and Part 24.
13. It was accepted by Mr Nicholas Collings on behalf of the Defendants that were the Court to treat the application as being under Part 24 the Defendant would not suffer any prejudice.
14. Subject to an undertaking by the Claimants to file a Part 24 application with the appropriate fee paid within seven days, I have given permission to treat this hearing as a Part 24 application, so that the real dispute at this stage between the parties may be considered in accordance with the principles set out in Part 1 of CPR, particularly bearing in mind proportionality and costs.

15. Mr Collings submits that summary judgment should not be given because the Defendant has substantive defences against the claim which not only have a real prospect of succeeding but which are likely to succeed.
16. The Defendants' primary case is that prior to the adjudication it had determined the sub-contract between the parties in accordance with Clause 29.
17. That so far as is material provides:
- 29.1 *Without prejudice to any other power of determination the contractor may determine the sub-contract by Notice to the sub-contractor if*
1. *Any ground mentioned in Clauses 29.6.1, 29.6.2 or 29.6.6 has arisen; the contractor has given Notice to the sub-contractor specifying the relevant ground and facts; and such ground was in existence 10 days after such Notice was given; or has arisen again at any subsequent time; or*
 2. *Any ground mentioned in Clause 29.6 has arisen, other than those mentioned in Clause 29.6.1, 29.6.2 or 29.6.6.*
- 29.2 *The contractor shall specify in a Notice of Determination under Clause 29.1 which of the grounds mentioned in Clause 29.6 apply.*
- 29.6 *The grounds referred to in Clause 29.1 are:*
- 29.6.1 *The failure of the Sub-Contractor to comply with a direction from the contractor within a reasonable period of his issue;*
2. *The failure of the Sub-Contractor to execute work in a workmanlike or proper manner, or to proceed regularly and diligently with the Sub-Contract Works, or the suspension by the Sub-Contractor of the Sub-Contract works (otherwise and in accordance with Clause 24), so that in the opinion of the Contractor the Sub-Contractor has not completed or be unable to secure the completion of the Sub-Contract Works or any part thereof to which a specific period for completion applies by the expiry of the period or periods for completion of the same.*
 3. *[Insolvency etc.]*
 4. *[Winding-up etc.]*
- 29.8 *If the Contractor shall determine the sub contract for any reason mentioned in Clause 29.6 the following provisions shall apply:*
1. *All sums of money that may then be due or accruing due from the Contractor to the Sub-Contractor shall cease to be due, or accrue to be due.*
- 29.9 *Until after the completion of the Sub-Contract Works and the making good of defects referred to in Clause 14.3 the Contractor shall not be bound by any provisions of the Sub-Contract to make any further payments to the Sub-Contractor.*
18. The Defendant sent a letter to the Claimant dated the 4 March 2002 giving notice that it required the Claimant to recommence work, and on the 22 March 2002 sent a further letter which said:
- Further to our letter of 4 March 2002 you are continuing to suspend the carrying out of the subcontract works.
- We therefore determine the contract between us in accordance with the contract terms.
- Any loss and expense incurred by us completing your works will be set-off against any sums due to you.
19. These letters Mr Collings submits comply with the requirements of Clause 29 and the consequences provided for in Clause 29.8.1 follow namely that:
- All sums of money that may be due or accruing due from the contractor to the sub-contractor shall cease to be due or accrue due.
20. Clause 29.10 provides that:
- Upon completion of the sub-contract works the making good of defects as referred to in Clause 14.3 the sub-contractor may apply to the contractor and the contractor shall pay to the sub contractor in accordance with the procedure set out in Clause 21 the value of any*

1. Work carried out in accordance with the sub-contract up to the date of determination.
2. Work carried out or other things done in accordance with any direction given by the Contractor under Clause 29.3; and
3. Things for incorporation brought onto the Site were in the cause of preparation or manufacture of the Site, which the Contractor elects to keep (whose value shall be ascertained on a fair and reasonable basis);

To the extent their value has not been included in previous interim payment. The Contractor in discharging its obligation to pay the Sub-Contractor may deduct therefore without prejudice to any other rights of the Contractor and subject to Clause 21.2.3 the amount of any direct loss and or damage caused to the Contractor by the determination; or, to the extent that such deduction does not account the full amount of any such recovery, loss, damage and/or loss and/ or damage, may recover the difference between the amount deducted and the foresaid full amount as a debt from the Sub-Contractor.

21. It is submitted by the Defendant that Clauses 29.9 and 29.10 provide that the Defendant will not be bound to make any further payment to the Claimant until after the works and making good of the defects have taken place and the payment application procedure referred to at 29.10 has been complied with. In short these provisions may be said to provide a complete code for the rights and liabilities of the parties upon determination of the sub-contract.
22. The dispute referred to the adjudication did not expressly include issues as to the purported determination of the contract.
23. Mr Collings submits that the sums adjudged due to the Claimant by the Adjudicator are not now payable because of the provisions of Clause 29 and he relies upon a passage in the judgment of HHJ Lloyd QC in **KNS Industrial Services (Birmingham) Limited Claimant and Sindall Limited Defendant** PCC 17 July 2000 at paragraph 28:

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 the party not to pay then the amount required to be paid by the decision does not have to be paid.
24. Mr Brannigan for the Claimants submits that the Adjudicator's decision, which the Defendant accepts that it is bound by, is that the Claimant was correct in its contention that it was owed monies at the time work was suspended. The Claimant was therefore entitled to suspend the works pursuant to section 112(1) of the Housing Grants, Construction and Regeneration Act 1996 which states:

Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made (the party in default).
25. The necessary implication of the award which was a competent award within the Adjudicator's jurisdiction and arose out of the terms of the reference is that the Claimant was entitled to suspend the works and that the purported determination based on wrongful suspension has no contractual effect.
26. In my judgment Mr Brannigan's submission is correct.
27. In any event the references under Clause 28.8.1 to monies "*that may be due or accruing due from the Contractor or to the Sub-Contractor shall cease to be due or accrue due ...*" do not include monies due under an Arbitrator's award within his jurisdiction which is not impeached.
28. The money in question here is not due accruing due in the sense contemplated by that Clause: it is by way of compliance with the Adjudicator's decision. It is to be noted that the parties contractually under Clause 38A7 have accepted Adjudication as binding until the dispute is determined by arbitration or agreement.
29. I reject Mr Collings' primary case based upon the effects of the contractual determination provisions of the contract that there is a defence to this claim to enforce the Arbitrator's award.

30. Mr Collings' alternative case is that the Defendant is entitled to raise a set-off and counterclaim against the award, the form and quantum is set out in the witness statement of Mr McCloy it includes the amount withheld (inclusive of VAT) of £51,659 and claims a further £58,880 representing the costs of completion.
31. Credit is given for amounts already paid and the contract value. The net claim exclusive of VAT amounts to £58,841.
32. The bulk of the net claim is close to the amount withheld under the withholding notice adjudged invalid by the Adjudicator.
33. To accede to Mr Collings' alternative submission would be to subvert the provisions of section 111 HGCRA which provides
A party to a construction contract may not withhold payment for sum due under the contract unless he has given an effective notice of intention to withhold payment.
34. It would be to ignore the Adjudicator's competent decision.
35. As to £51,659 there was no valid withholding notice. As to £58,880 there was no notice of any kind.
36. Mr Collings submits that a right of set-off against the Adjudicator's award arises by virtue of Clause 38.12.
In neither party may be precluded from raising any right of set-off, counterclaim or abatement in connection with the enforcement of an Adjudicator's decision.
37. That provision of course must be construed in the light of the HGCRA, and any other Clauses of the contract.
38. The effect of Mr Collings' submission is that by reason of Clause 38.12 and the set-off and counterclaim, the Defendant is not bound to comply with the Adjudicator's award.
39. That cannot be so because under Clause 38A7 the parties accepted that the award was to be binding until determined by Arbitration or agreement. The award expressly recorded that the withholding notice as to £51,659 was ineffective. The further sum of £58,880 was not the subject of any withholding notice.
40. In any event the provisions of section 111(1) the are clear:
*A party to a construction contract **may not withhold payment** after the final date of payment of the sum due under the contract unless he has given effective notice of an intention to withhold payment* (my emphasis).
41. A party has no right to set-off claims not dealt with by the Adjudicator as a defence to the enforcement of the Adjudicator's decision. See **VHE Construction plc v RBSTB Trust Company Limited** [2000] BLR p 187 judgment of HHJ Hicks QC at pages 199 and 196; **Northern Developments (Cumbria) Limited v J&J Nicol** [2000] BLR judgment of HHJ Bowsler QC pages 158 and 164; **Solland International Limited v Darayden Holdings Limited** TCC judgment of HHJ Seymour QC, 15 February 02.
42. The Clause (supra) clearly recognises the right to set-off a claim against the enforcement of an Adjudicator's award, when that claim is compliant with section 111 as to the requirements through withholding notice and this was dealt with by the Adjudicator . It does not create a fresh right of set-off.
43. I reject the Defendant's alternative case. There is no basis under Part 24 for not enforcing the Adjudicator's unimpeached award.

Sean Brannigan appeared for LAT, instructed by Davies and Partners.

Nicholas Collings appeared for Ferson, instructed by McCloy & Co.