

CA : B e f o r e : Lord Justice Pill, Lord Justice Jonathan Parker on appeal from the judgment of HHJ David Wilcox, TCC : 8<sup>th</sup> August 2002.

1. **LORD JUSTICE PILL:** Lord Justice Jonathan Parker will give the first judgment.
2. **LORD JUSTICE JONATHAN PARKER:** This is an application by Ferson Contractors Ltd, the defendant in the action, for permission to appeal against an order made by His Honour Judge David Wilcox QC in the Technology and Construction Court on 26 June 2002, whereby he entered summary judgment under Part 24 of the Civil Procedure Rules in favour of the claimant in the action, Levolux AT Limited, in the sum of £57,834.16. Permission to appeal was refused by Latham LJ on the papers on 18 July 2002.
3. The background to the application is briefly as follows. The applicant carries on the business of supplying and fixing wall claddings. In the course of its business it secured a contract for cladding work from a contractor, Pearce Construction Limited, on a project known as "Airbus", at Golf Course Lane, Filton, Bristol. Under this contract, the applicant was required to install not only roof cladding but associated louvre panelling and solar shading and glazing. The applicant sub-let this latter work to the claimant, which is a specialist in the field. The subcontract made between the applicant and claimant ("the contract") adopts the standard form GC/Works/Subcontract with a number of amendments as required by Pearce Construction. The contractor defines the applicant as "the Contractor" and the claimant as "the Sub-Contractor".
4. Clause 21.1 of the contract provides for interim payments to be made to the sub-contractor at intervals not exceeding one month, unless otherwise agreed. Clause 21.1.3 provides that the final date for payment of an interim payment is not later than 30 days after the date when the payment became due. Clause 21.2.3 entitles the contractor on giving written notice to the sub-contractor to withhold a specified part of an interim payment. The relevant part of clause 21.2.3 reads as follows:  

"Not later than 7 days before the final date for payment of any interim payment...the Contractor may give a written notice to the Sub-Contractor which shall specify any amount proposed to be withheld from the net amount notified under Clause 21.2.2, the ground or the grounds for such withholding and the amount of the withholding attributable to each ground..."
5. Clause 24 of the contract entitles the sub-contractor to suspend performance of his obligations where a sum due to him under the contract has not been paid in full by the final date of the payment, and no effective notice to withhold the payment has been given. The relevant parts of clause 24, as amended, which includes an additional subclause, clause 24.4, which was added by amendment, read as follows:  

*"24.1 Where a sum due under the Sub-Contract (as determined by agreement between the Parties, invoicing, adjudication, arbitration or litigation) is not paid in full by the final date for payment and no effective notice to withhold payment has been given under Clause 21.2.3, 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 Sub-Contract to the party by whom payment ought to have been made ('the Party in default').*

*24.1.1. The right may not be exercised without first giving to the Party in default at least 7 Days notice in accordance with clause 24.4 of intention to suspend performance.*

....

*24.4.1 Any written notice of intention to suspend pursuant to clause 21.6.1...."*

*which seems to be an error for 24.4.1 as that clause deals with mobilisation payments:*

*"...shall specify:*

  - 1. the name of the Project and the Contractor's Sub-Contract Order number;*
  - 2. the ground or grounds upon which the Sub-Contractor intends to suspend performance;*
  - 3. the amount alleged to be due but not paid in full; and*
  - 4. the date upon which it is intended to suspend performance*

*and shall be given to the Contractor by sending the same to the Managing Director at the office address shown on the Contractor's Sub-Contract Order and copied at the same time to the Project Manager at the site of the Sub-Contract Works by registered or recorded post."*

6. Clause 29 of the contract gives the contractor the right to determine the contract. Clause 29.1 provides, so far as material:

*"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."*

*7.29.6.2 reads, so far as material:*

*"...the suspension by the Sub-Contractor of the Sub-Contract Works (otherwise than in accordance with Clause 24), so that in the opinion of the Contractor the Sub-Contractor has not completed or will 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."*

*8. So far as material, clause 29.8 provides:*

*"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 to accrue due."*

9. Clause 38 of the contract provides for either party to refer a dispute to adjudication. I need not refer to any further terms of the contract.

10. On 18 December 2001 the claimant submitted an application for an interim payment (interim application no 2) in the sum of £45,625. On 23 December 2001 the applicant issued valuation no 2, giving details of the payment which it proposed covering the period up to week ending 7 January 2002. The amount of the proposed payment was £48,011.12. The valuation stated that the sum was payable on 22 February 2002. At the same time the applicant issued a notice of intention to withhold pursuant to clause 21.2.3 of the contract, stating its intention to withhold £43,965.46, leaving a balance of £4,045.66, excluding VAT, payable on the stated date of 22 February 2002.

11. On 30 January 2002 Mr Peacock, the claimant's senior quantity surveyor, wrote to the applicant as follows, so far as material:

*"We are in receipt of your letter of 23rd January 2002 notifying us of payment due in respect of our valuation No 2 for works complete up to and including 20/12/01.*

*We do not recognise the valuation or payment dates stated as relevant to this payment. The works in question were completed prior to 20/11/01 and payment is due within 30 days of the Month End (ie by 30/12/02). These are the terms contained within our estimate, which are not refuted by the terms of your order.*

*As a consequence, unless payment is received in full of all monies currently notified due by 31/01/02, in the event that non-payment persists for a further 7 days, we shall have no option to suspend our works and obtain payment by alternative means if necessary.*

*As you are aware, the areas necessary to enable us to proceed with our works at site, are not available, and as a consequence we are currently off site. In the absence of receipt of the payment previously mentioned, we shall be unable to return to complete our works.*

*We are also in receipt of a letter dated 32/1/02 but unsigned which is headed 'Notice of with-holding payment'. We can only presume that this is directed at ourselves as a contra-charge regarding monies withheld from your account by your client. The notice does not enclose a narrative explaining the basis upon which you perceive all or part of these charges to be our responsibility.*

*....*

*We wholeheartedly refute any suggestion that we have been the cause of a delay on this contract. On the contrary our works have been constantly delayed by yourselves and the poor performance of other direct and indirect trades, and we reserve the right to submit our costs as a result of the delay and prolongation experienced.*

*We conclude by confirming that unless we receive payment in full of our legitimate entitlements by 31/01/02 we shall have no option but to suspend our works at the end of the statutory period. we shall have no hesitation in placing our argument, if necessary, in front of the appropriate legal authority. Please therefore, clarify by return, your specific intentions with regard to the payment, which is due by return."*

12. According to a witness statement of Mr Anthony Benson, a director of the applicant, the claimant suspended work on the site (that is to say, suspended performance of its obligations under the contract) on 13 February 2002. On 22 February 2002 the applicant paid the claimant £4,045.66 plus £707.99 VAT, a total of £4,753.65. This left outstanding a total sum of £51,659.42, including VAT.
13. On 4 March 2002 the applicant wrote to the claimant requiring it to resume work. On 12 March 2002 the applicant wrote again to the claimant purporting to determine the contract pursuant to clauses 29.1.1 and 9 29.6.2, to which I have referred.
14. On 25 March 2002 the claimant notified the applicant that it intended to refer the dispute to adjudication in accordance with clause 38 of the contract. In due course Mr John Redmond of Messrs Osborne Clarke, solicitors, was appoint adjudicator. On 30 April 2002 the adjudicator handed down his decision. He decided that the notice withholding payment was defective in that it failed to specify the ground upon which the sum in question was withheld. Accordingly he held that it did not comply with the provisions of section 111 of the Housing Grants Construction and Regeneration Act 1996 ("the 1996 Act") and in consequence was ineffective. He further decided that the final date for payment of the sum of £51,659.42 was 22 February 2002 as had been asserted by the applicant. He ordered the applicant to pay the claimant 67 days' interest, which would cover the period from 23 January 2002 to date, amounting to £758.62 as at date of decision, plus legal costs of £3,617. The total sum payable by the applicant to the claimant was, therefore, £56,035.04. He gave the applicant 7 days to pay.
15. The applicant refused to pay relying among other things, on clause 29.8.1 of the contract and contending that it had validly determined the contract under clause 29.6 and that, on such determination, all sums of money which were due and owing from the applicant to the claimant, including the sum in dispute which remained outstanding, ceased to be due. The applicant also asserted a right of set-off in the sum of £58,880.
16. On 17 May 2002 the claimant commenced the present proceedings under Part 8 of the Civil Procedure Rules. By its claim form, the claimant claims payment of sums which the adjudicator ordered the applicant to pay with accruing interest. Before the judge it was agreed that the proceedings should be treated as a summary judgment application by the claimant under Part 24 of the Civil Procedure Rules.
17. Before the judge, Mr Nicholas Collings, for the applicant, contended that the applicant had validly determined the contract. He submitted that, even if any sums had been due to the claimant, as determined by the adjudicator, such sums were no longer payable. In support of this submission he relied on the decision of His Honour Judge Humphrey Lloyd QC in KNS Industrial Services (Birmingham) Ltd v Sindall Ltd (17 July 2000, unreported). In paragraph 28 of his judgment, Judge Humphrey Lloyd QC said:  
*"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 a party not to pay then the amount required to be paid by the decision does not have to be paid."*
18. For the claimant, Mr Sean Brannigan submitted to the judge that, on its true construction, clause 29.8 of the contract does not apply to sums due under an adjudicator's decision. In any event, he submitted, the claimant was entitled to suspend performance of its obligations pursuant to section 112(1) of the 1996 Act. That section provides:  
*"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 t the party by whom payment ought to have been made ('the party in default')."*

19. The judge accepted that submission. He added that the claimant was entitled to suspend the works under section 112(1) of the 1996 Act. In paragraph 25 of his judgment the judge said:  
*"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."*
20. The judge further concluded that, in any event, references in clause 28.8.1 of the contract to monies "*due or accruing due from the contractor*" do not include monies due under an Adjudicator's award where the Adjudicator's jurisdiction is not impeached. Accordingly, he rejected the applicant's primary case. He also rejected the applicant's alternative defence based on set-off, but since his decision on that issue is not sought to be challenged on appeal, I need not consider it further.
21. In support of the application to this court for permission to appeal, Mr Collings submits, once again, that the applicant was entitled to determine the contract. The focus of his submission is, however, somewhat different from the corresponding submission which he made to the judge; or at least the emphasis is somewhat different. He submits that the claimant's suspension of its obligations was not in accordance with clause 24 of the contract in that (a) the suspension began on 13 February 2002 (that is some 9 days before the final date for payment as found by the adjudicator - 22 February 2002); and (b) that the notice given by the applicant (being letter from Mr Peacock dated 30 January 2002 from which I have quoted) was defective in that it specified a date for final payment, 31 January 2002, which was some 22 days too early. These were not matters which were addressed, in terms, by the judge in the course of his judgment.
22. Mr Collings further submits that the judge was wrong to conclude, in paragraph 25 of his judgment, that it was a necessary implication of the award that the claimant was entitled to suspend the works, and that the purported determination by the applicant had no contractual effect. Mr Collings accepts, as he is bound to do, that, pursuant to the adjudicator's decision, the sum in question was payable, albeit on 22 February 2002 and not on 31 January 2002, but he submits that that does not answer the question whether the claimant's determination of the contract was in accordance with the terms of the contract which raises the issue of whether the suspension of performance was a proper suspension under the terms of clause 24 of the contract. Mr Collings further submits that the approach of Judge Humphrey Lloyd QC in the KNS case was wrong in this respect.
23. In my judgment, these submissions, which are reflected in the applicant's grounds of appeal raise arguable issues. It follows that, in my judgment, it is arguable that summary judgment ought to not to have been given in favour of the claimant. Accordingly, I would grant permission to appeal.
24. **LORD JUSTICE PILL:** I agree. Accordingly, permission to appeal is granted.

Order: Permission to appeal granted. Time estimated 4 hours.

MR NICHOLAS COLLINGS (Instructed by Messrs McCloy & Co, Wiltshire, BA15 1JS) appeared on behalf of the Applicant.

The Respondent did not attend and was not represented.