JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR Q.C. 17th January 2002. TCC.

1. In this action the Claimant, Shimizu Europe Ltd. ("Shimizu"), seeks against the Defendant, Automajor Ltd. ("Automajor"), enforcement of the award ("the Award") of Mr Stephen Haller dated 5 November 2001 that Automajor should pay to Shimizu a sum of £321,300.99. Mr. Haller made that award in the capacity of an adjudicator appointed under the terms of the Technology and Construction Solicitors Association Adjudication Rules – 1999 Version 1.3 ("the TeCSA Rules"). By the Award Automajor was required to make payment of the sum which I have mentioned within seven days of the date of it, that is to say, by 12 November 2001. Automajor in fact made payment of a sum of £146,231.89 on 14 November 2001. There are claims in this action for the outstanding balance of £175,069.10, for interest on the whole sum of £321,300.99 for the period of three days between 12 and 14 November 2001 inclusive, and for interest on the sum of £175,069.10 from 15 November 2001 until judgment.

2. By an undated agreement ("the Contract") in the Standard Form of Building Contract With Contractor's Design, 1998 edition, issued by The Joint Contracts Tribunal Ltd. and made between Automajor as employer and Shimizu as contractor Shimizu agreed to undertake for Automajor the design and construction of approximately 3140 square metres of business workspace on three storeys at a site at 111-115, Salusbury Road, London NW6. The agreement incorporated the TeCSA Rules.

3. The TeCSA Rules incorporated the following provisions which are presently material:-

" 3 (i) These Rules shall apply upon any Party giving written notice to any other Party requiring adjudication, and identifying in general terms the dispute in respect of which adjudication is required....

11. The scope of the Adjudication shall be the matters identified in the notice requiring adjudication, together with

(i) any further matters which all Parties agree should be within the scope of the Adjudication, and

(ii) any further matters which the Adjudicator determines must be included in order that the Adjudication may be effective and/or meaningful.

12. The Adjudicator may rule upon his own substantive jurisdiction, and as to the scope of the Adjudication.

14. Decisions of the Adjudicator shall be 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.

28. Every decision of the Adjudicator shall be implemented without delay. The Parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or is not to be the subject of any challenge or review. No party shall be entitled to raise any right of set-off, counterclaim or abatement in connection with any enforcement proceedings."

4. By a document ("the Notice") entitled "Referring Party's Notice Requiring Adjudication" dated 19 September 2001 sent on its behalf by its solicitors, Messrs. Hammond Suddards Edge ("HSE"), to Mr. Peter Rees, the Chairman of Technology and Construction Solicitors Association, under cover of a letter also dated 19 September 2001, Shimizu sought adjudication in relation to various matters of alleged dispute with Automajor under the Contract. At section 5 of the Notice was set out a "Summary of Dispute". That included the following:-

"5.1 Pursuant to TeCSA Rule 3, SEL [that is, Shimizu] give the following general particulars of the dispute. The dispute that has arisen between the Parties is in relation to:

5.1.1 monies payable under the Contract in respect of which SEL asserts that no or no valid notice of payment and/or set off/withholding has been given;

5.1.2 alternatively sums due under the contract;

5.1.3 entitlements to time

5.1.4 the existence, status and terms of "the agreement";

5.1.5 release of retention....

5.4 SEL seeks redress in the form of:-

5.4.1 an award for the payment of monies due including interest/financing charges.

5.4.2 a declaration and/or award of SEL's entitlement to time under the Contract

5.4.3 a declaration in respect of "the Agreement".

5.4.4 Further SEL seeks an order that Automajor do pay the adjudicator's costs of this matter."

5. One of the elements in the claims referred by Shimizu to adjudication was a claim for a sum of £153,530.28 in respect of alleged variations to the works the subject of the Contract. The detailed breakdown of that sum is not presently material, but it included both additions and omissions. The item within the claim in respect of alleged variations which is important for the purposes of this judgment related to smoke ventilation works. Shimizu claimed a total of £161,996.89 in respect of alleged variations to those works. Automajor did not accept that there had been any variation in relation to smoke ventilation works. Its position was that smoke ventilation works were within the scope of the works which Shimizu had undertaken under the Contract, albeit that the works undertaken were considerably more extensive and expensive than Shimizu had allowed for in its tender because of the need to comply with statutory requirements. Automajor had, prior to the making of the reference to adjudication, paid a sum of £50,000 on a without prejudice basis towards the alleged value of the alleged variations in relation to smoke ventilation works.

6. In the adjudication before Mr. Haller Automajor sought to raise a counterclaim in respect, amongst other things, of the £50,000 paid without prejudice on account of the alleged cost of the alleged variations to the smoke ventilation works. Mr. Haller ruled that he had no jurisdiction to entertain any counterclaim. He also ruled that the alleged variations to the smoke ventilation works in respect of which Shimizu sought to claim payment of an additional sum of £161,996.89 were not variations.

7. The Award included the following:-

"2.6.12 As regards the interim application dated 24 August 2001 (and after some argument):

2.6.12.1 The Referring Party stated that it withdrew its claim at paragraph 5.1.1 of Notice of Adjudication and no longer relied on strict compliance with clause 30.3.5 of the Contract but did rely on paragraph 5.1.2 of Notice of Adjudication .

2.6.12.2 Both parties made clear that they wanted me to deal with the merits of the application for payment notwithstanding the arguments which had been put to me.

2.6.12.3 Both parties confirmed that there were only 2 items in the list of variations in File 2 divider 16 of the Notice of Adjudication which were not agreed but the parties accepted that they could not be challenged in this adjudication given my decision on the question of the Counterclaim.

2.6.12.4 Given that the money claims relate to an interim application and the final account and other matters under the Contract remain live between the parties, the parties requested me, without necessarily giving detailed reasons, to give some indication of how I arrive at any sums which I might award so as to enable the parties to have regard to such matters in their subsequent dealings with the Contract.

2.7 The matters recorded in paragraph 2.6 above are not presented as reasons for my decision. They are recited because they indicate concessions or agreements made by the parties which effectively altered the matters referred to me for decision."

8. At paragraph 4.2.2 of the Award Mr. Haller indicated that:- *"I have taken the full value of variations but then reduced that by £10,000 to allow for the omission (accepted by both parties) of floor finishes and notified to me by emails from the parties dated 1 November 2001."*

   He went on to award Shimizu a sum of £321,300.99. The breakdown of that sum was set out at paragraph 4.2.6 of the Award. It included an element of £143,530.28, being the sum of £153,530.28 claimed by Shimizu in respect of alleged variations less the sum of £10,000 identified by Mr. Haller in paragraph 4.2.2 of the Award. It thus included as an element in the calculation an amount of £161,996.89 in respect of the alleged variations to smoke ventilation works which Mr. Haller had held were not variations, and made no allowance for the without prejudice payment on account in connection with the alleged variations of £50,000.

9. At paragraph 4.2.3 of the Award Mr. Haller explained that:- *"In relation to the measured works claim at File 2 divider 13 of the Notice of Adjudication, this sum is carried forward into the list of variations in File 2 divider 16 of the Notice of Adjudication. In view of paragraph 2.6.12.3, no adjustment has been made but it is part of my decision that my monetary award, which relates to an interim application, should not prevent the parties from adjusting the Final Account (to the extent permitted by the Contract) to reflect other matters that I have decided."*

10. It appears that Mr. Haller consciously included in his calculation of the sum to be awarded to Shimizu an amount in respect of the alleged variations to smoke ventilation works, notwithstanding that he did not consider there had been any variation in those works, in the expectation that appropriate adjustments could be made in the calculation of the sum, if any, due to Shimizu under the Final Account.

11. Following receipt of the Award the solicitors acting on behalf of Automajor, Messrs. S.J. Berwin ("Berwins") wrote to Mr. Haller a letter dated 6 November 2001 which was, so far as is presently material, in the following terms:-

"We write to acknowledge receipt of your Adjudication Decision dated 5 November 2001. Having considered the Decision carefully, however, we wish to advise that we consider the Decision contains an error which goes to your jurisdiction.

In clause 4.1.5.1 of your Decision you state that the atrium roof glazing/fire strategy (including smoke extract) was within the Referring Party's original scope of work and was not a variation. You further state that the Referring Party is not entitled to an extension of time for the item but that in any event, the delay on this item was concurrent with the delays relating to the rear doors and incoming power.

In paragraphs 4.2.2 and 4.2.3 of your Decision you state that you have allowed full value of the variations and note that the measured works claim at file 2, divider 13 is included in the list of variations to which you have made no adjustment because of what you say in paragraph 2.6.12.3 of your Decision.

You have awarded the Referring Party £143,530.28 in respect of variations which is the figure in the "Amount Complete" column in the Summary of Variations included in divider 16 of the Referring Party's documents (less the agreed £10,000 deduction for floor finishes). However, this decision is, we regret, erroneous because it fails to take account of one of the payments already made – the figure of £26,533.41 in the "Approved Amount" column. The Referring Party's claim for unpaid variations was £126,996.87 which is the difference between the Amount Complete and the Approved Amount column. In other words, the Referring Party was seeking payment of the difference between what they had claimed and what they had actually received from the Responding Party. The column on the left-hand side headed "Submitted Amount" is misleading because it contains claims for variations which have subsequently been cancelled and do not form any part of the Referring Party's claim. In awarding the Referring Party £143,530.28 in respect of variations, you have awarded them more than the Referring Party considers they are entitled, without actually allowing the Referring Party any more variations. Secondly, and equally fundamentally, paragraph 2.6.12.3 is incorrect. The Responding Party accepted on the final day of the hearing that as a result of your decision on the Counterclaim you had no jurisdiction to deal with the claim for repayment of £50,000 paid on account of the smoke ventilation costs (without admitting any liability) and the claim for an increased deduction in respect of the inter-tenancy walls. However, the Responding Party did not accept that the sum claimed for the smoke ventilation costs of £161,996.89 could not be challenged.

As a result of this, an error has arisen in your Decision as under para 4.1.5.1 you have stated that the smoke ventilation costs are not a variation yet in para 2.6.12.3 and paras 4.2.2 and 4.2.3 you have allowed the Referring Party costs of that work as a variation. You appear to have taken this decision on the understanding that both parties have accepted that the claim for smoke ventilation costs and the deletion of inter-tenancy walls could not be challenged in the adjudication. As we have said, that acceptance related only to the Counterclaim elements of those two items. Neither party addressed you on the final day with regards to Summary of Variations as the only two items that were outstanding on the Summary of Variations and had not been included in accounting between the parties were the smoke ventilation costs and the deletion of the inter-tenancy walls. Both parties had addressed you at length on the smoke extract costs as a measured work item.

We are sorry that an error has occurred after all your patient work during the course of the adjudication but the effect of it is to award the Referring Party the costs of an item as a variation having decided that the item was not a variation. On behalf of Automajor we did not accept that smoke ventilation costs should not be challenged during the Adjudication, merely that the Counterclaim element in relation to them could not be raised. The correct figure in paragraph 4.2.6 for the sum claimed under paragraph 4.2.3 should be nil. The Responding Party, of course, claims that it is entitled to repayment of the £50,000 paid on account of the smoke extract and the proper allowance for deletion of the inter-tenancy walls but these items did not form part of this adjudication as they were included in the Respondent's Counterclaim.

We calculate the award in favour of the Referring Party should be no more than £129,917.37 together with VAT of £22,735.54, making a total of £152,652.91.

We invite you by this letter (and the Referring Party by copy of this letter) to amend your Decision so that the sum awarded pursuant to paragraph 4.2.3 is nil. We consider that you have power to do so pursuant to the slip rule as explained in ***Bloor Construction v. Bowmer & Kirkland (London) Limited*** *"*

12. Mr. Haller replied to the letter dated 6 November 2001 written by Berwins in a letter dated 7 November 2001. In that letter he explained that he considered that he had taken into account in his calculations of the sum due to Shimizu the sum already paid in respect of variations. He then went on to deal with what he called his alleged error relating to smoke ventilation costs as follows:-

"I am fully conscious that my decision at paragraph 4.1.5 holds that the relevant work was not a variation. I am also fully conscious that the figures (as paragraphs 4.2.2 and 4.2.3 of my decision make clear) include the value of the items which I decided were not variations. In this respect, I have the following comments:

2.1 You say on the second page of your letter that, on the final day, neither party addressed me with regard to the Summary of Variations, but that is not correct. It was expressly addressed. I was told that there were two items marked "to be agreed" (and which were still not agreed) but that there was no dispute or issue on the balance of that list.

2.2 I then specifically anticipated the very matter about which you complain by asking, in relation to the smoke ventilation costs, what was to happen if I were to find against the Referring Party in principle. I further specifically asked whether, in such circumstances, I would need to omit the relevant sum in respect of this work. In this context, I reminded the parties that I had ruled that the counterclaim was not within my jurisdiction and indicated my concern, if not in so many words, that this might be a back-door method of circumventing my decision on the counterclaim. My notes then clearly record that it was "agreed not", i.e. agreed that I should not make such an adjustment. My notes also clearly record my statement that this was not a dispute on the final account and that I thought the issue would be capable of adjustment in the final account, which I believed the parties accepted.

2.3 At the conclusion of the discussion, I wrapped up (in part as a question to the parties) by stating that, if I were to award anything in respect of the variations, it would effectively have to be on the basis that the "list stands as drawn" (again I quote from my notes). There was no challenge to or dissent from that. I believe, therefore, that paragraph 2.6.12.3 of my decision is a correct record of where the parties agreed this issue should rest for the purposes of this adjudication.

2.4 I was at all times conscious of the oddity produced by deciding that these matters were not a variation and at the same time not adjusting the account to reflect this but that arose in the circumstances described above. It was for that very reason, in paragraph 4.2.3 of my decision, that I made it clear that my monetary decision related only to the interim application and that nothing in my decision should prevent the parties from adjusting the final account to reflect the other matters which I had decided, which would naturally include the decision that these matters were not variations. However, in the light of what I have said, I believe that both parties agreed that I should not adjust the variations account in this adjudication but I was comfortable in the knowledge that my decision on this would not leave the Referring Party without a remedy for the oddity, as I expressly made clear.

2.5 It seems to me that the real issue you raise is whether what I record at paragraph 2.6.12.3 is correct. My recollection and notes are clear, as I described above. If, despite my recollection and understanding, both parties in fact intended me to deal with the particular issue as it arose at the hearing differently, and there was a common understanding between the parties as to that intention, then it seems to me that the parties would be at liberty to ask me to amend my decision to reflect this. However, that would require me to be vested with ad hoc jurisdiction to deal with the issue in that way. It would also require the parties to make clear precisely what was the true and common intention on this issue in terms of what both parties were agreeing and expecting me to do. In the absence of that, however, I do not see that I can take the matter any further.

For the reasons explained above, I do not accept or believe that there has been any slip or error in my decision on either of the points raised. My decision reflects precisely what I intended to decide, having regard to the matters referred to in paragraphs 2.5 and 2.6 of my decision and specifically paragraph 2.6.12.3 which is a summary of the points mentioned above. "

13. There were put in evidence at the hearing before me the witness statements of Ian Insley, a partner in Berwins, dated 12 December 2001, Jane Hudson, a solicitor in the construction group at Berwins, dated 11 December 2001, and Philip Ward, a director of Peram Design Group Ltd., which acted as project manager for Automajor in relation to the works the subject of the Contract, dated 11 December 2001. Each of those people had been present at a hearing before Mr. Haller on 31 October 2001, which was the final day of a series of hearings before him. The effect of the evidence of each was that Mr. Haller had misunderstood the position of Automajor in relation to the sum to be included in any award in favour of Shimizu in respect of variations to smoke ventilation works. All that Mr. Insley, who presented Automajor's case before Mr. Haller, agreed to was that Automajor was not entitled to a credit for the £50,000 paid on account, because to allow such a credit would be to give effect to the counterclaim of Automajor. No evidence was put before me on behalf of Shimizu which was directed specifically to the question of what had actually been said on behalf of Automajor to Mr. Haller on 31 October 2001 about what account should be taken of the sum claimed by Shimuzu in respect of the alleged variations to smoke ventilation works.

14. As I have already recorded, of the sum awarded by Mr. Haller Automajor has paid an amount of £146,231.89. Although Miss Delia Dumaresq, who appeared on behalf of Automajor, accepted that the sum had been wrongly calculated, it appears that that sum was intended to represent an amount of £321,300.99 less £111,996.89, being £161,996.89 less £50,000, plus Value Added Tax at 17.5%. Arithmetically the correct result of such a calculation would be £189,704.65.

15. The claim form in this action was issued under CPR Part 8. The first issue raised on behalf of Automajor by Miss Dumaresq was the question whether it was appropriate to proceed under CPR Part 8 in a case in which it appeared that there was, or might be, a dispute of fact as to what had or had not been said to Mr. Haller at the hearing before him on 31 October 2001. Miss Dumaresq urged me either to dismiss the claim as being inappropriate in form, or to direct that it proceed as if commenced under CPR Part 7 and give consequential directions for the resolution of the factual questions which arose at a trial.

16. Mr. Adam Constable, who appeared on behalf of Shimizu, submitted that it was not necessary for me to give any directions concerning the resolution of factual disputes because no factual issue needed to be resolved in order to reach the conclusion that Shimizu was entitled to judgment for the balance unpaid of the amount of the Award. He submitted that, if Mr. Haller had made a mistake as to the position adopted on behalf of Automajor in relation to the account which should be taken by Mr. Haller of the amount claimed by Shimizu in respect of variations to smoke ventilation works, the effect of that was only that his decision in the Award was wrong, not that it was made without jurisdiction. If the sum determined in the Award as payable to Shimizu by Automajor was ascertained in the course of reaching a conclusion as to a matter referred to him for his decision by the Notice, it did not matter, submitted Mr. Constable, that it could be demonstrated that the sum was, or might be, incorrect.

17. Mr. Constable relied, in support of the submission set out in the preceding paragraph, upon the decisions of, first, Dyson J. and then the Court of Appeal, in **Bouygues (UK) Ltd. v. Dahl- Jensen (UK) Ltd**. [2000] Building LR 522. The leading judgment in the Court of Appeal was that of Buxton LJ. At page 526 of the report, in paragraph 14 of the judgment, Buxton LJ said:- *"This is a very short point. I am satisfied that the judge was right in rejecting Bouygues' argument. Although the effect of Mr. Gard's award was as Bouygues said, that was not because he answered a question about the release of the retention monies. No such question was put to him by the parties, and he did not pose any such question to himself. The case is quite different from, for example, that hypothesised by Dillon LJ in* ***Jones v Sherwood Computer Services Plc*** *[1992] 1 WLR 277 at page 287A, where an accountant instructed to value a parcel of shares values the wrong parcel, either by extent or by identity. Here, Mr. Gard answered exactly the questions put to him. What went wrong was that in making the calculations to answer the question of whether the payments so far made under the sub-contract represented an over-payment or an underpayment, he overlooked the fact that that assessment should be based on the contract sum presently due for payment, that is the contract sum less the retention, rather than on the gross contract sum. That was an error, but an error made when he was acting within his jurisdiction. Provided that the Adjudicator acts within that jurisdiction his award stands and is enforceable. "*

18. Mr. Constable also relied upon an unreported decision of His Honour Judge Gilliland Q.C. in **Farebrother Building Services Ltd. v. Frogmore Investments Ltd**., in which judgment was handed down on 20 April 2001. That case concerned a decision of an adjudicator acting under the TeCSA Rules, but in respect of which no reasons were given. The sum awarded by the adjudicator showed that he had not allowed a set-off for which the respondent party had contended. It was submitted by Counsel for the respondent party that not to decide a matter referred to him for his decision amounted to giving a decision in excess of the jurisdiction of the adjudicator. In the course of his judgment Judge Gilliland said, at pages 3 to 4 of the copy put before me:-
"Now, as far as adjudication awards are concerned, the approach of the court in relation to not enforcing the award has been to look not at the merits of the decision, but at the question of jurisdiction. If an adjudicator makes an award which is outside his jurisdiction, then it is of no effect and will not be enforced by the court. If, on the other hand the award was within his jurisdiction, then the court will normally give effect to that award.

It seems to me that Mr. Raeside's submission in the present case must involve the proposition that if it be the case that the adjudicator ignored or failed to take account of an issue of substance put forward by the defendant in the present case that is a matter which goes to jurisdiction. I am bound to say that it seems to me that that is not a matter which goes to jurisdiction. Rather it is a matter which goes to the conduct of the proceedings. The adjudicator may have been wrong or he may have erred in what he did, but it is an error which is, in principle, within his jurisdiction. He has simply made a decision which is incorrect.
An adjudicator's decision is not like an arbitrator's award where the court has power to interfere in pursuance of a statutory power under the Act. This is a case where statute says the adjudicator's award is binding until set aside in subsequent proceedings."

19. Miss Dumaresq sought to distinguish the decision of Judge Gilliland in **Farebrother Building Services Ltd. v. Frogmore Investments Ltd**. on the ground that in that case the adjudicator gave no reasons for his decision. She sought to rely on the decision of Lord Reid in the Scottish case of Ballast Plc v. The Burrell Company (Construction Management) Ltd. [2001] Building LR 529 to the effect that an adjudicator was bound to determine the dispute referred to him and could not, with binding effect, determine the extent of his own jurisdiction or narrow or extend his jurisdiction. She submitted, as I understood it, that if an adjudicator made any mistake about what he was supposed to decide or as to the basis upon which he was being invited to decide a question, such went to his jurisdiction and vitiated his decision. The particular mistake which Miss Dumaresq contended that Mr. Haller had made was to misunderstand that he had been asked to decide two separate questions, namely, first, what sums Shimizu was entitled to under the Contract, and, second, what sums, if any, were payable to Shimizu as sums due under the Contract. She went on to submit that, having found, as a stage in the evaluation of the matters referred to him, that there had been no variations in relation to the smoke ventilation works, the effect of which finding, she submitted, was that he had found that nothing was due to Shimizu in respect of variations, Mr. Haller had had no jurisdiction to go on to include in his overall assessment of the sum due to Shimizu, the element which he did in respect of variations.

20. It seems to me that the decision of Lord Reid in **Ballast Plc v The Burrell Company** (Construction Management) Ltd. depends critically upon the fact that, so it appears from paragraph 36 of that decision itself, under Scots law the remedy of judicial review is available not only in public law cases, but also in relation to powers conferred on a third party by a contract to make decisions as to the rights of the parties to the contract. What Lord Reid said at paragraph 36 of the judgment was:- *"Like Dyson J I have approached the issues raised by adjudication within a contractual framework, for the reasons I have explained. One difference between Scots and English law (in procedure at least), however, is (as I have already mentioned) that judicial review is not confined under Scots law to issues of public law, but extends to powers conferred by a contract upon a third party to determine the rights of the parties to the contract inter se. In particular, judicial review under Scots law extends to arbitration and is not uncommon in the context of arbitration under building and engineering contracts. This is a factor which appears to me to be potentially relevant, as those responsible for the Scottish Scheme [of adjudication] can be taken to have been aware both of the possibility, under Scots law, of a relatively rapid determination of questions as to the compatibility of a*

*decision with what might be described as **Wednesbury** standards; and they can also be taken to have been aware of the role played by judicial review under existing Scots law and practice in relation to construction contracts."*

21. It was against the background of the availability of judicial review as a mechanism for challenging a decision of a third party appointed under a contract as to the rights of the parties under such contract that the passages in the judgment of Lord Reid upon which Miss Dumaresq particularly relied must, in my judgment, be understood. Those passages were as follows:-

"[39] Balancing the various considerations to which I have referred, I have come to the conclusion that the Scheme should be interpreted as requiring the parties to comply with an adjudicator's decision, notwithstanding his failure to comply with the express or implied requirements of the Scheme, unless the decision is a nullity; and it will be a nullity if the adjudicator has acted ultra vires, (using that expression in a broad sense to cover the various types of error or impropriety which can vitiate a decision), for example because he had no jurisdiction to determine the dispute referred to him, or because he acted unfairly in the procedure which he followed, or because he erred in law in a manner which resulted in his failing to exercise his jurisdiction or acting beyond his jurisdiction.

[40] Applying that general approach to the circumstances of the present case, it seems to me that the adjudicator was bound to determine the dispute referred to him, provided the dispute fell within his jurisdiction. Paragraph 20(1) of the Scheme expressly provides that "the adjudicator shall decide the matters in dispute" (subject to his power to issue separate decisions on different aspects of the dispute); and that is reflected in paragraph 9(2). The adjudicator cannot determine with binding effect the extent of his own jurisdiction: the limits of his jurisdiction are determined by the notice of adjudication and the provisions of the Scheme, and cannot be narrowed or extended by the adjudicator's misconstruing those limits..."

22. In my judgment the propositions which Miss Dumaresq submitted were to be found in the decision of Lord Reid in **Ballast Plc v. The Burrell Company (Construction Management) Ltd**. are not supported by that decision. I could elicit no principle from the words of Lord Reid that any mistake whatsoever made by an adjudicator as to what he was supposed to decide or as to the basis upon which he was being invited to decide a question inevitably went to his jurisdiction and vitiated his determination. The distinction which Miss Dumaresq sought to draw between a reference to Mr. Haller of a dispute as to what sum Shimizu was entitled to under the Contract and a dispute as to what sum was payable to Shimizu under the Contract seemed to me to be a distinction without a difference in the circumstances of the present case. What had been referred to Mr. Haller, so far as is presently material was a dispute as to *"sums due under the contract"*. It seemed to me that the most attractive way in which the objection which it was sought to take on behalf of Automajor could be put was that Mr. Haller had made a decision as to how to deal with the sums claimed in respect of alleged variations to the smoke ventilation works which he would, or might, not otherwise have made under the misapprehension that the parties to the Contract agreed that he should deal with such sums in the way he believed they had agreed. In a sense, so it could be argued, they had, in his belief, extended his jurisdiction so as to enable him to take an account of Shimizu's claim in relation to variations to the smoke ventilation works which would not otherwise have been proper.

23. In order to decide whether Mr. Haller had jurisdiction to deal with the question of what sum, if any, to include in his calculation of a sum to be paid by Automajor to Shimizu in respect of alleged variations to the smoke ventilation works in the way he did it is necessary, in my judgment, in the light of the comments of Buxton LJ in **Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd** to which I have referred, to identify what question or questions were referred to him for decision. Miss Dumaresq accepted that, in relation to a reference to adjudication governed by the TeCSA Rules, the jurisdiction given to an adjudicator under Rule 11, by which it is provided, so far as is presently material, that:-

"The scope of the Adjudication shall be the matters identified in the notice requiring adjudication...is to determine those matters which, by Rule 3(i), are required to be specified in a notice requiring adjudication. Rule 3(i) requires that a notice of adjudication state:- "in general terms the dispute in respect of which adjudication is required."

Miss Dumaresq also accepted that in the present case the disputes so described in general terms were those set out in section 5 of the Notice, and thus included:- *"5.1.2 ...sums due under the contract."*

What, in my judgment, Mr. Haller in fact decided in the Award, other than in relation to the costs of the adjudication, was that Automajor should pay Shimizu under the Contract the sum of £321,300.99. I consider that it is obvious that he had jurisdiction, given the terms of the Notice, to decide both that some sum was payable by Automajor to Shimizu and what that sum was. Miss Dumaresq did not suggest the contrary. Once the issues referred to Mr. Haller for decision are correctly identified, it becomes plain, it seems to me, that, if Mr. Haller made a mistake, it was as to a matter relevant, or possibly relevant, to the evaluation of what sum, if any, should be paid by Automajor to Shimizu under the Contract. It was not a mistake as to what he was being asked to decide. He asked himself, it seems to me, the correct question. He answered that question. If the evidence of Mr. Insley, Miss Hudson and Mr. Ward is correct, as it may well be, Mr. Haller got the answer wrong because he misunderstood the submissions being made to him on behalf of Automajor about one element which might have given rise to an entitlement in Shimizu to a payment under the Contract. The proper mechanism for correcting the error, if error there was, seems to be in the course of a final account negotiation or in arbitration proceedings. It is not to challenge the Award on jurisdictional grounds, because, as must now be considered to be well-established, an adjudicator has jurisdiction to make a mistake, as long as he asks himself a question or questions which have actually been referred to him for decision and seeks to answer such question or questions.

24. In the result it is not, in my judgment, material to the question whether the Award is binding, to the extent for which Rule 28 of the TeCSA Rules provides, whether the evidence of Mr. Insley, Miss Hudson and Mr. Ward is correct, or whether the understanding of Mr. Haller, as set out in his letter dated 7 November 2001 to Berwins, is right. Consequently, the procedure adopted on behalf of Shimizu of proceeding under CPR Part 8 cannot, it seems to me, be faulted, and the procedural objection taken on behalf of Automajor fails.

25. There will be judgment for Shimizu for the balance unpaid of the amount of the Award, namely £175,069.10, together with interest in respect of non-payment of the sum of £321,300.99 for the three days 12 to 14 November 2001 inclusive, quantified at £211.27, and interest on the sum of £175,069.10 from 15 November 2001 until today, as to which I shall hear Counsel.

26. Although it is not strictly necessary to do so, in the light of the conclusions which I have already expressed, I should like to comment on the alternative case put forward by Mr. Constable, that even if Mr. Haller had exceeded his jurisdiction in making the Award, any right which there would otherwise have been to raise objection on behalf of Automajor had been waived by making part-payment of the sum awarded by Mr. Haller and/or by inviting him to correct the Award. In support of that submission Mr. Constable drew to my attention the observations of His Honour Judge Humphrey Lloyd Q.C. in paragraph 24 of his judgment in **KNS Industrial Services (Birmingham) Ltd. v. Sindall Ltd.**, an unreported decision handed down on 17 July 2000. So far as is relevant to the point now under consideration, what Judge Lloyd said was:-

"Mr. Darling [Counsel] was on surer ground in submitting that in trying to read such a decision there could be no severance of whatever the adjudicator decided so as to separate the good from the bad. Mr. Harris [Counsel] contended that there could be a severance for otherwise he could not treat the adjudicator's apparent adoption of KNS's gross valuation of £1,136,076 as the adjudicator's valuation, nor could he isolate (in order to discard as ultra vires) the figures of £107,143 and £23,613. He relied on what Dyson J had said in Bouygues (UK) Ltd v Dahl-Jensen UK Ltd [2000] BLR 49 at page 54 (para 25): "If the mistake was that he decided a dispute that was not referred to him, then his decision was outside his jurisdiction, and of no effect."

I have already explained why the dispute referred to the adjudicator included any ground open to Sindall which would justify not paying KNS. There may be instances where an adjudicator's jurisdiction is in question and the decision can be severed so that the authorised can be saved and the unauthorised set aside. This is not such a case. There was only one dispute even though it embraced a number of claims or issues. KNS's present case is based on severing parts of the adjudicator's apparent conclusions from others. It is not entitled to do so. Adjudicator's decisions are intended to be provisional and in the nature of best shots on limited material. They are not to be used as a launching pad for satellite litigation designed to obtain what is to be attained by other proceedings, namely the litigation or arbitration that must ensue if the parties cannot resolve their differences

with the benefit of the adjudicator's opinion. KNS must therefore accept the whole of this decision and if it does not like it to seek a remedy elsewhere... "

27. Mr. Constable also relied on the comments of His Honour Judge Gilliland Q.C. in **Farebrother Building Services Ltd. v. Frogmore Investments Ltd.** at the conclusion of the judgment in that case:- *"...It seems to me that a party cannot pick and choose amongst the decisions given by an adjudicator, assert or characterise part as unjustified and then allege that the part objected to has been made without jurisdiction. That is not permissible under the TeCSA Rules. Either the adjudicator has jurisdiction or he does not. If he had jurisdiction, it seems to me that his decision is binding even if he was wrong to reach the conclusion he did... "*

28. Miss Dumaresq submitted that both the decision in **KNS Industrial Services (Birmingham) Ltd. v. Sindall Ltd**. and the decision in **Farebrother Building Services Ltd. v. Frogmore Investments Ltd.** were distinguishable in relation to the comments which I have quoted. She submitted that a decision may have many separate and severable elements within it.

29. In my judgment it cannot be right that it is open to a party to an adjudication simultaneously to approbate and to reprobate a decision of the adjudicator. Assuming that good grounds exist on which a decision may be subject to objection, either the whole of the relevant decision must be accepted or the whole of it must be contested. It may, of course, be important correctly to characterise what constitutes a decision of the adjudicator. It is likely that, to be relevant for the purposes now under consideration, a decision will be the answer to a question referred to the adjudicator, rather than a conclusion reached on the way to providing such answer. For example, if the adjudicator has had referred to him or her for decision both the question how much money is due to a contractor and also the question to what extension of time for completion of construction works the contractor is entitled, it is likely that it will be open to a party to the adjudication to accept the determination in relation to the sum due while disputing, if otherwise there are good grounds for so doing, the assessment of the extension of time, or vice versa. In such a case two separate questions would have been referred to the adjudicator. However, that situation is to be distinguished from the case in which in order to answer the question to what sum a party is entitled it is necessary to consider a number of elements of claim, or the case in which in order to reach a conclusion as to what extension of time is appropriate a number of grounds of possible entitlement to extension of time need to be considered. In each of these latter cases the result of the evaluation of the various elements will be a single cash sum or a single period of extension of time. It seems to me that the option available to a party who otherwise has good grounds for objecting to a decision that a particular sum is payable is to accept it in its entirety or not at all. He does not have the option of declining to accept the decision in its entirety, but to accept the reasoning which led to particular items being included in the overall total. Similarly with an evaluation of a period of extension of time. The overall period of extension must be accepted or none.

30. In the present case Mr. Haller's error, if such it was, was committed in the course of reaching a conclusion as to how much was due to Shimizu. It was not a decision on a separate question which had been referred to him. In my judgment by inviting Mr. Haller to correct the Award under the slip rule Berwins on behalf of Automajor accepted that the Award was valid. It is true that in its letter to Mr. Haller dated 6 November 2001 Berwins asserted that the Award contained an error which went to Mr. Haller's jurisdiction, but, if that were right, it would follow that the Award, or the relevant part of it, was a nullity. There would be nothing to correct. I accept the submission of Mr. Constable that the invitation to Mr. Haller to correct the Award under the slip rule is only consistent with recognising it as valid. I also accept the submission of Mr. Constable that by paying part of the sum the subject of the Award Automajor elected to treat the Award as valid. Otherwise there was no need to pay Shimizu anything, and it was not appropriate to do so. Consequently, had it been necessary to do so, I should have held that Automajor had elected to forgo any opportunity which it might otherwise have had to object to the Award.

Adam Constable (instructed by Hammond Suddards Edge for the Claimant)

Delia Dumaresq (instructed by S J Berwin for the Defendant)