JUDGMENT : His Honour Judge Richard Seymour Q.C. 15th February 2002. TCC.

Introduction

1. The Claimant, Solland International Ltd. ("Solland"), carries on business primarily as a building contractor. The Defendant, Daraydan Holdings Ltd. ("Daraydan"), is a company which, so far as is relevant to the present case, acts as an intermediary for His Highness Sheikh Mohammed Bin Khalifa Hamad Al-Thani, who is Deputy Prime Minister of the State of Qatar.

2. His Highness Sheikh Mohammed Bin Khalifa Hamad Al-Thani is the owner of the property known as and situate at Lombard House, Curzon Street, London W1 ("the Property").

3. By an agreement ("the Building Contract") in writing dated 5 March 1999 and made between (1) Daraydan and (2) Solland Solland agreed to undertake the design, construction, refurbishment, fitting out and decoration of the Property on the terms, so far as is presently relevant, of Conditions attached to the Building Contract. The Conditions included the following:-

"12. Damages for Non-Completion

(1) If the Contractor fails to practically complete the Works by the Date for Completion of the Works stated in Appendix 1 [21 June 2000] or within any extended time fixed under Condition 14 then the Contractor shall pay on demand or allow to the Employer a sum calculated at the rate stated in Appendix 1 as Liquidated and Ascertained Damages [£15,000 per week] for the period during which the Works shall so remain or have remained incomplete and the Employer may deduct such sum from any monies due or to become due to the Contractor under these Conditions or the Employer may recover the same from the Contractor as a debt.

18. Payment

(2) The Employer's Representative [ASA Private Clients Ltd., "ASA"] shall at intervals of one month calculated from the Date for Possession of Site [7 December 1998] stated in Appendix 1 certify the amount of interim payments to be made by the Employer to the Contractor…

(3) Following certification by the Employer's Representative as aforesaid all such payments shall be due and payable by the Employer within ten (10) working days of whichever is the later of the date of receipt by the Employer of a valid VAT invoice addressed to the Employer by the Contractor and the date of certification by the Employer's Representative…

22. Disputes

(3) Any dispute or difference arising under or in connection with this Agreement may be referred to adjudication in accordance with the Scheme for Construction Contracts SI No 1998 except that paragraph 7(2) of the Scheme shall be amended by the addition of the following words at the end:-

"Provided that the referral notice shall not exceed 30 single sided sheets of A4 in total and any further sheet shall be disregarded by the adjudicator".

(5) The Adjudicator's decision is binding until the dispute is finally determined by the Courts."

4. By an agreement ("the Furnishing Contract") dated 21 July 1999 and made between (1) Solland and (2) Daraydan Solland agreed to supply and, so far as necessary, instal various items of furniture and fittings at the Property. The items to be supplied were described in the Furnishing Contract as "the Goods". The first recital to the Furnishing Contract referred to the Building Contract as follows:-
"The Buyer [that is, Daraydan] has by another contract commissioned the Seller [that is, Solland] to carry out the interior design and refurbishment of the Property which commission includes the design of the Goods."

5. By clause 3.7 of the Furnishing Contract provision was made, so far as is presently material, that:-
"If Completion does not occur by the date being ten Working Days following the Proposed Date [the "Proposed Date" was 21 June 2000] the Seller shall pay on demand or allow to the Buyer liquidated and ascertained damages (calculated at the same weekly rate as stated in the Building Contract) for the period commencing on the Proposed Date and expiring on the Date of Completion and the Buyer may deduct such sum from any instalment of the Price or (at its discretion) the Buyer may recover the same from the Seller as a debt…

Provided further that under no circumstances shall the liquidated and ascertained damages recoverable by the Buyer from the Seller under the combined provisions of the Building Contract and this Agreement exceed in aggregate in respect of any one week or part thereof the sum of £15,000 (Fifteen thousand pounds).. "

6. Notwithstanding that the making of the Building Contract preceded by some four and a half months the making of the Furnishing Contract Recital F to the Building Contract was in these terms:-
"The Employer has appointed (or proposes to appoint) the Contractor to carry out works in connection with the furnishing and soft fittings in the Building ("Furnishing Contract"). It is recognised that the works to be carried out under the Furnishing Contract will in part be carried out simultaneously with the Works at the Site."

7. It appears that the works to be carried out under the Building Contract and the supply of goods under the Furnishing Contract were not completed until 29 June 2001. By two letters, dated respectively 12 July 2001 and 23 July 2001, written by its solicitors, Messrs. Gouldens, Daraydan demanded payment by Solland of a sum of £810,000 as liquidated and ascertained damages under the Building Contract. That sum was calculated as 54 weeks at £15,000 per week. No separate claim was made for liquidated and ascertained damages under the Furnishing Contract, but, given the further proviso to clause 3.7 of the Furnishing Contract, there was no point in making such a separate claim. No greater sum would be recovered by so doing.

8. On 11 July 2001 ASA certified in Valuation No. 59 that a sum of £560,804.02 was due to Solland under the Building Contract. On 11 July 2001 Solland issued an invoice, numbered 00219, under the Building Contract by which it sought payment of the sum of £560,804.02 plus Value Added Tax of £98,140.70, a total of £658,944.72. That sum was not paid within the period for which the Building Contract provided in clause 18 of the Conditions, namely ten days after receipt by Daraydan of the VAT invoice.

9. By a notice given by a letter dated 7 November 2001 written on behalf of Solland by its solicitors, Messrs. Berwin Leighton Paisner, to Daraydan Solland referred to adjudication a dispute briefly described in the letter as follows:-
"The dispute concerns the non-payment of the invoice dated 11 July 2001 to which reference is made above, and the validity of a purported Notice specifying the amount of payment under Section 110(2) of the Housing Grants Construction and Regeneration Act 1996 ("the Act")/Notice of Intention to Withhold Payment under Section 111(1) of the Act."

10. Mr. Dominic Helps was appointed as adjudicator. In a decision dated 12 December 2001 Mr. Helps determined that the letters dated, respectively, 12 July 2001 and 23 July 2001 written by Messrs. Gouldens on behalf of Daraydan were not good notices for the purposes of Section 111 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). He decided that Daraydan should pay Solland the sum of £658,944.72, plus interest of £25,166.80, within seven days of the date of publication of his decision and that Daraydan should pay his fees for acting as adjudicator. Those fees amounted to £2,156 and were in fact paid by Solland.

11. Daraydan did not pay the sums determined by Mr. Helps. Consequently this action was commenced on behalf of Solland. Solland sought summary judgment for the sums awarded by Mr. Helps and also reimbursement of Mr. Helps's fees. The grant of judgment under CPR Part 24 was resisted on behalf of Daraydan.

The statutory provisions

12. Section 111(1) and (2) of the 1996 Act are in the following terms:-

"(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.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify –

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment."

13. By Section 114(1) of the 1996 Act provision was made for the making by regulations of a scheme called "the Scheme for Construction Contracts" ("the Scheme"). The regulations by which the Scheme was made are The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998 No. 649 ("the Regulations"). The Scheme includes, as paragraph 23:-

> *"(1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.*
>
> *(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. "*

The alleged grounds of opposition to the application for summary judgment

14. In a letter dated 15 November 2001 to Solland Messrs. Gouldens wrote as follows:-

> *"Furnishings Contract dated 26th July 1999 ("the Furnishings Contract") between Daraydan Holdings Limited and Solland International Limited*
>
> *We write in connection with the above contract between our client, Daraydan Holdings Limited ("the Buyer") and your client, Solland International Limited ("the Seller") and are serving this letter upon you in accordance with the requirements of clause 18.1 of the Furnishings Contract.*
>
> *It is a requirement of the Furnishings Contract that the Seller would use reasonable endeavours to Install the Goods by the Proposed Date (all terms defined in the Furnishings Contract).*
>
> *We are writing to confirm that no applications have been received by the Buyer and/or its agents and/or us requesting extensions to the Proposed Date pursuant to clause 3.4 of the Furnishings Contract.*
>
> *Furthermore under the terms of the Building Contract (referred to in clause 3.3.8 of the Furnishings Contract) there has been no extension of time granted and therefore this cannot be claimed as a reason for an extension under the Building [sic] Contract. There is therefore no reason pursuant to clause 3.5 of the Furnishings Contract to extend the Proposed Date beyond 21st June 2000.*
>
> *Pursuant to clause 3.7 the Seller shall pay on demand to the Buyer liquidated and ascertained damages at a rate of £15,000 per week or part thereof from the Proposed Date until the Date of Completion.*
>
> *For the purposes of the Furnishings Contract the Date of Completion was 29 June 2001 when practical completion of the Building Contract was given. Whilst certain items relating to the Goods remain in need of defect rectification it is accepted that beneficial use of the Goods was taken at that time.*
>
> *Pursuant to clause 3.7 our clients are therefore entitled to recover as a debt the sum of £810,000.*
>
> *Whilst liquidated and ascertained damages are being claimed under the Building Contract between the Buyer and the Seller this is a matter of dispute subject to adjudication proceedings. As such no liquidated and ascertained damages have yet been paid under the Building Contract. The full amount of liquidated and ascertained damages pursuant to the Furnishings Contract is therefore payable and no aggregation needs to take place at this time.*
>
> *In the event that the dispute under the Building Contract finds that liquidated and ascertained damages are also due under the Building Contract a re-calculation of the actual amount due to the Buyer can be made at that time. Alternatively if it is found by the adjudicator that sums in connection with the Building Contract are due to the Seller our client will set off the Furnishings Contract liquidated and ascertained damages against any sums so due.*
>
> *We look forward to receipt of settlement. "*

15. The sum requested was not paid by Solland. In a letter to Messrs. Berwin Leighton Paisner dated 21 December 2001 Messrs. Gouldens referred to their letter dated 15 November 2001 and went on:-

> *"In that letter liquidated and ascertained damages of £810,000 were demanded. Those damages are payable under the Furnishings Contract.*
> *Our clients intend to set off against that sum the amounts due for payment pursuant to Adjudicator's award made under the Building Contract.*
> *By our calculations this means that the sum of £124,593.13 is still due and payable on demand under clause 3.7 of the Furnishings Contract.*
> *Would you please arrange for the total sum due to be transferred to this firm's client account…"*

16. The first ground of opposition to the application for summary judgment is thus that Daraydan has a claim against Solland which exceeds the amount of Solland's claim in the action.

17. A second alleged ground of opposition to the application for summary judgment is that it is said that Solland has failed to complete all the works required under the Building Contract and has executed some of the works defectively. This was disputed on behalf of Solland. On the evidence put before me the value of the works allegedly not completed and the alleged cost of remedying allegedly defective works total some £171,571.22. It was submitted by Miss Stephanie Barwise, who appeared on behalf of Daraydan, that Daraydan was entitled to abate the sum awarded by Mr. Helps to Solland by the amount of the claims for incomplete or defective work.

18. Apart from the matters to which I have referred Miss Barwise invited me, if I were otherwise inclined to give judgment for Solland, not to do so, or at least to stay enforcement of any judgment, on one or other or both of two grounds. The first was that the dispute which had resulted in Mr. Helps's award in favour of Solland was but one of a number of disputes between Daraydan and Solland and the other disputes were both complex and involved greater sums than those the subject of this action. The second was that Daraydan had fears for the solvency of Solland. Thus, submitted Miss Barwise, if subsequently it were found that Daraydan was entitled to set off its claims for liquidated damages against the sum certified in favour of Solland, or it were found that Daraydan was entitled to abate that sum, there was a risk that Solland would not be able to repay whatever sum it should. The evidence as to the solvency of Solland was flimsy and in the end I think that Miss Barwise accepted that it was not sufficient to justify any finding that Solland was, or might be, insolvent. I do not consider that it is necessary to consider further in this judgment the question of the solvency of Solland.

Submissions on behalf of Solland

19. Mr. Sean Brannigan, who appeared on behalf of Solland, submitted, in effect, that it was not open to Daraydan at the stage of enforcement of the decision of Mr. Helps to resist the application for summary judgment on the grounds it did. He reminded me of the decision of H.H. Judge Hicks Q.C. in VHE Construction Plc v. RBSTB Trust Co. Ltd. [2000] BLR 187, and in particular of what H.H. Judge Hicks had said at page 192 of the report in paragraph 36:-

"The first subject of dispute as to the effect of section 111 [of the 1996 Act] is whether section 111(1) excludes the right to deduct money in exercise of a claim to set-off in the absence of an effective notice of intention to withhold payment. Mr. Thomas, for RBSTB, submits that it does not. I am quite clear, not only that it does, but that that is one of its principal purposes. I was not taken to the reports or other preparatory material leading to the introduction of this part of the Act, nor to anything said in Parliament, but the see-saw of judicial decision, drafting fashion and editorial commentary in this area is familiar to anyone acquainted with construction law, and in my judgment section 111 is directed to providing a definitive resolution of the debate. The words "may not withhold payment" are in my view ample in width to have the effect of excluding set-offs and there is no reason why they should not mean what they say. "

20. Mr. Brannigan also reminded me of what H.H. Judge Hicks said at pages 196-197 of the report in VHE Construction Plc v. RBSTB Trust Co. Ltd. at paragraph 66 of the judgment:-

"Finally RBSTB relies on a residual right to set off its liquidated damages claim. I use the word "residual" because many of the submissions already discussed were aimed (unsuccessfully, as I have held) at establishing, directly or indirectly, a means by which that claim could be deducted, withheld or set off by way of clause 30.3.4 of the contract or section 111 of the Act or by some other route. In my view there is no such residual right, where these adjudication decisions are concerned. In the first place the right under clause 24.2.1 is to deduct from monies due or to become due "under the contract". The money in question here was not payable under the contract, in the sense contemplated by that clause, but by way of compliance (albeit contractually required) with the adjudicators' decisions. More generally, for the reasons given in paragraphs 36 and 37 above section 111 now constitutes a comprehensive code governing the right to set off against payments contractually due. RBSTB 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 left unanswered in paragraph 56 above, therefore, I find these compelling reasons for concluding that in clause 39A.7.2 and 39A.7.3, at least on the facts of this case, "comply" means "comply without recourse to defences or cross-claims not raised in the adjudication"."

21. The decision of H.H. Judge Hicks in **VHE Construction Plc v. RBSTB Trust Co. Ltd**. was referred to with approval by H.H. Judge Peter Bowsher Q.C. in **Northern Developments (Cumbria) Ltd. v. J & J Nichol** [2000] BLR 158 at page 164 in paragraph 30. In the preceding paragraph H.H. Judge Bowsher said this:-

"The [1996] Act by section 111 imposes on the parties a direct requirement that the paying party may not withhold a payment after the due date for payment unless he has given an effective Notice of Intention to Withhold Payment. That seems to me to have a direct bearing on the ambit of any dispute to be heard by an Adjudicator. Section 111 requires that the contract must require that within 5 days of any sum falling due under the contract, the paying party must give a statement of the amount due or of what would be due if the payee had performed the contract. Section 111 provides that no deduction can be made unless the paying party has given notice of intention to withhold payment. The intention of the statute is clearly that if there is a dispute about the amount of the payment required by section 111, that dispute is to be mentioned in a notice of intention to withhold payment not later than 5 days after the due date for payment. Equally it is clear from the general scheme of the Act that this is a temporary arrangement which does not prevent the presentation of other set-offs, abatements, or indeed counterclaims at a later date by litigation, arbitration, or adjudication. For the temporary striking of balances which are contemplated by the Act, there is to be no dispute about any matter not raised in a notice of intention to withhold payment. Accordingly, in my view, the Adjudicator had no jurisdiction to consider any matter not raised in the notice of intention to withhold payment in this case."

22. The decision of H.H. Judge Hicks Q.C. in **VHE Construction Plc v. RBSTB Trust Co. Ltd**. and that of H.H. Judge Bowsher Q.C. in **Northern Developments (Cumbria) Ltd. v. J & J Nichol** were referred to by H.H. Judge John Toulmin C.M.G., Q.C. in **Bloor Construction (UK) Ltd. v. Bowmer & Kirkland (London) Ltd.** [2000] BLR 314 in a passage on page 319 of his judgment which was introduced as follows:-

"In a number of cases that have come before the Technology and Construction Court, the court has held that a decision of an Adjudicator which could be challenged as to its factual or legal conclusions remains a decision and will ordinarily be enforced.."

23. Mr. Brannigan recognised that, although there have been a number of decisions of this Court as to the approach to be adopted to the enforcement of decisions of adjudicators, each was a decision of a judge exercising the same jurisdiction as that which I have to exercise in the present case. There is no decision which is technically binding upon me. Mr. Brannigan urged me to approach the question of whether to grant Solland summary judgment in the present case in the same way as such question had been approached by H.H. Judge Hicks Q.C., by H.H. Judge Bowsher Q.C. and by H.H. Judge Toulmin C.M.G., Q.C. in the cases to which he drew my attention. However, Mr. Brannigan did not go so far as to submit that I ought simply to count heads amongst my brethren and follow the majority view.

24. Mr. Brannigan did submit that I could derive some assistance from the decision of the Court of Appeal in C & B Scene Concept Design Ltd. v. Isobars Ltd., handed down as recently as 31 January 2002. That was an appeal from a decision of Mr. Recorder Moxon-Browne Q.C. One of the issues before the learned Recorder, as set out in the leading judgment of Sir Murray Stuart-Smith in the Court of Appeal was :-

"That both under the Act (ss110 and 111) and under the Scheme failure to give a notice within the stipulated time does not preclude the Employer from contending on an adjudication that sums claimed are not "due under the contract" for the reasons upon which the Defendant wished to rely."

About that issue, which he described as "the second point", Sir Murray said at paragraph 19 of his judgment:-

"The second point is one of some general importance in construction contracts, and is one upon which there has been some difference of view at first instance. But although we obtained every assistance from Mr. Constable, we did not think it right, in the absence of argument from the Respondent, to express a view on this

point, which would in any event be obiter, if we concluded, as we do that the Recorder's decision on the third point was erroneous."

The issue which Sir Murray mentioned does not arise in the present case. In this case the question is not whether a potentially paying party could raise before an adjudicator the issue what sum was due under the relevant contract without having served a notice under section 111 of the 1996 Act setting out contentions going to that matter, but, an adjudication having taken place and the adjudicator having made a decision, whether the potentially paying party could raise now matters said to be relevant to what sum, if any, should in fact be paid. The passage in the judgment of Sir Murray Stuart-Smith, with which Rix LJ and Potter LJ agreed, which Mr. Brannigan submitted I might find of assistance in relation to the question now before me, was this:-

"24. *In **Northern Developments (Cumbria) Ltd. v. J & J Nichols** His Honour Judge Bowsher Q.C. cited with approval the following formulation of principles stated by His Honour Judge Thornton Q.C. in Sherwood v. Casson:*

"(i) a decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;

(ii) a decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, be enforced;

(iii) a decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;

(iv) the adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction;

(v) an issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the Court on the balance of probabilities with, if necessary, oral and documentary evidence".

25. I respectfully agree with this formulation. I would also add, as I have already pointed out, the provisional nature of the adjudication, which, though enforceable at the time can be reopened on the final determination."

Mr. Brannigan accepted that the passage which I have just set out was obiter, but he submitted that it indicated approval by the Court of Appeal of the approach adopted by my brethren in the cases which he cited.

Submissions on behalf of Daraydan

25. Miss Barwise sought to distinguish the decisions upon which Mr. Brannigan relied. She also relied upon other decisions, which she submitted indicated another approach. In particular, Miss Barwise sought to rely upon the decision of H.H. Judge Humphrey Lloyd Q.C. in **David Maclean Housing Contractors Ltd. v. Swansea Housing Association Ltd**., the judgment in which was given on 27 July 2001. Before coming to that decision it is convenient to consider the grounds upon which Miss Barwise submitted I should distinguish the decisions upon which Mr. Brannigan relied.

26. Miss Barwise submitted that the decision of H.H. Judge Hicks Q.C. in VHE Construction Plc v. RBSTB Trust Co. Ltd, was a decision on the particular wording of the contract then before the Court, which was different from the wording of the clause 22 of the Conditions attached to the Building Contract in the present case. In particular, the word "comply" did not appear in clause 22(5) of the Conditions. The relevant wording in clause 22(5) of the Conditions was "The Adjudicator's decision is binding until the dispute or difference is finally determined by the Courts". There was no reference to the parties "complying" with the decision. Although the Scheme, in paragraph 23(2) does provide, in material part, that "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..", and although the Scheme was incorporated by reference in clause 22(3) of the Conditions, the fact that clause 22(5) was in the terms it was showed, submitted Miss Barwise, that it was not the intention of

the parties to the Contract that the parties should comply with a decision of an adjudicator, merely that they would accept it pending final resolution of any dispute.

27. Miss Barwise relied on the first instance Scottish decision of Lord Macfadyen in **SL Timber Systems Ltd. v. Carillion Construction Ltd.** [2001] BLR 516 in support of the proposition that in an adjudication, and, so she submitted, at the enforcement stage, a claimant had to prove what sum was due under the relevant contract. In particular, she submitted, it appeared from the judgment of Lord Macfadyen at pages 524-525 in paragraphs 20-23 that the burden was on the claimant to prove what sum was due and he could not simply rely upon the fact that no notice of intention to withhold payment had been served as entitling him to the sum he claimed. She submitted that in that context it was open to Daraydan before me to raise both the question of Daraydan's alleged counterclaims and the question of abatement.

28. Miss Barwise submitted that an adjudicator's decision is not enforceable per se, but merely provides a possible basis for an application to the Court for enforcement. In support of that submission she relied upon a passage in the judgment of H. H. Judge Lloyd Q.C. in **Glencot Development and Design Co. Ltd. v. Ben Barrett & Son (Contractors) Ltd**. [2001] BLR 207 at page 222 in paragraph 33 and a passage in the judgment of H.H. Judge Bowsher Q.C. in **Austin Hall Building Ltd. v. Buckland Securities Ltd**. [2001] BLR 272 at page 279 in paragraph 35. I confess that I do not consider the proposition for which Miss Barwise contended to be controversial, but equally I do not see how it advances her argument.

29. I come then to the decision of H.H. Judge Lloyd Q.C. in **David Maclean Housing Contractors Ltd. v. Swansea Housing Association Ltd.** Miss Barwise submitted that that decision was authority for the proposition that at the enforcement stage it was open to the Court to consider defences of a potentially paying party in the nature of a set-off or abatement notwithstanding that such set-off or abatement had not been raised in a notice of intention to withhold payment under section 111 of the 1996 Act or considered in the adjudication. The facts of the case, so far as material, were that a contractor claimed entitlement to payment of a sum including loss and expense arising as a result of delay to completion of the relevant works. Under the relevant contract the contractor was liable to pay liquidated and ascertained damages for delay in completion unless an extension of time was granted. The question to what sum the contractor was entitled was referred to adjudication. The adjudicator held that the contractor was entitled to some, but not all, of the loss and expense which he claimed, because he was not entitled to a full extension of time. At the enforcement stage it was argued on behalf of the employer that an effect of the adjudicator's decision was that a sum was due to the employer as liquidated and ascertained damages for the period for which the adjudicator had found that the contractor was entitled to no extension of time. After the decision of the adjudicator a notice of intention to withhold payment of the amount of such liquidated and ascertained damages was served which H.H. Judge Lloyd Q.C. held was a good notice. H.H. Judge Lloyd Q.C. held that the employer had a viable counterclaim for the liquidated and ascertained damages which should be taken into account as a set-off against the sum which the adjudicator had found was due.

Consideration and Conclusions

30. Were there no authority at all on the meaning of s111 of the 1996 Act and it fell to me to construe without assistance the words in s111(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", I should have come to the conclusion that the force of the words, "may not" is "is not permitted to", so that in a case in which a sum is due under the contract in question, that sum has to be paid unless an effective notice of intention to withhold payment has been given. Where a dispute as to the amount due to be paid has been referred to adjudication in accordance with the express terms of the relevant contract, or in accordance with the terms of the Scheme incorporated into the relevant contract by an express term, or as a result of the operation of s114(4) of the 1996 Act, it seems to me that the consequences of the making by the adjudicator of a decision fall to be determined as a matter of construction of the contract in question, including, if necessary, the Scheme. If, as in **VHE Construction Plc v. RBSTB Trust Co. Ltd.**, the contract provides for the parties to the contract to comply with a decision of an adjudicator, then the

sum which the adjudicator has determined to be payable has, in my view, by virtue of his determination become payable under the contract, notwithstanding that the determination was itself a decision as to what sum was payable under the contract. In other words, that which, before the decision of the adjudicator may have been payable by virtue of provisions in the relevant contract as to valuation of the works, and so forth, after the decision of the adjudicator becomes payable by virtue of the provisions of the contract to abide by or comply with the decisions of the adjudicator. Consequently in the ordinary case, as there will be no notice of intention to withhold payment of some amount of what an adjudicator determines to be due, there can be no question but that the amount which the adjudicator decides is due is payable in full. It is a comfort to find that the conclusion which I should have reached as a matter of construction of s111 of the 1996 Act accords in substance with the views of H.H. Judge Hicks Q.C., H.H. Judge Bowsher Q.C., H.H. Judge Toulmin C.M.G., Q.C. and the opinion, obiter, of the Court of Appeal in **C & B Scene Concept Design Ltd. v. Isobars Ltd.**

31. Contrary to the submissions of Miss Barwise, I do not consider that in **David Maclean Housing Contractors Ltd. v. Swansea Housing Association Ltd**. H.H. Judge Lloyd Q.C. was expressing a view different from that indicated in the previous paragraph. The facts of the case before H.H. Judge Lloyd Q.C. are, in my judgment, important to a correct understanding of the decision. 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 to completion of the relevant works was that the employer was entitled to liquidated and ascertained damages for such part of the period of delay as was excluded from the evaluation of the loss and expense to which the contractor was entitled. 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. H.H. Judge Lloyd Q.C. 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, at least three of my brethren and the Court of Appeal consider to be appropriate.

32. The question then is, what was the effect of the contractual provisions in the present case as to the effect of a decision of an adjudicator. It is correct, as Miss Barwise submitted, that, so far as express terms go, what the Conditions provided was that "The Adjudicator's decision is binding" and the word "comply" did not appear. However, clause 22(3) did incorporate by reference the Scheme in which paragraph 23(2) did include an express obligation to comply with a decision of an adjudicator. I reject Miss Barwise's submission that the correct construction of clause 22 of the Conditions is that, by virtue of including clause 22(5) with no reference to compliance with the decisions of an adjudicator, paragraph 23(2) of the Scheme was incorporated into the Conditions without the words "and they shall comply with it". Clause 22(3) of the Conditions did make a small modification to the Scheme as incorporated into the Conditions, and had any further modifications been intended it seems to me that they would have been set out in the same sub-paragraph. Further, the modification contended for makes no commercial sense. The parties plainly intended that any decision of an adjudicator should be "binding". It seems to me that inherent in the concept of a decision being "binding" is, first, that the parties should accept the decision for the period for which the Conditions provided, and, second, that the parties should give effect to it. Giving effect to a decision that A should pay £X to B means that A pays £X to B, and not that A pays some different sum or no sum at all. Any other construction of clause 22(5) of the Conditions would mean that in the Building Contract adjudication was simply for fun and could not be for profit. That strikes me, with all respect to Miss Barwise, as manifestly absurd.

33. The reliance which Miss Barwise sought to place on the decision of Lord Macfadyen in SL Timber Systems Ltd. v. Carillion Construction Ltd. seems to me to be misconceived. The point with which

Lord Macfadyen was concerned was that described by Sir Murray Stuart-Smith in C & B Scene Concept Design Ltd. v. Isobars Ltd. as "the second point". For the reasons which I have already explained that point does not arise in this case. Lord Macfadyen's decision, if correct, as to which I express no view, does not provide any analogy helpful in considering the issues in the present case.

34. Although I have analysed at some length the submissions made to me in this case, in the end the simple point is that as a result of the decision of Mr. Helps Daraydan became obliged under the terms of the Building Contract, including the terms of the Scheme as incorporated therein, to pay Solland the sum of £658,944.72 plus interest and also to pay Mr. Helps's fees amounting to £2,156. Daraydan did not pay. This action was commenced. Solland is entitled to judgment for the sum claimed, £658,944.72 plus interest, and for the amount of Mr. Helps's fees which Solland paid. I will hear Counsel as to the amount for which judgment should be entered having regard to the interest which has accrued since Mr. Helps's decision.

35. It does not seem to me that the fact that there are, as it appears, other disputes between Daraydan and Solland is any reason not to enter judgment for Solland for the sum to which it is entitled in the light of the decision of Mr. Helps, or any reason to make an order the effect of which would be that such judgment would not be immediately enforceable. In reality the question is which of the parties should hold the money which Mr. Helps has decided should be paid by Daraydan to Solland while the disputes between them are resolved. The policy underlying Part II of the 1996 Act is that matter should be resolved by an adjudicator, at least in a case in which there is no reliable evidence of insolvency on the part of the party to which the adjudicator has determined that payment should be made. In this case Mr. Helps has decided that payment should be made to Solland. In the circumstances of the present case the function of the Court is to enforce that decision.

Sean Brannigan (instructed by Berwin Leighton Paisner for the Claimant)
Stephanie Barwise (instructed by Gouldens for the Defendant)