JUDGMENT : JUDGE THORNTON: 29th August 2001. TCC.

1. Before the court is an application by Britcon (Scunthorpe) Limited to enforce a decision in its favour by an adjudicator in which the respondent in the adjudication and the defendant in these proceedings is Lincolnfields Limited. The adjudication arose out of infrastructure works being carried out by Britcon for Lincolnfields as main contractors. The adjudicators decision, that of Mr. Michael E. Morris, was issued on 13th July 2001. The reference sought, by notice of adjudication dated 16th May 2001, a decision as to whether a payment should be made based on an interim valuation certificate issued in the gross sum of £370,000. The adjudicator's decision was to the effect that £260,000 of that sum should be paid with VAT and interest.

2. The issue today raised by Lincolnfields is as to whether the decision was rendered in excess of jurisdiction or by following a failure to consider and give effect to material that had been submitted to the adjudicator by Lincolnfields and for those reasons is a decision which is either vitiated or unenforceable.

3. The question that it is said had been referred by Lincolnfields to the adjudicator and not decided upon by him, was the question broadly speaking of whether representatives of the parties, prior to the entry into the contract, had reached an agreement or understanding which had sufficient contractual effect as to modify the payment provisions of the contract. It was explained by way of submission to the adjudicator that this prior agreement was a collateral contract entered into orally.

4. There is scope for potential confusion and debate as to whether what was being contended for was a collateral contract, strictly speaking, as opposed to an agreement either incorporated into or entered into in addition to the principal contract in terms that enabled the parties to rely on modified arrangements to those provided for in the principal contract. But for present purposes it is not necessary to resolve those conceptual questions because what is arguably the case is that if the adjudicator declined to consider the potential existence and effect of the agreement, he had reached his decision as a result of non-compliance with the provisions of the scheme for construction contracts, which governed this particular adjudication, and in particular paragraph 17 which requires the adjudicator to consider any relevant information submitted to him by any of the parties to the dispute, and shall make available to him any information to be taken into account in reaching his decision.

5. The adjudicator, in his decision, referred, in paragraph 2, to the contentions of the parties by way of a summary of the ambit of what he understood to have been referred to him. He set out the notice of adjudication, which I have in essence already summarised, and he then set out in the next section of his decision the contentions of Lincolnfields. Paragraph 3.5 of those contentions, which summarises Lincolnfields further submissions states this*: "An oral collateral contract was made on 29 March 2000 by Mr. P. Akrill for Lincolnfields and Mr. D. Hunt for Britcon that the final payment would be made from an Escrow Account. The monies can only be released from the Escrow Account on the happening of an Escrow Event. Part of that event is the certification that the Section 38 had been substantially complete."*

6. Section 38 is a reference to Section 38 of the Highways Act which defines certain highways works and infrastructural works to highways. The submission continues, "This certificate had not been issued because two bell mars required on the Section 38 drawings had not been constructed. Consequently the sum of £250,000 held in the escrow account could not be released. Lincolnfields also contended that they had incurred direct actual costs and loss in the sum of £620,606.97p which they seek to recover from Britcon".

7. In the adjudicator's decision he then proceeds to deal with, initially, what he refers to as -- this is under Section 5 -- questions of jurisdiction. The material paragraphs are 5.17, 5.18 and 5.19, which read as follows:

   "5.17 Before leaving the question of jurisdiction, I have to deal with the question of the Escrow Account. Lincolnfields contend that this came about through an oral collateral contract and, in accordance with Mr. Akrill's evidence, was made on 29 March 2000. Neither Lincolnfields' submissions nor Mr. Akrill's evidence identifies the terms of that collateral contract. What is identified is part of an agreement between Stamford Developments Ltd. and J.J. Gallagher but I have no submissions of how Lincolnfields contends that this was incorporated into an agreement between Lincolnfields and Britcon. The documents

appended to Mr. Brackenbury's statement shows that Lincolnfields' solicitors would not disclose the terms of the Stamford/Gallagher agreement to Britcon and would only go as far as to say "I understand it is (Stanford Development's) intention that this would be used to pay your client". An intention does not create an obligation.

5.18 Mr. Akrill also maintains that the alleged oral agreement was made after the Contract between the Parties was made. This cannot be right. The terms of the Contract were not finalised on 7 April 2000, when a revised Letter of Intent was issued by Lincolnfields and, by their own submission, the letter of intent of 30 March 2000 (and by inference the letter of intent of 7 April 2000) was superseded by the Agreement entered into on 2 August 2000. The documents forming that Agreement were prepared by Lincolnfields' (or, more probably, Stamford Development's) consultants. Had the matter of the Escrow Account been agreed, they should, and normally would, have been incorporated into the written Contract. I note the evidence of Messrs. Hill and Brackenbury and accept that viz a viz Briton and Lincolnfields/Stamford Developments, no Escrow arrangements were in fact agreed. For the above reasons, I do not consider that any reference to Escrow Accounts/ Events was incorporated into the Contract and, therefore, I reject Lincolnfields contentions in that respect.

5.19 Notwithstanding the above, the alleged collateral contract was said to be oral and related to financial matters. The Act and the Scheme only apply to contracts in writing and to construction contracts. In my opinion, therefore, I do not have jurisdiction to decide any dispute in respect of an oral financial contract. Furthermore, my jurisdiction is limited to matters arising under a construction contract (Section 108(1) of the Act) and does not extend to matters connected with it."

8. It is perhaps, with the benefit of hindsight and following the careful and helpful submissions of counsel for both parties on the enforcement proceedings, possible to question the structure and reasoning of the adjudicator in those paragraphs. But that is with the benefit of hindsight, in circumstances in which the court can and must take into account that an adjudicator's decision is one that is published under circumstances of considerable pressure both of time and often discipline, given that the decision must deal with at times complex questions of law by a professional quantity surveyor without the benefit of legal advice or legal training.

9. Having said that, it seems to me that the decision in those three paragraphs is acceptably clear. In reverse order, in paragraph 5.19, the adjudicator considers whether it is open to him to consider the existence, meaning and effect of what was put to him as an oral collateral contract. That badge had been, as I have already indicated, ascribed to the agreement by the respondent's representatives. They were not lawyers but they had chosen to describe the arrangement as a collateral contract. The adjudicator concluded that he did not have jurisdiction to deal with any dispute in respect of that contract.

10. Had the adjudicator left the decision at that point there might well have been difficulties on Britcon's part without further ado seeking to enforce the decision. It is at least arguable -- I do not propose to consider further the argument and the consequences of that argument in this judgment -- that the adjudicator has incorrectly, as a matter of law, analysed the nature, existence and effect of the arrangement contended for, in the sense that he has arguably erroneously concluded that the existence and effect of such a contract is, first, that it is oral and secondly, that it falls outside the statutory scheme provided by the Housing Grants, Construction and Regeneration Act provisions.

11. But the adjudicator does not leave it there. In the preceding two paragraphs he has dealt, as I see it, with two separate but clearly related strands of Lincolnfields contentions. In paragraph 5.17 he concluded that whatever the agreement or understanding reached by Mr. April and Mr. Brackenbury, it was not something which gave rise to a legally enforceable obligation. In paragraph 5.18 he then considers whether, even if there was a legally enforceable obligation reached on 29th March, that agreement still had contractual effect once the principal contract had been finalised and entered into. He concluded, as I read his decision, that that arrangement or agreement had been superseded by the agreement entered into on 2nd August 2000 and it was not incorporated into that agreement, which in context means it was not something which survived in the sense of being able to effect the contractual terms entered into on 2nd August.

12. Again speaking with the benefit of hindsight and having had the benefit of the helpful submissions of the parties' respective counsel, it is no doubt possible to re-draft in language which would be different language, the conclusions of the adjudicator on what are, after all, difficult questions of law. But although Mr. Holden submitted that the reality of those two paragraphs, taken in conjunction with paragraph 5.19, was that they were in reality doing no more than summarising the potential conclusions that might have been reached had they needed to have been decided, what in reality the adjudicator was doing was disposing of those potential conclusions by the conclusion that he did not have to go into them. I cannot read them, given the structure of the decisions identified, taken against the background of the referral notice and the material that was referred to him, as indicating that the adjudicator was taking such a circumscribed approach to his decision. As I read the decision, he was reaching three quite clear and discrete conclusions: first, that he had no jurisdiction to deal with the matter raised by Lincolnfields; but that, secondly, and in any event, there was no such agreement at all; but that, thirdly, and in any event, if there was an agreement with which he had jurisdiction to deal, it had been superseded and robbed of contractual effect once the 2nd August 2000 agreement was entered into.

13. It is not for me to decide whether the adjudicator was right as a matter of law in those three conclusions, even more so for me to reach any conclusion as to whether he was right in evaluating the evidence and submissions that had been placed before him in relation to that issue. As I see it, he had referred to him the issue and fairly and squarely dealt with it. For those reasons I reject the contention of Lincolnfields that the decision that he reached lacked jurisdiction in that it was vitiated by his declining to deal with an essential issue referred to him, or that it should not be enforced because it failed to comply with the provisions of Rule 17 of the scheme. In my judgment, it was a decision reached within the jurisdiction and having complied with the provisions of that paragraph. I will now hear counsel on the effect, by way of the order, that should be made as a result of that decision.

MS. DUMARESQ: *My Lord, I ask for judgment for the claimant in the sum of £353,897.94p, which is the principal sum plus interest, plus the VAT.*

JUDGE THORNTON: *Should I not separate out in the judgment those three strands? Otherwise you will get interest on interest on interest and interest on the VAT.*

MRS. DUMARESQ: *In my skeleton argument I set out the figures separately on the first page. Your Lordship will see there the principal sum which was ordered to be paid was £260,000.*

JUDGE THORNTON: *First you seek judgment for £260,000.*

MRS. DUMARESQ: *It is more than that because the adjudicator found, first, that there was the principal sum under the interim certificate dated 29th August for £260,000; there was VAT of £63,875 due on the principal sum of £365,000.*

JUDGE THORNTON: *Why is the adjudicator giving a decision for VAT on £115,000 which is not the subject of the decision?*

MRS. DUMARESQ: *My Lord, it is. That was the issue referred to him. If we can turn to the adjudicator's decision -*

JUDGE THORNTON: *I do not want to go into the detail if I do not need to.*

MRS. DUMARESQ: *There had been a previous payment which initially Britcon had split. It had not been identified as being inclusive or exclusive of VAT.*

JUDGE THORNTON: *Are the parties agreed, first of all, as to what the effect of the judgment should be?*

MRS. DUMARESQ: *I think they are.*

JUDGE THORNTON: *You are asking for £353,897.94p. Do you agree with that, Mr. Holden?*

Mr. HOLDEN: *Yes.*

JUDGE THORNTON: *Then I need not go into that. That is the first limb. Is there anything else?*

MRS. DUMARESQ: *Yes. I would ask for the claimant's costs of the action.*

JUDGE THORNTON: *The token payments of the order are, first, the judgment for £353,000 odd and costs. That is all you are seeking.*

MRS. DUMARESQ: *My Lord, yes.*

JUDGE THORNTON: What about the costs?

MRS. DUMARESQ: We ask for the claimant's costs of the action and my instructions are that those costs have been agreed as being the reasonable costs, subject to the issue of whether the claimant is entitled to his costs.

Mr. HOLDEN: I cannot resist an application for costs.

JUDGE THORNTON: As to the sum?

Mr. HOLDEN: The sum is reasonable. The only query this raises is whether or not VAT was due on the plaintiff's costs. Subject to that the figures are agreed.

JUDGE THORNTON: The judge does not normally order VAT in the judgment. That is dealt with elsewhere. If it is agreed, what is the sum of the costs?

MRS. DUMARESQ: It is £3,367.91.

JUDGE THORNTON: So paragraph 1, judgment for the claimants in the sum of £353,397.94p; paragraph 2, claimants to recover the costs of the action and the application, assessed in the agreed sum of £3,367.91p. Both those sums will be payable within 14 days. Is that acceptable to the parties?

MRS. DUMARESQ: Yes, my Lord.

Mr. HOLDEN: Yes, my Lord.

JUDGE THORNTON: Thank you both.

Note added by Judge when approving the text of the draft judgment:

"There was no application for permission to appeal. Had this been sought, I would have refused permission. No reasonable prospect of success."

For the Claimant MS. D. DUMARESQ (instructed by Messrs. Berryman Shacklock)

For the defendant: Mr. R. HOLDEN (instructed by Messrs. Carrick Carr & Wright)