SUMMARY JUDGMENT : Mr RECORDER MOXON-BROWNE QC : TCC. 21 June 2001

1. This is an application by the Claimant, C&B Scene Concept Design Ltd ("C&B Scene') for summary judgment pursuant to CPR Part 24. The claim is brought by a Part 8 Claim Form. This shows that the Claimant is seeking to enforce a decision made on 4th April 2001 by an Adjudicator Mr Brian Holloway, in an Adjudication commenced by the Claimant in relation to its entitlement to payment of 3 interim applications for payment ("Application No's 4, 5 and 6") purportedly made under a design and build contract for work done to Unit 2 Leisure Wood, Southampton (essentially the design, construction and fitting out of a cafe-bar). The employer under the contract was the Defendant Isobars Limited ("Isobars").

The Test under CPR Rule 24

2. To be entitled to judgment the Claimant must show that the Defendant has no realistic prospect of successfully defending the claim. (CPR r. 24.2(a)); and that there is no other compelling reason why the case or issue should go to trial CPR r 24 2(b)).

The Terms of the Contract

3. It is common ground that the contract consisted of a JCT Standard Form of Building Contract with Contractors' Design, 1988 edition "Employers' design requirements" dated 17.8.2000; and certain "revised contractors' proposals" sent under cover of a letter dated 10.10.2000.

4. The JCT Form was left unsigned (which, is not material), and its Appendices (including Appendix 2) were left uncompleted. The omission of Appendix 2 was important. Without it, Clause 30.3 of the contract, dealing with applications for interim payments, was unworkable for reasons which I shall examine below.

5. The revised contractors' proposals" incorporated a term that any "specific requirement of the Employers regarding the works notified after [10.10, 2000] and/or not expressly contained in the Employers' Requirements annexed hereto, must be agreed between the parties before implementation which agreement shall include express provision as to variation of the works and the contract price."

6. The letter accompanying the "revised contractors' proposals" stated "there is no need to sign a formal copy of the JCT contract, but it will be sufficient that the parties are agreed on those terms that incorporate the JCT provisions, subject to any alteration made by the special terms agreed."

7. As noted above, the parties' failure to complete Appendix 2 to the JCT Form was significant. Clause 30 of the JCT Form requires the parties to elect which of Alternatives "A" and "B" they will adopt. The two alternatives are set out in Appendix 2. Alternative A provides for interim payments to be made in accordance with predetermined stages, i.e. according to the progress of the Work; while Alternative B provides for interim payments to be made according to the elapse of predetermined periods of time. Thus the two alternatives are quite different, and the election of one or other of them is fundamental to the proper operation of the entire machinery for making of interim payments. If no election is made, Clause 30 of the JCT Form must in my judgment fall away. In so finding I reject Mr Constable's submission an behalf of the Claimant made orally and later re-emphasised in a supplementary written submission that Clauses 30.3.3 to 30.3.5 of the JCT Form are workable in the absence of an election between Alternatives "A" and "B". Without such an election I do not see how it is possible for the contractor to make an application for payment containing requisite particulars; nor for that matter for the employer to serve any meaningful notice of an intention to withhold payments. An election between Alternatives A and B is an essential prerequisite to the working of any Part of the interim payment provisions. In the absence of any agreement in terms of Clause 30 of the JCT Form s. 109 of the Housing Grants Construction and Regeneration Act 1996 ("HGCRA") comes into play, so as to imply into the contract terms derived from the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme"). Part II of the Scheme provides that where parties have failed to agree machinery for interim payments, s. 2 of Part II of the scheme will apply, thereby importing a standard form of interim payment machinery into the contract. The Scheme machinery is in very different terms from that provided by Clause 30.3 of the JCT Form.

The Interim Applications

8. In January 2001 the Claimant sent the Defendant 3 Applications for Interim Payment as follows:

No. 4, "as per original agreement" in the sum of £69,000.
No. 5, in respect of 7 alleged variations, in the sum of £45,496.33.
No. 6 in respect of "AA Print and Design" in the sum of £1,500.

9. It is apparent that there were a number of irregular features about each of these applications. Of the original contract sum of £450,000, the Defendant had paid at least £436,000, so there is not on any view £69,000 owing "per original agreement". While there is a dispute about variations, it was not suggested that the machinery envisaged by the 'revised contractors' proposals" was ever implemented (especially in relation to the requirement that variations be agreed and priced before implementation). Nor was there any attempt to calculate amounts due in accordance with Paragraph 2 of Part II of the Scheme. In relation to Application No. 6 there is at least some indication that the Claimant itself believes that work done by AA Design and Print was outside the scope of the JCT works, being a matter agreed directly between the Defendant and this contractor.

10. By letter dated 29 January 2001 the Defendant disputed the applications for payment and stated that it was unaware of any variations to the works. Whether or not it was intended that this letter should comply with Clause 30.3.3 of the JCT Form, it plainly did not do so.

The Adjudication

11. Although fully apprised of the nature of the dispute between the parties on the merits, the Adjudicator took the view that the Defendant's failure to serve any valid notice under Clause 30.3.3 of the JCT Form gave the Claimant an absolute right to payment of the sums set out in the Applications. In doing so he distinguished between the mandatory language of Clause 30.3.5 and other forms of contract which on their proper construction restrict the employer's obligation to payment of "amounts due", which (in the Adjudicator's words) "allows an employer to abate amounts otherwise due on the basis of defective works or work not carried out, without even having to issue an abatements notice" (see Adjudication Paragraph 83).

12. In so stating the Adjudicator had plainly overlooked the fact that Clauses 30.3 and 30.5 of the JCT Form had been substituted by Scheme provisions, the language of which was certainly open to the construction that the employers' obligation was only to pay amounts in fact due in respect of work properly done.

13. Accordingly the Adjudicator held that each of the interim applications should be paid including that in relation to AA Design and Print's work. The Adjudicator noted the Defendants contention that this application fell outside the JCT Contract but nevertheless said 'I feel bound by Clause 30.3.5". (See Adjudication Paragraph 92).

The Housing Grants Construction and Regeneration Act 1996 ("HGCRA")

14. The essential features of the Scheme for dispute resolution provided by HGCRA are in my judgment threefold. First, the adjudication should be summary. Secondly it should be enforceable, Thirdly, it does not mark the end of the road. It is open to as aggrieved party to reopen all the issues in traditional litigation or arbitration. Meanwhile however, the Adjudicator's decision is binding and enforceable. As Dyson J put it in Macob Civil Engineering v Morrison Construction (1999) BLR 93 at 97:

"It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are being and are to be complied with until the dispute is finally resolved."

15. But this does not mean that an Adjudicator's decision can never be impugned. An award can be attacked on the grounds that the Adjudicator had no jurisdiction to make it (for example because the dispute in question did not arise under any construction contract). An award can also be vitiated, on the ground that the Adjudicator has addressed himself to the wrong task (for example basing his decision on contractual provisions which were never agreed between the parties). The latter situation may perhaps be characterised as an excessive assumption of jurisdiction (because the Adjudicator is not empowered to base his decision on the wrong contract) or more generally as "asking the wrong

question" See **Bouygues** (2000) BLR 522 where the Court of Appeal approved the test formulated by Knox J in **Nikko Hotels** (1995) 2 EGLR 103 (*'If he has answered the right question in the wrong way his decision will be binding. If he has answered the wrong question, his decision will be a nullity*).

The Defendant's Case

16. By its Defence and Counterclaim in these proceedings the Defendant not only attacks the Arbitrator's jurisdiction to adjudicate as he did, but also opens up what it claims to be the merits of the case, seeking declarations to the effect that the Claimant is not contractually entitled to be paid for any variations. I understand that at the same time there has been a second reference to adjudication, this time by the Employers. I understand that the Adjudicator in this second reference has assumed jurisdiction to investigate the case, and if so advised to make certain declarations which may well turn out to be at odds with the Award of the first Adjudicator, although unsurprisingly the second Adjudicator has declined jurisdiction to reopen the question actually decided by the first Adjudicator, which was whether the Claimant was contractually entitled to payment of the interim valuations on the grounds that no notice of intention to withhold payments was served in accordance with Clause 30.3.3 of the JCT Form.

17. Thus it appears to be the intention of the Defendant to pursue all avenues open to it to explore the underlying merits of the case.

The Contentions of the Parties on the Part 24 Application

18. Not surprisingly Mr Constable on behalf of the Claimant urged on me the large volume of authority to the effect that Adjudicators' decisions are intended to be binding and enforceable regardless of what may appear to be obvious errors by the Adjudicator and/or any underlying merits of the case. He pointed out very forcibly that the purpose of HGCRA would be defeated if every mistake by an Adjudicator was to be characterised as an excessive assumption of jurisdiction; and he said that is any event by participating in the adjudication the Defendant had waived any jurisdiction points it might have.

19. In a full and careful argument advanced on behalf of the Defendant, Mr Lewis urged on me several discrete attacks on the Adjudicator's jurisdiction. He also argued that by overlooking the fact that Clause 30.3 of the JCT Form had been substituted by Part II of the HGCRA Scheme, the Adjudicator had exceeded his jurisdiction, or at least had "asked the wrong question" in the **Bouygues** sense.

20. Although originally somewhat sceptical, I have in the event come to the clear view that this latter point, which was absolutely fundamental to the Adjudicator's whole approach, and which was evidentially critical to his decision, is a good one, and amounts to a compelling reason why the Defendant should have leave to defend this claim. While this conclusion strictly makes it unnecessary to consider the other jurisdiction points, I propose to do so in deference to full arguments by counsel, and in case I should be wrong in what I have concluded is the main point in the case.

Jurisdiction

21. The Defendant's first point was that while the contract provided for adjudication by a member of the RIBA, Mr Holloway was not so qualified, being a member of the RICS.

22. In my judgement this objection, although no doubt accurate as a matter of fact, does not provide a sound basis for a belated challenge to the Arbitrator's jurisdiction. The point was not taken before him and the Defendant may therefore be taken to have consented to an adjudication by a member of the RICS rather than the RIBA and to have waived any right to raise a challenge to Mr Holloway's jurisdiction on this ground. See **Maymac Environmental Services v Faraday Building Services** 16.10.2000 (which I believe remains unreported, although a transcript was helpfully attached to Mr Constable's Skeleton Argument adduced on behalf of the Claimant). At p 14, lines 10-23, Toulmin HHJ said:

> *"Maymac make a further submission. They say that Faraday agreed that the dispute should be adjudicated and cannot resile from their agreement. I agree with this submission. Faraday consented to submit to the adjudication and admitted that there was a contract to which the Act and the scheme apply. The adjudication was conducted on that basis. Accordingly, Faraday are estopped by representation and convention from now*

arguing that the Act and the scheme did not apply and that the adjudicator was not entitled to make an adjudication which would be binding until the final determination of the dispute."

23. In my judgment this reasoning (which was applied to a challenge to jurisdiction on grounds rather less obvious than the Adjudicator's lack of appropriate qualifications in the present case) apply a fortiori where the possible ground for objection is a very obvious one.

24 Mr Lewis' second jurisdiction point was that while the contract provides that there will be no entitlement to payment for variations unless they have been the subject of prior agreement, and since it is common ground that there was no such prior agreement in the present case, the application for payment for variations has not arisen "under the contract". In relation to valuations 4 and 5, Mr Lewis argued that on the Claimant's own case (made by it in its response to the Claimant's referral of the dispute to the second Adjudicator) Applications 4 and 5 arose out of a compromise meeting held on 1st November 2000; while valuation No. 6 related to arrangements for making direct payments to a subcontractor (AA Paint and Design) which were arrangements wholly outside the JCT contract.

25. In my judgment, Mr Lewis' contention that it is fairly arguable that valuations 4 and 5 arose out of a compromise agreement, rather than the JCT agreement, is a good one. He was obviously correct in submitting that a compromise gives rise to a cause of action in contract quite independently of the contractual provisions which are the subject of the compromise; and more generally. I can see good reasons why the potentially draconian provisions of HGCRA should apply only to valuations arising out of contractual machinery which has been properly used, and not to agreements which may have arisen out of the rough and tumble of a compromise meeting, The language of Article 5 of the JCT Contract is clear in its reference to disputes arising "under this Contract". It is certainly arguable: that this form of words (as opposed to words such as "arising out of this contract") cannot apply to a dispute about a compromise agreement.

26. However it seems to me that it is now too late to take a jurisdiction point based on this argument. The situation is quite close to that considered by Toulmin HHJ in the **Maymac** case referred to above, where the jurisdiction issue centred on whether or not a contract governed by HGCRA had ever come into being, as opposed to whether or not a particular dispute arose "under" it.

27. It was argued by Mr Lewis that a point of this kind only becomes discernible after a judgment based on an erroneous assumption of jurisdiction has been delivered. I do not accept this. I see no reason why the point could not be taken at the outset, as Toulmin HHJ found an analogous point should have been taken in the **Maymac** case.

28. I am fortified in this conclusion by the fact that the Defendant did take just such a point before the Adjudicator in relation to the AA Design and Print valuation (ie, No. 6). At Paragraph 61 of the Adjudication, the Adjudicator records:

"As regards Application No. 6 ... the employer admits the sum but outside the scope of the JCT contract."

29. This seems a clear indication that all parties had this sort of jurisdiction pointed in mind. If the employer was able to take the point in relation to valuation No. 6 it could equally have taken the point in relation to valuations 4 and 5, and its failure to do so amounts to a waiver.

30. There was, as I have pointed out, no such waiver in relation to valuation No. 6. A jurisdiction point was taken. The Adjudicator dealt with it thus:

"I have given consideration to the Employer's claim that the matter of payment to AA Design & Print falls outside the JCT contract. However it is inescapable that the Employer gave no notice in respect of Application 6, and I feel bound by Clause 30.3.5".

31. With respect to the Adjudicator, it is apparent that he did not fully understand the point being put to him, which was that because a dispute about Application 6 was not a dispute under the contract, Clause 30.3.5 did not apply at all. In my judgment this point is well arguable, and even if the Claimant was otherwise entitled to summary judgment I would have granted leave to defend in respect of this Part of the claim.

32. Mr Lewis' final submission on jurisdiction was a fundamental one he argued that there were serious errors of law in the Adjudicator's decision, which sufficed to vitiate the award; either because the

Adjudicator had "answered the wrong question" (see **Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd** (2000) BLR 522) or more radically because a decision based on an error of law is ipso facto a decision based on an excess of jurisdiction.

Error of Law, Answering the Wrong Question

33. It is clear from the terms of the Award that the Adjudicator considered that having regard to the mandatory terms of Clause 30.3.5 of the JCT Form, he was bound to order payment of the sums stated in the relevant Applications, in, the absence of any valid notice on the part of the Defendant of an intention to withhold payment. See Paragraph 85 of his decision

34. As I pointed out at the beginning of this Judgment, at Paragraph 83 of the Adjudication he expressly noted:

"(The merits) might be germane if the Contract Conditions were other JCT or alternative institutional standard forms, where applications in respect of interim statements or payments, employ terminology such as "amounts due". That description (without qualification by the introduction of further clauses) arguably allows an employer to abate amounts otherwise due on the basis of defective works or works not carried out, without even having to issue a withholding notice."

35 In so stating, it seems to me plain that the Adjudicator overlooked the fact that Clause 30.3.5 of the JCT Form had no application to the contract which as the Claimant itself had asserted before him, lacked agreed provisions in relation to 'Alternatives A or B" in Appendix 2 to the Form. As I have explained, Clause 30.3 of the Contract relating to Applications for Interim Payment, is predicated on agreement of either Alternative A or B, and in the absence of agreement as to either of these alternatives, the scheme for Construction Contracts specified by HGCRA applies (see HGCRA s. 109(3)).

36. Part 2 of the Scheme provides that where parties have failed to agree the machinery for interim payments, s.2 of Part II shall apply. It is unnecessary to recite these provisions. Suffice to say that the language employed makes it clear that amounts due to the employer will depend on the value of work in fact done and/or materials in fact supplied. The language is far removed from Clause 30.3.5 of the JCT Form. Having regard to what the Adjudicator said at paragraph 83 of his Award, it is apparent that he would have come to a different decision if he had appreciated that in the case before him Clause 30.3 of the JCT Form had been supplanted by the relevant provisions of the HGCRA Scheme.

37. In these circumstances I agree with Mr Lewis' submission that the Adjudicator addressed wholly the wrong question. The question he asked was whether any of Applications 4, 5 or 6 had been the subject of any timely notice to withhold payment on the Part of the Defendant; and accordingly treated the Defendant's failure to serve such notice as conclusive of its liability to pay the amounts stated in the applications. The question the Adjudicator should have asked was what in terms of Part II of the HGCRA Scheme was the value of work performed and/or materials supplied during the period the subject of each of the Applications.

38. I am fortified in this conclusion by contrasting the words of HGCRA s. III ("*A party to a construction contract may not withhold payment ... of a sum due under the contract unless he has given an effective notice")* with those of Clause 30.3.5 of the JCT Form ("*where the Employer does not give any written notice ... the Employer shall pay the Contractor the amount stated in the application*").

39. In reaching this decision, I am mindful of Mr Constable's submissions about what has repeatedly been said about the purpose of HGCRA, and the adjudication process for which it provides. Adjudications are meant to be swift and conclusive, unless and until the issues decided are reopened in litigation or arbitration. They are not susceptible of attack on the grounds of error of fact or law, however obvious. See for example **Bouygues** (2000) BLR 522, **Macob** (1999) BLR **Northern Developments** (2000) BLR 158, **VHE Construction** (2000) BLR 187 and **Sherwood v Casson** (unreported, cited in **Northern Developments**).

40. But in my judgment the dicta in these cases, strong as they are, have no application to a case where the Adjudicator's decision is based exclusively on consideration of a contractual provision which did not apply to the agreement between the parties to the adjudication. In the case **of Bouygues** the Court of

Appeal approved the test formulated by Knox J in **Nikko Hotels** 1991 2 EGL 103 ("*If he has answered the right question in the wrong way his decision will be binding. If he has answered the wrong question, his decision will be a nullity").* In my judgment it is (to put it at its lowest) fairly arguable that that dictum applies here, and the Adjudicator did indeed consider an irrelevant question.

41. I have previously mentioned that Mr Lewis submitted that for the Adjudicator to proceed on the erroneous basis I have identified amounted of itself to a wrongful assumption of jurisdiction, see for example the analysis of the Adjudicator's error discussed in the Scottish case **Homer Burgess v Chirex** (2000) BLR 124. I do not think it is necessary for me to decide that point in the present case. I would however say that if the Adjudicator's conduct in considering Clause 34.3.5 of the JCT Form rather than Part II of the HGCRA Scheme was in excess of his jurisdiction. I do not think that was the subject of any waiver by the Defendant, who throughout pursued its argument that no variations had been authorised, and that Applications 4, 5 and 6 had been sufficiently protested by their letter of 31.1.2001. In my view the Adjudicator's approach to the case, and any wrongful assumption of jurisdiction by him, would not have been apparent until his award was published. Certainly I see no evidence that the Defendant waived any objection to his approach to the case.

Other Points

42. Other more minor points were addressed to me by Mr Lewis in support of his argument that there should be leave to defend. Chief of these was the submission that there was an underlying dispute as to whether an important letter had or had not been sent (with the possible implication that it might have been fabricated to support the Claimant's case). It was submitted by Mr Lewis that the existence of a dispute of this sort might be itself provide a good reason why there should be a trial of the action.

43. In view of my main finding it is not necessary for me to decide this point. However I will say that in the absence of any pleading to the effect than the letter in question was a forgery (which Mr Lewis frankly admitted was not an allegation he could support) the receipt or otherwise of this letter is a simple issue of fact like any other. It goes without saying that the existence of one or more issues of fact, however fundamental, is not of itself a reason not to enforce an Adjudicator's decision on an application for summary judgment.

Conclusion

44. For the reasons given I will give leave to the Defendant to defend the Action and pursue its Counterclaim. I will hear Counsel as to any ancillary matters including any directions which may now be appropriate.

Administrative Footnote

45. As a Recorder visiting Plymouth for the day of the hearing of this application I had little time for pre-reading the 5 volumes of documents and the numerous authorities referred to in Counsel's skeletons. A direct result of this was the need to reserve my judgment which would not otherwise have been necessary. May I suggest (with the diffidence becoming an invitee) that in this type of case it would be helpful if the parties were to alert the Court in good time if it is likely that much pre-reading will be necessary, so that the Court administration has a chance to make appropriate arrangements (eg at the least faxing Counsel's Skeletons to a visiting Recorder a day or two in advance of the hearing). There is of course nothing to stop Counsel themselves taking the initiative to achieve the same objective.