JUDGMENT : His Honour Judge David Wilcox : 7 March 2001. TCC.

1. There are 2 applications before me. The first being a claimant's application for summary judgment under CPR Part 24 & the defendant's application for a stay of proceedings under s9 Arbitration Act 1996.

2. On the 25 November of 1999 the parties executed a building contract. It incorporated the terms of the JCT 1980 edition as amended private with quantities. The building works were the provision of further accommodation at the defendant's hotel in Chester. The contract sum was £2.85 million. The contract documentation was prepared and produced by the defendant's quantity surveyors, Messrs Davies Langdon & Everest. The manner of amending the standard form variously followed the scissors and paste method, the deletion by striking out together with some attempt to amend the original text manually. If greater care had been taken in the preparation of the documentation the difficulties confronting the parties and the court would have been much less.

3. A dispute arose between the parties relating to the claimant's application for payment number 13 and the subsequent valuation and Architect's certificate number 13. The Architect on the 8 November 2000 certified that £346,425 was due. On the 21 November 2000 the defendant gave notice that they were withholding £347,000, on account of 14 weeks delay - adjustment of preliminaries £108,000; 4 weeks liquidation and ascertained damages £24,000 and defects and incomplete works valued at £215,000.

4. On Wednesday 22 November 2000 the claimant building company wrote to the Defendant:-
"For the following reasons our client disputes that you have any contractual entitlement to deduct £347,000 or any other sum"
   i) You have failed to issue a valid notice.
   ii) You have deducted £108,000 in respect of preliminaries despite the fact that adjustment has already been made within certificate number 13.
   iii) You have claimed £21 5,000 for defective works, our client disputes the allegation that the works are defective and further disputes the quantum claimed by you.
"Our client seeks payment of the sum of £346,425 as certified and we hereby give notice of a dispute in respect of the forgoing matters which our client intends to refer to adjudication.
In accordance with clause 41 A of the Conditions of Contract we invite you to agree the appointment of Mr Michael Black QC, 2 Temple Gardens, London EC4Y to act as Adjudicator ….
Should you not wish to agree the appointment we invite you to propose the name of a person or persons you would be happy to appoint as Adjudicator for our consideration. Alternatively we invite you to agree that the RICS be invited to appoint an Adjudicator.
We look forward to hearing from you in respect of part or all of our proposals by 2 pm on the 24th November 2000".

5. The 24 November was a Friday. Under the invoice for payment dated the 30 October 2000 payment was due in 21 days, namely the 29 November 2000.

6. On Friday 24 November 2000 there was a telephone call between Mr Kerrigan and Mr Gary Vickers.

7. A facsimile letter timed at 15.01, in fact despatched at BST 14.01 was sent by the defendants to the claimants. *"Dear Sirs*
   Re G & G Vickers and Joseph Finney PLC
   We refer to your letter 22 November re certificate number 13. We wish to inform you that this will be paid as per invoice".

8. Mr Kerrigan informed Mr Roland Finney of the claimants that payment would be made on or by 29 November 2000 and he was instructed not to proceed with the intended adjudication.

9. On Friday 24 November 2000 at 15.25, Mr Kerrigan wrote to the defendant by fax and mail:-
"Further to the telephone conversation earlier this afternoon between Mr Kerrigan and Mr Gary Vickers, we acknowledge receipt of your facsimile transmission. We confirm Mr Vickers' statement that the amount due in respect of certificate number 13 will be paid as per invoice by 29 November 2000.

On the basis of the foregoing our client will not be proceeding with the appointment of an Adjudicator".

10. At 16.59 on Friday the 29 November 2000, the defendants despatched a further letter to Peter Kerrigan. It was headed Re confirmation of payment to Joseph Finney Plc with date for payment inserted
"We refer to your letter 22 November re certificate number 13. We wish to inform you that this will be paid as per invoice 29 November 2000".

11. On Monday the 27 November 2000 the defendant wrote the following:- "We write further to your fax dated 24 November 2000 and in response to your letter 22 November 2000. We have considered the matter very carefully. In the first instance our fax letter dated 24 November as sent was not, and does not in any way supersede or invalidate the notice of withholding as duly served on the 21 November 2000 which remains wholly valid and effective. When we said that the contractor's invoice would be paid on the 29 November 2000, that statement has the clear implication that the payment will always be subject to both sides contractual rights and obligations. We note that you consider our notice to be invalid and invite you to tell us why you hold that view. As to the adjudication we think that an Architect or building surveyor is a more appropriate person to deal with matters of defects as opposed to a lawyer. We are prepared to put forward names if you agree this proposal".

12. The claimant's advisor wrote back on Monday the 27th November 2000 referring to that letter and saying:-
"The telephone conversation between Mr Peter Kerrigan & Gary Vickers on 24 November 2000 was unequivocal. Mr Gary Vickers stated that the sum certified (and invoiced on 30 October 2000) would be paid on 29 November 2000. Further, Mr Brian Evans also telephoned Mr Kerrigan on your behalf on 24 November 2000 and agreed the sum certified and invoiced would be paid by the 29 November 2000.
Our client is not prepared to play your games and we are instructed to proceed to appoint an Adjudicator in respect of those matters referred to on our letter 22 November 2000 and at the same time to commence Court proceedings to sue upon the comprise breached on the 24 November 2000".

13. **THE APPLICATIONS :** In relation to the claimant's application for summary judgment under CPR Part 24, Mr Bowsher submits that there is clear and unambiguous evidence of a compromise agreement evidenced in the correspondence whereby the defendant agreed to pay the sum in the invoice by the 29 November 2000 and on the strength of that promise the claimant forbore from pursuing his remedy to recover the monies by way of adjudication.

14. Mr Singer applies for a stay of proceedings under Section 9 of the Arbitration Act of 1996 contending that there was no concluded compromise agreement, but in any event the proper forum in which to determine whether or not there was such an agreement is that of an arbitrator in accordance with the arbitration provisions of the JCT 1980 edition contract as amended.

15. The 1st matter is to consider precisely what are the dispute resolution provisions provided for in the contract.

16. **THE CONTRACT PROVISIONS :** By amendment 18 provision was made in JCT Contract 1980 Edn, private with quantities, for an adjudication procedure to comply with the provisions of Housing Grants Construction and Regeneration Act, 1996 Part 11 Construction Contracts.

17. Art 5 of the original & unamended edn provides so far as it is relevant "If any dispute or difference as to the construction of this Contract or any matter or thing of whatsoever nature arising thereunder or in connection therewith shall arise between the Employer or the Architect on his behalf & the Contractor either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor.. it shall be & is hereby referred to arbitration in accordance with Clause 41".

18. There is an issue raised by the Defendant as to whether this provision has been amended.

19. There are amendments in accordance with amendments 14, 16 and 17 and TC/94 which are not relevant to these proceedings.

20. Amended Article 9 provides:- "The conditions shall have effect as modified by the amendments in Amendment 18 attached hereto". The original unamended edition provides for arbitration as the sole means of settling disputes. Amendment 18 makes provision for adjudication complying with the 1996 Act. It also introduces legal proceedings as a further option for the settlement of disputes, thus there is a new clause 41A providing for adjudication, a revised clause 41 renumbered as clause 41B for arbitration proceedings and a new clause 41C Legal Proceedings".

21. The guidance notes in the rubric of Amendment 18 for users wishing to incorporate the amendments arising from the Housing Grants, Construction and Regeneration Act 1996 Part II Construction Contracts suggests that they should either amend the Form of Contract in accordance with amendment 18 and execute the Contract as so amended with each amendment initialled by or on behalf of the parties or cut out the pages 5 to 13 and delete all amendments not marked with a bullet point and to insert in the Articles an additional Article which states: *Article.... "Amendment 18 - incorporation The conditions shall have effect as modified by the amendments in Amendment 18 attached hereto and not deleted." * Allocate the next available article number

22. In the Articles of Agreement there is a new Article 5:- If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 41A.

23. Then there follows a new Article 7A dealing with dispute resolution by -arbitration, and a new Article 7B dealing with dispute resolution by - legal proceedings. These make reference to the renumbered clauses 41B and clauses 41C respectively. The new Articles 5, 7A and 7B provide a comprehensive menu for the parties choosing the appropriate form of dispute resolution, in substitution for the pre-amendment provisions.

24. Articles 7A and 7B are of course alternatives. Article 7A has been struck out and the deletion has been initialled. Mention however should be made the first line of Article 7A "Where the entry in the Appendix stating that "clause 41B applies" has not been deleted then subject to Article 5 if any dispute or difference as to any matter or thing of whatsoever nature arising tinder this Contract or in connection therewith .. shall arise between the Parties either during the progress or after the completion or abandonment of the Works or after determination of the employment of the Contractor .. it shall be referred to Arbitration in accordance with clause 41B and the JCT 1998 edition of the Construction Industry Model Arbitration Rules."

25. In fact on the amended Form of Contract the words "clause 41 B applies" has not been deleted, Mr Singer relies upon that omission as indicating that the wholly deleted Article 7A should prevail over the undeleted new Article 7B.

26. As the heading of clause 41 as amended the following appears

    Clause 41 Settlement of Disputes - Arbitration
    Re-draft the heading
    Arbitration legal proceedings
    Clause 41B will be deleted. Clause 41C will apply.

    This text is cut out and stuck on by way of amendment and initialled indicating the intention of the parties.

27. In the re-drafted clause 41 following there are no physical deletions. The text at 41A provides for Adjudication, 41B for Arbitration and clause 41C provides for Legal Proceedings.

28. In my judgment, because Article 7A has been clearly struck out and the heading of clause 41 in terms states that clause 41B will be deleted and clause 41C will apply, the clear intention of the parties was to provide for legal proceedings to be the route for the settlement of disputes rather than arbitration. Mr Singer accepts that the re-drafted heading of clause 41 is compatible with an intention for legal proceedings as the means of settling disputes but he argues that the use of the future tense, is fatal as to ascertaining the intention of the signatories at the time the contract was signed.

29. In my judgment, despite the inelegance of expression and clumsy means of amendment it is clear the parties agreed, and the contract provides, that the means of Judgment Approved by the Court for

handing down dispute resolution chosen was that of legal proceedings (clause 41C). The conjunction of Article 9, the physical deletion of Article 7A and the words of choice make it clear that the arbitration provision was removed from the contract by effective amendment. The original Article 5 was removed by substitution and the adoption of Amendment 18.

30. In the absence of an arbitration provision, it is for the Court to determine whether there was a contract of compromise. Had the arbitration clause in the 18th amendment at Article 7A remained undeleted it seems to me that the wording "any dispute or difference as to any matter or thing of whatsoever nature arising under the contract or in connection therewith . .." are wide enough to encompass the dispute as to whether there was an agreement compromising the parties rights and obligations under the principal contract. See **Ashville Investments v Elmer Limited CA** (1989) IQB 488 page 503 letters C to H.

31. **The Claimant's application under CPR Part 24:** Mr Gary Vickers in his sworn statement states that in relation to the matters covered by interim certificate 13 and valuation issues that he had the benefit of independent professional advisors. Namely the quantity surveyors Davies Langdon & Everest who prepared the contract, the Architects Brian, Clark Roberts and Byrom Evans Associates Chartered Surveyors. In his statement, Mr Vickers said that on Friday the 24 November 2000 as to his conversation with Mr Kerrigan that he said that he "thought we will pay the invoice in accordance with the contract". Later in his statement of the 9 January 2001 he said that the question of settling the adjudication simply never arose in his conversation or fax to Mr Kerrigan and that he didn't "intend to abandon any rights which (he) as employer had as regards defects or other matters referred to in the notice of withholding dated 21 November 2000". Significantly he did not assert that he ever said that he would only offer £346,425 with one hand and withhold £347,000 by the other.

32. The message of the claimant's letter of the 22nd November 2000 is clear. Pay £346,425 in accordance with the contract or we will proceed to adjudication to secure payment of the money.

33. At about 2pm on Friday 24 November 2000, Mr Vickers and Mr Kerrigan had a conversation by telephone. Both Mr Vickers and Mr Kerrigan agreed that Mr Vickers agreed to pay the claimant the sum certified and contained in the invoice by the 29 November 2000. Mr Vickers in his statement of the 19 January 2001 said that he didn't intend to abandon any rights which he as an employer had, as regards defects or other matters referred to in his notice of the 2l'~ November 2000. He does not assert that he articulated this to Mr Kerrigan in this conversation or say that he was notionally proffering payment £346,425 with one hand and withholding £347,000 with the other. The unqualified written promise to pay was first put into writing by the first letter sent by Mr Gary Vickers. It promised to pay as per the invoice. Mr Kerrigan was therefore instructed by Mr Finney not to proceed with the adjudication. Mr Kerrigan's letter at 3.25.p.m. rehearses Mr Vickers' promise of payment in accordance with certificate 13 and the invoice by the 29th November 2000 and on the strength of that promise, the claimant's forbearance to proceed with adjudication.

34. The 2nd letter of Gary Vickers of the 24 November 2000 entitled Re Confirmation of payment of Joseph Finney Plc for payment inserted boldly confirms the earlier promise & states the date of payment in writing.

35. Neither of the Vickers' letters are subject to qualification.

36. This correspondence clearly contains a clear promise by the defendant to pay in accordance with the invoice and thus the contract, in consequence of which claimant's promised not to proceed with an adjudication to enforce the claimant's rights under the contract.

37. It offends common-sense to construe Mr Vickers' two letters of the 22 November 2000 as a "promise to pay on the 29 November 2000 but not to …". They were not an acknowledgement as to entitlement subject to a contra claim, otherwise actual payment would not have been promised on a specified occasion.

38. Mr Singer submits that there was no contract to compromise because the defendant's letter of Monday the 27 November 2000 shows what Mr Vickers state of mind was on Friday the 24 November of 2000.
"..When we said the contractor's invoice will he paid on the 29 November 2000 that statement has clear implications that payment will always he subject to both sides contractual rights and obligation."
"We note you consider our notice invalid and we invite you to tell us why you hold that view."
"As to an adjudication we think that an Architect or Building Surveyor is more a appropriate person to deal with matters of defects as opposed to a lawyer."

39. He contends that this evidences that Mr Vickers did not intend to agree to compromise, even though he promised to pay on a specific date He submits that in the claimant's pleaded case, the compromise agreement is pleaded as partly in writing and partly oral and that where the oral part is in issue a CPR Part 24 disposal is not appropriate, because oral evidence is necessary to resolve the issues raised. if an agreement is clearly unambiguously contained in writing the fact that a cautious pleader has used a form of words wider than necessary is no impediment to a Court giving the appropriate relief when justified. But there is no real conflict disclosed in the sworn statements as to the afternoon conversation on the 24 November which gainsays that the defendants without qualification promised to pay and that on the strength of that the claimants promised not to pursue the adjudication proceedings. That is exactly what the claimants asserted in their letter of the 24 November 2000 transmitted at 3.25.p.m. in the afternoon, and which was uncontradicted or qualified in the defendant's subsequent letter at 4.59 on the afternoon of the 24 November 2000. On the evidence before me there is no arguable case that a compromise agreement was not concluded on the afternoon of the 24 November 2000.

40. An exchange of mutual promises is good consideration. The promise not to adjudicate is a promise of value. An adjudication would involve expenditure of resource in terms of time, money and personnel and while the parties considered themselves as bound by the contract to compromise, the claimant could not have pursued an adjudication on certificate 13. By their letter of the 27 November 2000 the defendants repudiated the compromise and thus the claimants were no longer bound by their promise not to adjudicate.

41. The claimant is entitled to summary judgment in the sum of £346,425 plus VAT under CPR Part 24.

42. Subject to any submissions the defendants will pay the costs of both applications.

MR MICHAEL BOWSHER (instructed by DAVIES WALLIS FOYSTER for the CLAIMANT)
MR ANDREW SINGER (instructed by WALKER, SMITH & WAY for the DEFENDANT)