JUDGMENT : His Honour Judge Richard Havery : 2nd February 2001 TCC

1. I have before me an application under Part 24 of the Civil Procedure Rules for summary judgment to enforce the decision of an adjudicator appointed under the provisions of the Housing Grants Construction and Regeneration Act 1996. The point is a very short one, namely, whether the arbitrator had jurisdiction to make the decision that he did. The question arises under two applications for payment made pursuant to the relevant construction contract, application No 7 and application No 8. Before I look at those, I should just mention briefly some of the terms of the contract.

2. Clause 6.1 provides for the assessment of amounts due under interim certificates, and 6.1 provides that the gross amount due to the specialist, which is LPL, the Claimant in this case, who is obviously a sub-subcontractor of the Defendant Kershaw, shall be the sum of the value of the work pursuant to the contract plus variations plus additional costs, and materials and fluctuations. Then 6.3 provides for the circumstances in which the amounts ascertained under clause 6.1 shall be due and payable. It says that the amounts ascertained under clause 6.1 shall be due and payable or allowed not later than 60 days after the valuation dates listed in an appendix, less certain things, which include payments previously due under this clause. I note that that does not say payments previously made.

3. When one looks at the applications, one sees that they are made in accordance with clause 6:3. Application No 7 gives a current value of works completed £346,000, no materials on site, so the gross value of the application is the same sum. There is then deducted previous application, which in fact also was an amount that had been paid, of £297,000, making an application for the balance £48,903. Then we come to application No 8, where the current value of works completed was slightly amended upwards to £346,000 and a few more pounds, and then the previous application was deducted, and the balance of £171.98 plus VAT was claimed under application No 8, which seems to me to be really in accordance with clause 6.3, which says that the sum due shall in effect give credits for payments previously due. It leaves a credit for payments which cumulatively came to £297,000.

4. So, although the gross values stated on the applications were undoubtedly cumulative, the amounts applied for were not cumulative, as I interpret the agreement. Indeed it seems tolerably clear from the applications that they were not cumulative and that indeed, subject to what I am about to say, the balance on application No 7 would remain due even though application No 8 had been made and would be due in addition to the amount due under application No 8.

5. However, that is not how the adjudicator decided the case. Before I come to his decision, I should just say what passed between the parties. The last part of clause 6.1 of the contract provides as follows: Where the amounts due as ascertained by the subcontractor viz., the Defendant Kershaw in this case differ from the amount of an application for payment made by the specialist i.e. LPL, the Claimant pursuant to clause 6.4, then the subcontractor shall notify in writing to the specialist the amount actually due and his reasons for his dissension from the aforementioned application for payment and not less than 30 days prior to the date for payment as clause 6.3. It is common ground that if effective notice of that kind is given then the payment is not due, for the time being at any rate, and such a notice was given in relation to application No 7, so that the money was not paid under application No 7.

6. No such notice was given in relation to application No 8. What the adjudicator said about it this: The contract clause 6.1 requires that wherever subcontractor's ascertainment varies from the specialist's application he shall notify his dissension not less than 30 days prior to the date for payment. It does not refer to only interim applications. This final account, which it is common ground was application No 7 would appear to be LPL application No 7 dated 10 May 2000. Kershaw responded to this on 16 May 2000, the majority of queries being full costs breakdown and substantiation required.

7. Then he went on: LPL submitted further details with application No 8 dated 16 June 2000. Kershaws having received a response to their queries then have a reasonable time (Clause 6.2) to consider and investigate the variations. In this case a period of 30 days would seem reasonable. The contract in accordance with clause 6.1 still requires that the subcontractor should notify the specialist where in particular the subcontractor's ascertainment differs from the specialist's application and this should be prior to 30 days before the specialist is due payment. A dissension to the earlier application is no

longer applicable, hence Kershaw still required to submit their reasons etcetera within a period of 30 days prior to when payment is due, i.e. 16 July 2000. Kershaws submission was not until 15 August 2000. This is not within the 30 days prior to the date for final payment. I therefore conclude that it is correct that Kershaw are required to pay LPL's application No 8 in full as this became the amount due. That is the end of my quotation from the adjudicator's decision, and it will be seen that it was based purely on his view as to the true construction of the agreement.

8. This court is not hearing an appeal from the decision of the adjudicator and it is no part of my function to say whether the adjudicator was right or wrong when he came to that conclusion. Nevertheless, it may be said to be a somewhat technical decision, and the objection to it taken by Mr Pennycote, counsel for the Defendants, is also a technical one, which is that the adjudicator went outside his jurisdiction. Mr Pennycote recognised that the mere fact (if it is a fact) that the adjudicator's decision was wrong was not a sufficient ground for him to succeed in opposing this application. His submission was that there was no jurisdiction. To make that good, he referred me to the notice of adjudication, and that notice was given on 15 September 2000 and was made in pursuance of either para. 1.3 of the schedule or some similar provision in the contract. I think actually it was the schedule itself. Paragraph 3 of that notice of adjudication says this under the heading Details of the dispute or difference: The referring party has submitted applications for payment for work completed under the contract. The responding party has not made payment in response to the referring party's interim application for payment No 8 and dated 16 June 2000, in accordance with the contract. 4. The nature of redress which is being sought. The referring party claims payment of the sum of £70,162 .17 net excluding VAT for work carried out in accordance with that interim application No 8 and dated 16 June 2000, if not, what sum is to be paid?

9. Then in the referral notice, which was made in accordance with para. 7 of the scheme, it is said in para. 1 that the applicant issued their interim application for payment No 8 dated 16 June 2000 in the gross sum of £346,217.17 which included so much for variation work, and in para. 5 it said this: The responding party has paid the gross sum of £272,362.15 against the referring party's interim application for payment No 7. Therefore the outstanding balance is a net sum of £70,162.27 following the deduction of retention.

10. Mr Pennycote's argument is that this whole reference related to application No 8. Application No 8 was only for £171 odd. As I have already said, and as I think perhaps Mr Pennycote would accept, though I have not asked him to, this is rather a technical point which is made, I think, to meet perhaps a rather technical point in the decision. But it seems to me that it is clear that the Claimant was asking for the payment of the sum of £70,000. It says for work carried out in accordance with interim application and it is of course true that the interim application does mention the total value of the work, and the strongest point in Mr Pennycote's favour really arises from para. 3 of the notice of adjudication, saying that the responding party has not made payment in response to the referring party's interim application for payment No 8. If that were in isolation, it would be quite a strong point, perhaps, but given the notice of the redress which is expressed as being sought in the notice of adjudication, it does seem to me to be within the jurisdiction of the adjudicator to decide that that sum was due. I have, of course, had brought to my attention by Mr Pennycote the terms of Part 24, but it seems to me that it is purely a point of construction of jurisdiction and I can decide it. It seems to me that there is no prospect of the point succeeding. Accordingly, I must give judgment for the Claimant. I give judgment for the Claimant. The relevant sum is £70,162.17 and there may be some interest, on which I will hear counsel.

(Discussion re form of order and costs)

MR A. HUGHES (Instructed by Taylor Joynson Garrett) appeared on behalf of the Claimant.
MR I PENNYCOTE (Instructed by Fenwick Elliott) Appeared on behalf of the Defendants.