

**JUDGMENT : Her Honour Judge Frances Kirkham : 13 August 2001. TCC.**

**Background**

1. The claimant ("Parsons") is a specialist in odour abatement and exhaust systems. The defendant ("Purac") is a contractor supplying effluent treatment plant.

2. The parties entered into a sub contract in October 2000 for the provision of odour abatement equipment at the AWA Lowestoft Waste Water Treatment Works, at a price of £626,850 plus VAT.

The sub contract was based on the FCEC Blue Book standard form, modified-to tie in with the main contract between Purac and Anglian Water, which was on, or based on the Green Book standard form. The sub contract in question here is therefore not an industry-wide standard.

Parsons gave a bond, with an expiry date of 31 January 2001, for £310,291.

3. On 23 November 2000, representatives of each company discussed outstanding deliveries. There is a dispute as to what was said in that conversation. By letter to Parsons dated 24 November 2000, Purac stated that they considered Parsons to be in breach of their obligation to deliver equipment and materials by 23 November 2000, as provided by the third schedule to the sub contract. Purac said they would be prepared to accept rescheduled deliveries, by dates set out in that letter, and that failure to meet any of those dates would be considered to be a continuing default under the sub contract. I am not aware of any reply to that letter.

4. The sub contract allowed Parsons to apply for payment when it had reached certain milestones set out in the Third Schedule. On 20 December 2000 Parsons applied for payment No. 3, asserting that they had achieved milestone 3, namely the completion at their works or delivery to site of the equipment.

On 21 December 2000 Purac gave notice under clause 17f and sections 2 and 3 of the third schedule of the sub contract, by which Purac stated that no payment would be made on the ground that Parsons had failed to meet its obligations under the sub contract.

5. By letter to Parsons dated 2 January 2001, Purac notified Parsons that they considered Parsons to be in breach of the sub contract, and warning that failure to improve performance would result in Purac's engaging others to complete the work; Purac would claim the cost of doing so.

By letter to Parsons dated 11 January 2001, Purac contended that Parsons were in breach of contract by failing to complete deliveries by 23 November and complete site installation by 21 December 2000. Purac gave notice pursuant to clause 20c that they were taking over the remaining sub contract work. The letter said:

*"...we will take over the remaining Sub-Contract Works including any supply of outstanding plant and equipment and any remaining installation and commissioning works. We will advise you of the financial implications of this action when all costs are known..."*

On 12 January 2001, Purac ejected Parsons from site. Parsons say that was wrongful (Purac subsequently engaged Alderley Process Technologies to complete Parsons' work.)

On 30 January 2001 Purac gave notice to the pursuant to the bond given by Parsons. No sum has yet been paid under the bond, but I understand that the bond itself has not been returned to Parsons.

6. By a Notice of Adjudication dated 4 April 2001, Parsons referred the dispute regarding application number 3 to adjudication. On 5 April 2001 Mr D Atkinson was appointed adjudicator.

During the course of the adjudication, Purac raised a jurisdictional issue, namely. that, as the works were not a construction operation as defined by the Housing Grants Construction and Regeneration Act 1996, there was no dispute capable of adjudication. However, in the course of submissions on the point, Purac conceded that they would submit to the jurisdiction of the adjudicator under the terms of the contract. The relevant letter stated:

*"For the sake of clarity and for the purposes of expedition, we confirm that (Purac) is prepared to submit to your jurisdiction undue the terms of the sub-contract only, in respect of the dispute referred to you.*

*It is (Purac's) position that you would not have jurisdiction to conduct an adjudication in relation to this issue under the provisions of the [Act]..... but notwithstanding this, (Purac) is prepared to submit to you (sic)*

*jurisdiction in respect of matters properly referred to you to be conducted under and in accordance with the provisions of the Contract between the parties. "*

The adjudicator made an interim decision dated 4 May 2001. The adjudicator concluded that the operation carried out by Parsons under the sub contract was not a construction operation for the purposes of the Act and the matter referred was not a "Construction Dispute" as defined by clause 1(g) of the sub contract.

7. As Purac had agreed to submit to adjudication by him, Mr Atkinson proceeded to deal with the substantive issue. He made his decision on 17 May 2001. By that he:
  - declared that, in respect of application number 3, the sum of £222,765.75 was payable by Purac to Parsons
  - ordered Purac to pay Parsons within seven days of the date of the decision the sum of £222,765 plus VAT
  - ordered Purac to pay Parsons interest on that sum in accordance with clause 17 of the sub contract, from 19 March 2001 until the date of payment
  - declared that the sum claimed by application number 3 became due on 2 February 2001
  - declared that Purac's letter of 21 December 2000 was not an effective notice for the purpose of Clause 17e or of Clause 17g
8. By letter dated 23 May 2001 Purac gave notice, said to be pursuant to clause 17g withholding sums found due under the adjudication.
9. On 25 May 2001 Parsons began Court proceedings to enforce the adjudicator's decision. Parsons seeks an order for summary judgment in respect of the sums awarded by the adjudicator. Purac has served a defence and counterclaim. By order dated 17 July 2001 they were given permission to amend that pleading. Broadly, Purac's defence is that, by reason of its letter of 23 May 2001, and in reliance on clauses 17, 20 and 31, it was entitled to withhold payment from Parsons; Parsons were in breach of contract because they failed to proceed with due diligence and had fallen behind programme, equipment was not fit for purpose Purac had taken work out of Parsons' hands in January 2001 Parsons was unable to pay its own suppliers, so Purac paid some directly. Purac counterclaim the cost, put at £303,000, of completing Parsons' work and damages for breach by Parsons.  
No reply to defence and defence to counterclaim has yet been served.

#### **Applications**

10. Parsons apply for summary judgment and for an order staying Purac's counterclaim to arbitration pursuant to S.9 Arbitration Act 1996. Purac apply for summary judgment or an interim payment on their counterclaim.
11. The court considered evidence and heard submissions relating to all issues save Purac's application in relation to their counterclaim. That application is dependant upon Parsons' application for a stay to arbitration and thus on this judgment.
12. During oral submissions, issues were raised as to Parsons' financial position. It was agreed that, if that were relevant, the court would invite further submissions from the parties.
13. For the purposes of the applications only, Parsons concede that Purac have an arguable counterclaim.

#### **Sub Contract**

13. Relevant provisions of the sub contract are as follows: Clause 1 sets out various definitions, including
  - 1f: "*Adjudicator*" means the person referred to and so called in clause 27
  - 1g: "*Sub-Contract Dispute*" means any disagreement or difference between (Parsons) and (Purac) arising under the Sub-Contract in relation to any matter in connection with a "construction operation" as defined in the (Act) including any dispute as to whether the matter referred to the Adjudicator is in connection with a Construction Operation...
  - 1m: "*Final Date For Payment*" means the date determined in accordance with Clause 17(h)(i)."

*"17f. Subject to Clauses 11(e), 11(f), 20(c) and 31 and as hereinafter provided and without prejudice to any rights which exist (Purac) shall be entitled to withhold or defer payment of all or part of any sums otherwise due under the provisions hereof where:*

- i. any work done or Plant supplied by [Parsons] is not in accordance with the Sub-Contract then (Purac) may withhold the cost and expense of making good the defect in question. If without reasonable cause (Parsons) performance of the Sub-Contract falls behind the approved programme of work then (Purac) may withhold the reasonable value of the Sub-Contract Works which ought to have been performed in accordance with the approved programme of work but which at the relevant stage in the programme remained undone.*
- ii. a dispute arises or has arisen, between (Parsons) and [Purac] and/or (Purac) and the Purchaser involving any question of any matter included in an such application.*

*17 g. If (Purac) intends to withhold payment of a sum that has become due under the Sub-Contract in connection with a Construction Operation or otherwise then not later than one day before the Final Date For Payment in respect of that sum (Purac) shall serve a notice specifying:*

- 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.*

*Provided that such notice will not be required if the notice mentioned in clause 17e complies with the requirements in sub clauses (a) and (b) above.*

*17 h. (i) (Purac) shall pay [Parsons] any amount due under the Sub-Contract 14 days after the date upon which the sum became due (the Final Date for Payment). Provided that where the matter in respect of which payment is to be made is not a "construction operation" within the definition provided by the Housing Grants Construction and Regeneration Act 1996 or the Purchaser becomes insolvent within the definition of "insolvent" provided by section 113 of the Housing Grants Construction and Regeneration Act 1996 (Purac) shall have no obligation to make any payment to (Parsons) except to make payment within 14 days after the date upon which (Purac) receives payment in respect of the sum due in respect of the subcontract works....*

*20 a. If [Parsons],*

- i. fails to proceed with the Sub-Contract Works with due diligence; or*
- ii. fails to execute the Sub-Contract Works or to perform his other obligations in accordance with the Sub-Contract; or*
- iii. refuses or neglects to remove defective materials or make good defective work after being directed in writing so to do by [Purac]; or*
- iv. commits an act of bankruptcy or enters into a deed of arrangement with his creditors or, being a company calls a meeting of its creditors, becomes subject to an Administration order, has a receiver appointed to manage its affairs by the holder of a charge or debenture or has a liquidator appointed, (other than, a voluntary liquidation for the purposes of reconstruction),*

*then in any such event and without prejudice to any other rights or remedies, [Purac] may by written notice to [Parsons] forthwith determine (Parsons) employment under this Sub-Contract and thereupon (Purac) may take possession of all materials, plant and other things whatsoever brought on to the Site or in respect of which (Parsons) has received payment under Clause 17 and may use them for the purpose of executing, completing and maintaining the Sub-Contract Works and may, if he thinks fit, sell all or any of them and apply the proceeds in or towards the satisfaction of monies otherwise due to him from [Parsons].*

- b. Upon such a determination, the rights and liability of [Purac] anti (Parsons) shall, subject to the preceding Sub-Clause, be the same as if [Parsons] had repudiated this Sub-Contract and (Purac) had by his notice of determination under the preceding Sub-Clause elected to accept such repudiation.*
- c. [Purac] may in lieu of giving a notice of determination under this clause take part only of the Sub-Contract Works out of the hands of [Parsons] and may by himself his servants or agents. execute,*

*complete and maintain such part and in such event (Purac) may recover his reasonable costs of so doing from [Parsons], or deduct such costs from monies otherwise becoming due to (Parsons).*

Clause 27 sets out a procedure for adjudication. It is a bespoke adjudication scheme, but is compliant with S.108 of the Act.

27g. *The decision of the Adjudicator shall be complied with forthwith, upon receipt. [DELETE ONE OF THE FOLLOWING BEFORE ISSUING TENDER]*

*h (i) The decision of the Adjudicator shall be final and binding. Or*

*(ii) 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 or by agreement between the parties.*

*(iii) If one of the above options 27h(i) or 27h(ii) has not been deleted then 27h(i) shall apply.*

*[Neither (i) nor (ii) had been deleted.]*

28a *Where clause 27(h)(i) does not apply and subject to the provisions of clause 27 herein if any dispute arises between (Purac) and (Parsons) in connection with this Sub-Contract, it shall subject to the provisions of this Clause, be referred to arbitration...*

31 *Nothing contained in this Deed whether expressly or by incorporation or by implication shall in any way restrict [Purac's] equitable or common law rights of set off. Without prejudice to the generality of the foregoing, (Purac) shall have the right to set off against any sum due to [Parsons] whether hereunder or otherwise a fair and reasonable sum in respect of or on account of any claim or claims that have been made or which are to be made against [Purac] by the Purchaser the subject matter of which touches or concerns the Sub-Contract Works.*

The period for completion is set out in the third schedule to the sub contract. This gives dates for (1) completion of delivery to site (2) completion of site installations and (3) completion of site commissioning. The schedule states that those dates are provisional, and that they will be confirmed by Purac as the main contract progresses. (Parsons say that those dates remained provisional, Purac say that they were confirmed to Parsons as fixed dates.)

14. Relevant passages in Purac's letter to Parsons of 23 May 2001 are:

*"We refer to the decision of the Adjudicator, Mr Daniel Atkinson, dated 17 May 2001.*

*The Adjudicator decided and determined that, in respect of Application No 3, the sum of £222,761.75 excluding VAT is due under the contract. He also ordered that we should pay interest on this sum for the period from 19 March 2001 until the date of payment at the main contract rate (ie 1% above Bank of England minimum lending rate). We calculate that the amount of interest accrued to date is £2,622.84, making a total (exclusive of VAT) payable to date of £225,388.59. He further ordered that we should pay the aforementioned sums to you within 7 days of the date of the decision. Accordingly, the Final Date for payment is 24 May 2001.*

*Pursuant to clause 17(g) of the Sub-Contract, we hereby give you notice of your intention to withhold payment of the above mentioned sums. In accordance with the requirements of that clause and section 111 of the Housing Grants, Construction and Regeneration Act 1996, we set out below the ground for withholding payment and the amount withheld in respect of that ground.*

- 1. You failed to execute the Sub-Contract Works or to perform your other obligations in accordance with the Sub-Contract. Accordingly, we gave you notice on 11 January 2001 that we were exercising our right, pursuant to clause 20(c), to take over and complete the remaining Sub-Contract works in your place.*
- 2. Pursuant to clause 20(c) we are entitled to recover, or deduct from monies otherwise becoming due to you, our reasonable costs of completing such works.*
- 3. The Sub-Contract for completing your works was let to Alderley Process Technologies ("APT") on 12 April 2001. The Sub-Contract was let in the sum of £303,000.00 (exclusive of VAT). This cost of completing the works is supported by an independent valuation conducted on our behalf by E C Harris.*
- 4. The cost to us completing your works in your place is therefore greater than the sum due to you. We are entitled to set off that amount due to us against the amount due to you. It is on this ground that Purac*

*intend to withhold the entire sums awarded by the Adjudicator. Accordingly, you have no entitlement to any payment.*

*For the avoidance of doubt therefore:*

- i. The ground for withholding payment is our entitlement, pursuant to clause 20(c) of the Sub-Contract, to deduct the costs incurred by us, in completing the remaining Sub-Contract works in your place, from monies otherwise becoming due to you.*
- ii. The amount proposed to be withheld is £222,765.75 (exclusive of VAT) together with all accrued interest (as referred to above), making a total (exclusive of VAT) of £225,385.59.*

*We shall seek payment of the balance due from you, pursuant to clause 20(c) separately."*

#### **Parsons' application for summary judgment**

15. Parsons accept that this was an ad hoc adjudication, not one to which the Act applied. However their case is that the adjudicator's decision should be applied on the same basis as if the Act applied. This is because, by accepting that Mr Atkinson had jurisdiction, Purac agreed to adjudicate on the basis of the "Act-compliant" adjudication procedure set out in the sub contract. In fact, Purac did proceed on the basis that this was an Act-compliant procedure. For example, in giving notice of its intention to withhold money, Purac referred expressly to the provisions of clause 17g.

Parsons relies on the decision of HHJ Toulmin QC in **Maymac Environmental Services v Faraday Building Services** (16 October 2000) (unreported):

*"The referral was not under the Act, it was made by the parties on the basis that the adjudication took place by agreement between the parties on the same terms as the Act and the Scheme, such on agreement between the parties is enforceable on the same basis as if the Act applied."*

The adjudicator's decision is final and binding on Purac: see the text of clause 27g. Section 111 of the Act provided that the parties may so agree.

By analogy, expert determination clauses are expressed to be "final and binding". The court has generally held that a court may not review or overturn such expert determination except for fraud or bad faith.

To allow a set off or counterclaim would amount to reopening a dispute that had finally been settled. In **Farebrother Building Services Ltd v Frogmore Investments Ltd** (20 April 2001) a claim had been referred to adjudication; the respondent had tried to set off a counterclaim by way of defence to a claim. The adjudicator concluded that he did not have jurisdiction to deal with the counterclaim. The respondent sought to set-off the counterclaim when the claimant sought to enforce the adjudicator's decision HHJ Gilliland QC held that the defendant should not be permitted to set off its counterclaim.

16. Parsons' case is in large part dependant upon the premise that the adjudication decision is enforceable on the same basis as if the Act applied. However, Purac submitted to the jurisdiction of the adjudicator not under the provisions of the Act but "under the terms of the sub contract only". The judgment in **Maymac** states: *"It is clear that there was a common understanding that there was a concluded contract... and it was one to which the Act applies."* The circumstances here are, therefore, different from those in **Maymac**, where the adjudication took place on the same terms as the Act and the Scheme. Here, the adjudication proceeded on the basis that the sub contract terms applied. Accordingly, the decision in **Maymac** does not assist.

The requirements and purposes of the statutory scheme for adjudication lie at the heart of the cases to which Mr Bleasdale for Parsons has referred. The approach of the courts to questions of enforceability has reflected those requirements and purposes. But those requirements and purposes are absent here where in fact the Act did not apply and where Purac had expressly agreed to submit to jurisdiction on the terms of the sub contract and not as if the Act or statutory scheme applied.

In determining matters concerning the adjudicator's decision it is therefore necessary to give effect to what the parties had, by the sub contract, agreed. In summary, clause 17f permits Purac to withhold money or defer payment if Parsons is in breach. Clause 17g requires Purac to give notice of intention to withhold payment, not later than one day before the Final Date For Payment. That applies whether

the sum is due in connection with a Construction Operation or otherwise. Clause 20 permits Purac to take work out of Parsons' hands if Parsons is in breach. Clause 27g states that the adjudicator's decision is final and binding. Clause 31 permits Purac to exercise a right of set off Clause 17f is said to be subject to clauses 20(c) and 31.

In my judgment on a true construction of clause 27, the choice between clause 27h(i) and 27h(ii) is a choice between a decision which is subject to review in subsequent legal or arbitration proceedings and one which is not.

Is there an inconsistency between the provision in clause 27 that the decision is final and binding, and that in clause 31 which allows set off? In my judgment, the answer to that is no. The two are not mutually exclusive. A decision can be final and binding in the sense that it cannot itself be challenged. That is a different issue from the question whether a set off against a final and binding decision may be permitted. Parsons say that the effect of allowing set off is to defeat altogether the purpose of clause 27. In my judgment, that is not so. The effect of clause 27, is that the decision itself cannot be opened up. It would be different if Purac's claims had been the subject of the adjudication. But they were not. No decision has been made concerning them, There is no inconsistency between (1) a decision which is final and binding from the point of view of subsequent legal or arbitral proceedings and (2) an express contractual right of set off.

It follows that clause 31 may operate notwithstanding the statement in clause 27 that the decision is final and binding, so that Purac may set off sums in respect or on account of any claims against sums awarded by the adjudicator.

In any event, and even if there were an inconsistency between clauses 27 and 31, in my judgment, the wording of clause 31 is sufficiently wide to permit set off against the decision of an adjudicator in an ad hoc adjudication under the sub contract.

17. Parsons submit that both of Purac's clause 17g notices, dated 21 December 2000 and 23 May 2001, are invalid. Clause 17g, the withholding clause, requires a notice to be served not later than one day before the Final Date For Payment, which here was, they contend (by analysis) 17 February 2001.

Purac say that it matters not if the Final Date For Payment was 17 February or if the letter of 23 May was not an effective notice under clause 17g because the obligation to pay arose pursuant to the decision of the adjudicator, so that no withholding notice was required.

The Final Date For Payment is defined in the sub contract in the context of a payment due pursuant to clause 17h(i), namely any sum due under the sub contract. In my judgment, the sum claimed by Parsons is a sum determined by the adjudicator, it is not a sum due under the sub contract.

Accordingly, it falls outwith the definition of Final Date For Payment so that a withholding notice is not required. It follows that it matters not that the letter of 11 January 2001 was not an effective clause 17g notice or that the letter of 23 May may have been out of time.

In any event, Clause 17f is expressly said to be subject to clause 31. Accordingly, the wide terms of clause 31 permit Purac to withhold the sums they claim by way of set off by reason of clause 31, to which clause 17f is expressly said to be subordinate.

18. Parsons rely on **Forbes v Git and Others** IAC (1922). In that judgment, Lord Wrenbury said: "*The principle of law to be applied maybe stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails.*" In my judgment the position here is different from that in *Git*. Here, for the reasons I have given, I do not consider that clause 31 is repugnant to clause 27, nor does it destroy the effect of clause 27. Accordingly, the principle enunciated by Lord Wrenbury does not apply. The position is as set out later in Lord Wrenbury's judgment:

*"But if the later clause does not destroy, but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed."*

Here, the intention of the parties is clear, as I have set out earlier. The effect of clause 27h(i) is that an adjudicator's decision may not be opened up in subsequent proceedings. The effect of clause 31 is to permit set off against sums otherwise due.

In **KNS Industrial Services (Birmingham) Limited v Sindall Limited** (17 July 2000) HID Humphrey Lloyd QC held that rights of set off were not excluded under the Act.

*"...Therefore other rights under the contract which were not the subject of the decision remain available to the relevant party. If therefore by the time an adjudicator makes a decision requiring payment by a party, the contract has been lawfully terminated by that party (or that party has real prospects of success in supporting that termination) or some other event has occurred which under the contract entitles a party not to pay then the amount required to be paid by the decision does not have to be paid."*

Here, Purac have a good prospect of demonstrating that they lawfully terminated the sub contract before the adjudicator made his decision; Purac did not submit their counterclaim to adjudication by Mr Atkinson. I accept Mr Rigneys submission that, *a fortiori*, the principle set out by HHJ Humphrey Lloyd QC applies here where the adjudication is one to which the Act does not apply.

20. Given Parsons' helpful concession regarding Purac's counterclaim it is not necessary to consider in detail the matters which Purac raises by way of defence and counterclaim, However, I deal briefly with the main issues.

There is no dispute that, on behalf of Parsons, Purac paid one of Parsons' suppliers directly the sum of £36,381.53, on the basis that it would be deducted from the next payment application or be repaid by Parsons. Parsons have not repaid that sum. Purac is entitled to be repaid.

In the absence of full evidence, I am cautious about reaching a conclusion as to whether or not the parties had agreed dates for delivery, installation and commissioning. However, from the available evidence, it appears that Parsons were bound by the dates in the third schedule, and that they failed to meet these. Purac were therefore entitled to treat the sub contract as repudiated (clause 20) and engage others to complete work. Clause 20(c) permitted Purac to take work out of Parsons' hands. There was no formal requirement for notice to be given.

Purac appear to have gone through a proper arms length tender procedure when deciding to engage APT to complete work. There is no serious challenge to the sum payable to APT.

21. The sums claimed by Purac total approximately £303,000. Purac's defence to Parsons' claim has a realistic prospect of success. Accordingly, it is not appropriate for summary judgment to be entered on Parson's claim. Parsons' claim for summary judgment therefore fails.

#### **Parsons' application to stay Purac's counterclaim to arbitration**

22. It is common ground that, if there is a valid arbitration agreement, Parsons are entitled to succeed in their application that Purac's counterclaim be stayed for arbitration.
23. In clause 27, neither 27(h)(i) nor 27(h)(ii) had been deleted. Accordingly, by the provisions of clause 27(h)(iii), 27(h)(i) applied.
24. Parsons' case is that clause 28a provides for arbitration "*where clause 27(h)(i) does not apply..*" On a true construction, clause 27 does not apply.

Clause 27 applies only to a "Sub Contract" dispute. The expression "*Sub Contract Dispute*" is defined in clause 1 as "*any disagreement or difference between [Purac] and [Parsons] arising under the Sub Contract in relation to any matter in connection with a 'construction operation' as defined in the Housing Grants Construction and Regeneration Act 1996 including any dispute whether the matter referred to the Adjudicator is in connection with a Construction Operation.*" The relevant matters in issue between the parties are not matters "*in connection with a construction operation*", because the adjudicator determined that the operations were not construction operations. Accordingly (and notwithstanding Parsons' submissions in relation to their application for summary judgment) clause 27(h)(i) cannot apply. As clause 27(h)(i) does not apply, clause 27 in its entirety does not apply.

Further, for clause 27(h)(i) to apply, there must have been an adjudication and an adjudicator's decision. As Purac has not referred any dispute to adjudication, clause 27 does not apply.

The adjudicator concluded that the operation carried on by Parsons was not a "construction operation" as defined by the Act, and that the matter referred to him was not a construction dispute. It follows that clause 27 does not apply. Accordingly, clause 27(h)(i) does not apply.

Further, for clause 27(h)(i) to apply, there must have been a dispute referred to adjudication. Purac has not referred any dispute to adjudication. Accordingly, the clause does not apply.

Alternatively, clause 28 refers to "any dispute" whereas clause 27(h)(i) applies only to "Sub Contract Dispute" as defined by clause 1. Any dispute is therefore by definition wider than the defined term.

25. Purac's case is that clause 28 applies only where clause 27 (h)(i) does not apply. Clauses 27 (h)(i) and (ii) contain alternative provisions relating to the effect of the decision of an adjudicator who is appointed, and provides for the parties to delete one or other of them. Because clause 27(h)(i) applies, it follows that clause 28 does not apply. Accordingly there is no operative arbitration agreement.

The applicability of clause 28 does not depend on whether the underlying nature of the dispute between the parties is one which gives rise to an entitlement to refer it to adjudication.

26. In my judgment, it is clear on the face of the contract that, if clause 27h(i) does not apply then clause 28 does. It follows that if clause 27h(i) does apply then clause 28 does not. By operation of clause 27h(iii), clause 27h(i) does apply to this contract. It follows that clause 28 does not apply, ie there is no agreement to arbitrate.

In support of their application for summary judgment, Parsons submit that clause 27 applies. However, in their stay application, they submit that it does not apply. If it were necessary to consider the point, I should conclude that that inconsistency of approach was fatal to their application. Alternatively, I should have concluded that, by pleading reliance on clause 27 and in fact relying on it in the context of their application for summary judgment, Parsons would have been estopped from denying the applicability of clause 27.

27. In all the circumstances, therefore, I conclude that there is not a valid arbitration agreement. Accordingly, Parsons' application for a stay fails.

Mr Paul Bleasdale QC and Mr Peter Collie (instructed by Paris & Co) for the Claimant  
Mr Andrew Rigney (instructed by Masons) for the Defendant