JUDGMENT : His Honour Judge Moseley : 2nd October 2001. TCC.

1. This application for summary judgment gives rise to an interesting and important point concerning the effect of the Housing Grants, Construction and Regeneration Act 1996, ("the 1996 Act"). The application: is to enforce the decision of an adjudicator, pursuant to a contract complying with section 108 of the Act. The Act itself sets out a scheme, which is a novel scheme, for the construction industry, the purpose apparently being to ensure that disputes between the parties to a construction contract are decided summarily by an adjudicator quickly, at the least possible cost, with a view not only to saving cost but, with view to maintaining cashflow.

2. The scheme of the Act is that, under section 108, a contract falling within the ambit of the Act has to contain certain provisions. One of those provisions, is referred to in section 108 (3) in the following terms: - "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings by arbitration (if the contract provides for arbitration) or by agreement."

3. There are other provisions in the Act, which I need not refer to, which provide that, in default of the contract complying with the requirements of section 108, the parties shall be bound by a scheme which is brought into being under the Act. That makes similar provisions making the decision of the adjudicator binding.

4. That is the background. There is no dispute in the present case that the contract between the parties properly provided for the terms required to be incorporated in it by section 108; and that, pursuant to the terms of the contract, an adjudicator was appointed. The adjudicator eventually gave his adjudication, and under that adjudication a substantial sum of money, of the order of £140,000 is payable by the defendant to the claimant.

5. The defendant's counsel, Mr. Evans, to whom I am very grateful for his clear arguments, mentioned at the last hearing, ten days ago that he did not dispute for one moment and 'he has repeated that today, that the decision of the adjudicator is binding. His case is that the defendant is entitled to raise a set-off, and that, in those circumstances, judgment should not be given on the claim for the amount ordered by the adjudicator; alternatively that if judgment is still due, notwithstanding his arguments, payment of the judgment should be stayed pending an event which I have yet to describe.

6. I pause there, before returning to the terms of the statute and the contract, to say something briefly about the facts The claimant (McAlpine) was the main contractor for the construction of a building in Cardiff Docks. The defendant was a subcontractor whose function it was to construct a certain amount of the steelwork for what is called a brise-soleil, which I understand to be a device for preventing the surface of the building from heating up.

7. As events transpired, the Steelwork had to be constructed by means of onsite welding. During the course of the welding, the adjudicator has found that glass, which had already been installed by the claimant (McAlpine or its other subcontractors), was damaged. As a result, McAlpine has claimed a payment from the defendant, representing the cost of replacing the glass. That is a very substantial sum.

8. The dispute went to adjudication and the adjudicator found that McAlpine's case was well founded and ordered that within seven days of the date of the decision of the adjudicator the defendant make a payment to McAlpine of that substantial sum.

9. The defendant says that that is all very well, but that it is entitled, by general principles of law, to set-off of sums owed to it by McAlpine. In general terms – I do not think I need refer to the details, though the details are set out in the affidavits-- the defendant says, first, that there is a substantial sum due from McAlpine to the defendant which is not in dispute - at all that being the difference between sums already paid by McAlpine under the subcontract and sums admittedly due from McAlpine under the subcontract, that dispute being of the order of £60,000, in very round terms.

10. Secondly, the defendant says that in addition to those sums which are undoubtedly due, there is a further substantial sum, due from McAlpine to the defendant, first for the storage of steel which, in very round terms, amounts to some £9,000, and another very substantial sum due in respect of an

alteration in the nature of the work required of the defendant, as a result of which the defendant had to weld the steelwork onsite instead of being able to construct it in other more economical ways.

11. The defendant says that the set-off to which it is potentially entitled exceeds the amount of McAlpine's claim and that, therefore, either nothing is due or, at the very worst, that I should stay enforcement of the judgment until the dispute on the counterclaim has been resolved. There I come back to the point which I said I had not yet mentioned which is that now, since the last hearing, ten days ago, the adjudication machinery has been set in motion a second time, this time by the defendant with a view to resolving the dispute concerning the payments alleged to be owed by McAlpine to the defendant.

12. In the nature of the scheme set up under the Act, that decision will take about twenty-eight days, or thereabouts -- there is power under the Act for the adjudicator to a grant a short extension and it follows that, within a matter of weeks, it will be known whether any sum is owed, by McAlpine to the defendant. Mr. Evans points out that for that reason the stay need not be for a long time and moreover will be until a specified event in the near future.

13. The dispute between the parties is, in effect under the contractual framework brought into being under the Act, a set-off is permitted. Mr Evans argument is that a set-off must be permitted: the court has no option but allow a set-off, unless by some provision of statute or by some provision of the contract the right of set-off is excluded. He has pinpointed sections 110 and 111 of the Act as a possible exclusion of set-off, only to proceed to the more, important part of his argument those sections, when one looks at them carefully, have no application.

14. Under section 111 (1) it is provided: "A party to construction contract may not withhold payment after the final date for payment of a sum due under the contract unless has given an effective notice of intention to withhold payment. The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment…" Mr Evans has brought to my attention various statements by TCC judges to the effect that section 111 precludes set-offs. Perhaps the shortest and most succinct statement to- that effect is in the judgment of His Honour Judge John Hicks QC in **VHE Construction v RBSTB Trust** [2000] SLR 187. His reasoning in summary is that section 111 (1) of the Act does exclude the right to deduct money by way of set-off in the absence of an effective notice of intention to withhold payment. At paragraph 36 on page 192 of the report he says "The words 'may not withhold payment' are, in my view ample width to have the effect of excluding set-offs, and there is no reason why they should not mean what they say."

15. Mr Evans, however, argues that section 111 has, when one looks at it carefully, no application to a case such as this. He points out that the standard situation in which section 111 will apply is where money is due from a Contractor to a subcontractor and the contractor serves a notice on the subcontractor in order to withhold some of the money that is due. The notice is normally to be given by the payer and not, as would be the case if section 111 were to apply in the present case, by the payee. He says that notwithstanding what the experienced judges who have considered this section in the decided cases have said what they have said has no application to a claim such as this for compensation or damages brought by the contractor against the subcontractor.

16. He makes two other points too, other than concerning the usual ambit of sections 110 and 111. The first is, I think, a point he adopted as a result of an observation of mine, that the payment of money by the defendant is not a payment due under the contract but a payment due under the adjudication, with the result that it is not necessary to serve a notice of intention to withhold payment under section 111 (1).

17. The second point he makes is that in the present case there is no "final date for payment". He has drawn attention to the distinction between the words "the final date for payment" in section 111(1) and the words "after the date on which a payment becomes due in section 110(2). His argument is, in effect, that the distinction between those terms is a pointer to the fact that these two sections only apply in the standard case where payment is due by contractor to the subcontractor and the contractor wants to withhold some of it.

18. I will deal first with the first of those two specific arguments, namely the argument that the sum in the present case is not due under the contract. In that connection, he drew my attention to paragraph 45 of the judgment of His Honour Judge John Hicks QC (at page 194 of the report) which he contends should be understood as meaning that a sum due under an adjudication is literally that and not under the contract at all. That is not the way that I read Judge Hick's judgment. Under the contract in the present case, as in the contract which Judge Hicks was considering --- he was considering a standard JCT Contract --- there is a provision to the effect that the parties shall give effect to the decision o± the Adjudicator. It seems to me that that provision has the effect of making the sum one payable under the contract for the purposes of section 111. I reject the argument that, for that reason, section 111 has no application. Judge Hicks was considering a very different situation from the present situation. He was faced with two separate adjudication decisions. If part of what he said contradicts what I have said his words must be read against the background of that situation, which he was considering.

19. I reject Mr Evan's second argument also. It seems to me that there is a provision in the present contract for final date for payment: the adjudication was in accordance with the contract and under the adjudication the adjudicator ordered that payment be made within seven days. That, in my view, is the final date for payment. There is in my judgment no difficulty in applying section 111(1) to the present contract.

20. That brings me back to Mr Evan's first point, which was that sections 110 and III have no application to this exceptional case. In my view, that not correct. It seems to me that section 111(1) has a wide application and in my judgment there is no reason why it should not be applied the present unusual circumstances.

21. In that outline, I have not referred to two of the main decisions on the Act, which provide some guidance to its true construction. I touched upon them in my own words in describing what the apparent purpose of the Act is. It is said in far better terms by His Honour Judge Humphrey Lloyd QC in **Outwing Construction v Randall** a case in March 1999, at page 7 of his judgment, which I need not read, it is most of paragraph 10 from the words "VHE" onwards, to the end of the paragraph. The same point in made in a decision of Dyson J in **Macob Civil Engineering v Morrison** which contains an important and useful analysis at, paragraph 14, where he sets out what he understands to be the intention of Parliament. I adopt those passages in both those judgments, but do not feel the need to read them out verbatim.

22. It seems to me, in those circumstances that this sum is due. One starts with section 108. The adjudication is final and binding. Section 111 (1) does apply. No notice to withhold payment was served by the defendant. In those circumstances, a set-off is not available and the sum is due. Mr Evans's final fallback position was then that I ought to grant a stay until the adjudication decision on the final payment is forthcoming. That adjudication is expected between four and six weeks hence. In my view, I ought not to grant a stay. As a result of the reasoning which I have gone through, the claimant is entitled to judgment. As a general principle, when the person is entitled to have a sum of money paid to him under a judgment, that sum of money should be paid and no stay ought to be imposed. I decline to grant the stay that Mr Evans has argued I should impose.

MR PAUL SHENTON (Messrs Eversheds) appeared on behalf of the Claimant

MR. ROBERT EVANS (instructed by Messrs Osborne Clarke) appeared on behalf of the Defendant